

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 347 OF 2015

Sameer @ Bappy Sukharanjan DasApplicant
V/s.

The State of MaharashtraRespondent

Ms. Anjali Patil a/w Mr. Arun Rajput for Applicant
Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : OCTOBER 8, 2015.

PC :

Heard.

2) Applicant in Criminal Revision Application No. 347 of 2015 is convicted by Metropolitan Magistrate, Special Court for Immoral Traffic (Prevention) Act, 54th Court at Mazgaon, Mumbai in C.C. No. 822/PW/2009 for offence punishable under section 3,4 & 5 of Immoral Traffic (Prevention) Act, 1956 (Hereinafter referred as 'ITPA') and was sentenced to rigorous imprisonment for a period of 2 years for offence punishable under section 3 & 4 of the Act with fine of Rs. 2000/- and Rs. 1000/- respectively in default to suffer simple imprisonment for one month. For offence punishable under section 5 of the Immoral Traffic (Prevention) Act, applicant is sentenced to rigorous imprisonment of 3

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years and fine of Rs. 2000/- in default to suffer simple imprisonment for one month.

3) Being aggrieved by the said Judgment and Order, applicant had filed criminal appeal no. 383 of 2015 before Sessions Court at Greater Mumbai. Learned Sessions Judge vide Judgment and Order dated 27/07/2015 was pleased to allow the appeal partly. Applicant was acquitted of the offence punishable under section 5 of the said Act. The conviction and sentence for offence punishable under section 3 & 4 of the said Act was upheld. By clause 5 of the operative order, order passed by Trial Court under section 18 (2) of Immoral Traffic (Prevention) Act was also confirmed. Being aggrieved by the concurrent judgments, applicant has filed this criminal revision application. Revision application against conviction is being heard out of turn for the reason that there are several intervention applications filed in the present revision application against conviction. It prima facie appears that the issue in dispute is Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (West) Mumbai. Learned counsel for the applicant has submitted that

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applicant is being falsely implicated only in order to evict his mother from Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (West), Mumbai. On 14/08/2015, this Court (Coram: M. L. Tahaliyani, J.) had heard Criminal Writ petition no. 1454 of 2015 filed by Saira Hamiduddin Khan alias Maladas and had observed that petitioner claims to be in possession of the premises, hence, liberty was granted to the petitioner therein to intervene in present criminal revision application 347 of 2015. Ad-interim relief granted earlier was vacated. Thereafter, intervener Saira Khan has filed criminal application no. 840 of 2015 in revision application no. 347 of 2015 seeking relief of de-sealing the premises.

4) By an order dated 05/08/2015, this Court (Coram: Abhay M. Thipsay, J.) had taken up the matter for production and extended the time fixed by the Court of Sessions for the petitioner to surrender himself before the Trial Court till 11/08/2015.

5) Criminal Application No. 840 of 2015 is filed by Saira Hamiduddin Khan alias Maladas i.e. mother of the petitioner had filed an application contending therein that she is the tenant of the premises

Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W), Mumbai. It was contended that the room where she was residing was attached under section 18 (2) of ITPA Act for a period of one year. It was further contended that she had filed writ petition no. 1454 of 2015 during the pendency of appeal before Sessions Court and had prayed that the room be de-sealed. It was contended that order under section 18 (2) of the said Act was stayed in writ petition no. 1454 of 2015. It was specifically contended by her that since 14/02/2009 till 14/05/2012 she had lodged complaints to the Commissioner of Police through Advocates demonstrating therein that landlord is creating false grounds for eviction. It was contended that the landlord has filed eviction suit no. 116 of 1996 which is pending before Small Causes Court at Bombay. The suit is filed against the petitioner in writ petition no. 1454 of 2015. She had also brought it to the notice of the court that earlier landlord had filed false complaints under ITPA Act against her son which was registered as C.C. No. 217/PW/2004 and by Judgment and Order dated 18/12/2008, her son was acquitted of all the charges by the Metropolitan Magistrate. That

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on 19/05/2005, the then Commissioner of Police had withdrawn the show cause notice no. 67 issued to her under section 18 of the said Act. By an order dated 19/05/2005, Commissioner of Police had restored the possession of the premises to Sameer Das i.e. present applicant. Present applicant was shown as care taker of the said premises.

6) On 29/04/2015, this Court (Coram: M. L. Tahaliyani, J.) had stayed action under section 18 of the said Act. Criminal Writ Petition no. 1454 of 2015 was heard along with Criminal Writ Petition No. 1695 of 2015 and Criminal Application No. 303 of 2015 i.e. during the pendency of the appeal 383 of 2015 filed by present applicant before the Sessions Court, stay was granted. By an order dated 14/07/2015, this Court (Coram: M. L. Tahaliyani, J.) had directed the Sessions Court to hear Criminal Appeal No. 383 of 2015 within a period of one week from the date of production of authenticated copy of the said order. By an order dated 11/08/2015, revision application was admitted. Applicant was enlarged on bail. The substantive sentence imposed by the applicant is suspended and he was directed to be enlarged on bail.

7) One Mr. Goldie Sud filed affidavit in criminal application no. 840

of 2015 and had claimed that applicant Saira has attempted to mislead the Court, that according to him, application seeking de-sealing of the premises was not maintainable. Mr. Goldie Sud filed intervention application no. 313 of 2015 in criminal application no. 347 of 2015 which was taken up for hearing on 17/08/2015 by this Court (Coram: M. L. Tahaliyani, J.). Intervener had claimed that he is the owner of the property room no. 19 (A) and therefore, had sought intervention. Intervener had showed the court a document that he has entered into an agreement to purchase the property in question. On the basis of said document, this Court (Coram: M. L. Tahaliyani, J.) had allowed the applicant to intervene. The document was returned to the intervener. It was directed that intervener who had filed intervention application 313 of 2015 be shown as an intervener in revision application no. 347 of 2015. Intervention application was disposed of by an order dated 17/08/2015. In view of the above circumstances, this Court had allowed intervener to address the Court.

8) In the meanwhile, one Ajay Das had filed intervention application no. 805 of 2015 in Criminal Application No. 840 of 2015 and had

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sought intervention in the application and had prayed that Criminal Application No. 840 of 2015 filed by Saira Das be rejected. The intervener in intervention application no. 805 of 2015 had placed on record a rent receipt in room no. 19 issued by Gazebo House. All the intervention applications are being considered along with main revision application.

9) It prima facie appears that real bone of contention in the present proceedings is room no. 19 (A) occupied by Maladas as tenant.

10) On 30/09/2015, intervener Goldie Sud had approached this Court by filing an independent writ petition demonstrating that police authorities while exercising the powers under section 18 (2) of ITPA have sealed the premises which were not raided on 06/02/2009. This Court had verified from the police officer, who had admitted, that she had erroneously sealed the said premises. This Court had directed the police officer to de-seal the same within 24 hours. It is a matter of record that Goldie Sud has taken undue advantage of bonafide order of this Court and has taken possession of Room No. Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W),

Mumbai. Orders passed in Writ Petition No. 3429 of 2015 dated 30/09/2015 and the orders subsequently passed in Criminal Application No. 840 of 2015 be read in present revision application. It was made clear that this Court while exercising the jurisdiction on the criminal side has not determined the title, ownership and possession of Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W), Mumbai. The dispute is pending on Original Side of this Court as well as in the Small Causes Court. The original landlord has brought it to the notice of this Court that Goldie Sud had purportedly entered into an agreement of sale but has filed a suit for specific performance which would clearly indicate that he was not put into possession of the said premises on the basis of agreement of sale. It is in these circumstances that this Court has decided to hear the revision application against conviction finally, although the revision application is filed in 2015 and the applicant is on bail.

11) Such of the facts necessary for the decision of this revision application are as follows.

12) It is the case of prosecution that on 06/02/2009, at about 8.15

p.m., a secret information was received by P. I. Gaikwad at Bandra Police Station that in Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W), Mumbai, one person is running the brothel. Hence, P. I. Gaikwad verified the genuineness of the said information. That P. I. Gaikwad had taken the permission from Assistant Commissioner of Police, Bandra Division and had proceeded towards the said spot. That P. I. Gaikwad had called upon one Rahul Shankar Sonawane to the spot of incident and he was directed to act as decoy witness. That P. I. Gaikwad had given Rahul Sonawane Rs. 1000/- in the denomination of Rs. 500/- each to be used in the said raid. The panchas were called. Premises were raided. After bogus customer had given the signal, raiding party had reached the spot. They had found present applicant Sameer Das on the spot. There were two couples in the said room. Names of the male persons were Rahul Bhattacharya and Chandan Suryawanshi. Two females were Payal Suryawanshi and Sapna Das. There was another young girl whose name was Pooja Bhattacharya. They had seized the trap notes below the pillow. According to the prosecution, female members had disclosed

that they were forced into prostitution by the male members present in the room and that they had shared the benefits of prostitution. Sameer Das was taken into custody. Three female members were sent for medical examination.

13) According to prosecution, the names of female members were Pooja Rahul Bhattacharya, age 24, Payan Chandan Suryawanshi age 24, Sapna Ashok Das, age 25. Persons who were present in the room 19 (A) were Sameer Sukhranjan Das, Rahul Vishwajeet Bhattacharya and Chandan Pandit Suryawanshi. The victims were produced for medical examination and at that time she had disclosed that she was married.. Payal Suryawanshi had given no history of sexual abuse. Sapna Das age 25 years had given no history of sexual abuse. Patients had no complaints. Pooja Bhattacharya had given her age as 23 years, married, no history of sexual abuse. The medical casepapers of Payal Suryawanshi show her age between 17 to 18 years, Pooja 18 to 19 years and Sapna above 21 years.

14) On 06/02/2009, Sushil Parab working as P.S.I. at Bandra Police Station lodged a report at Bandra Police Station on the basis of secret
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information. After investigation, charge-sheet was filed and the case was registered as C.C. No. 822 of 2009. Prosecution examined 6 witnesses to bring home the guilt of the accused.

15) P. W. 1 Sushil Parab is the first informant. He deposed before the Court that on 06/02/2009, at about 8.15 p.m. senior P.I. George had called him, P. I. Gaikwad and crime detection staff into his cabin. Senior P.I. George informed them that he was having information that in Gazebo House, Hill Road, Room no. 19 (A), prostitution work was conducted by indulging young girls. P. I. Gaikwad visited the office of Assistant Commissioner of Police and obtained necessary permission, thereafter, raid was planned. Ladies police constables and detection staff were ready for the raid. P. I. Gaikwad had called upon one person by name Rahul Sonawane to act as bogus customer/decoy witness. Rahul was asked to reach the spot of incident. P. I. Gaikwad had given trap amount to Rahul. As directed by the raiding staff, Rahul had given signal, there upon the staff had raided room no. Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W), Mumbai. Room was opened by Sameer Das. He gave evasive answers to

the queries made by the raiding staff. The raiding staff saw two girls sitting on the sofa and two other males. Raiding staff knocked the door of the closed room. Rahul was in the room with half dressed female. They had seized the currency notes of Rs. 500/- from below the pillow. Name of the girl was Pooja Bhattacharya and according to the informant, she disclosed that she had received Rs. 1000/- from the bogus customer. She had also disclosed that she was indulging into prostitution at the said place. The other two girls were also indulging into prostitution. According to informant Pooja had disclosed that three male persons present in the room were conducting and managing the brothel and that they were taking half of share of the prostitution income from the girls. In the cross-examination, P. W. 1 has admitted that P. I. Gaikwad had not brought written permission from A.C.P. whose office was adjacent to Bandra Police Station. That P. I. Gaikwad had returned within few minutes after he left for taking permission. He has admitted that he got information at about 8.25 p.m. The form of F.I.R. was filled up in his presence. P. W. 1 was not sure as to whether the panchas were called to the police station. P. W. 1 has also admitted

that the transaction of money between the bogus customer and the P.I. was not done in his presence and he had no personal knowledge about it. P. W. 1 has denied the suggestion that the female members in room no. 19 (A) had disclosed that they were the spouses of Rahul Bhattacharya and Chandan Suryanwanshi. Subsequently, P. W. 1 has admitted that he had no knowledge about the alleged act. No enquiry was done in his presence. P. W. 1 has identified the seized articles i.e. two currency notes.

16) P. W. 2 Tanvir Khan who called by the P. I. Gaikwad to act as a Panch has been declared hostile by the prosecution.

17) P. W. 3 Sushant Bhosale is another Panch. According to him, P. I. Gaikwad had called him to the police station when he had been to visit his ailing friend in the hospital, which was adjacent to the police station. According to him, when he visited the police station, there was one more person. P. W. 3 was informed by the police that the third person was to act as bogus customer. Officers had sent bogus customer and P. W. 2 to the spot along with two currency notes of Rs. 500/-. Specific instructions were given to the bogus customer. He has

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reiterated the story narrated by P. W. 1. According to P. W. 3, the girl who was found with the bogus customer was a minor girl below 18 years. It is elicited in the cross-examination that P. W. 3 was not having a restaurant earlier. That he was conducting his business on footpath. Thereafter, he had started his business at Santacruz. On the date of incident, he had been to Diamond Dispensary to visit his friend Dinesh Rahate. It is further elicited that while he was returning home from Diamond Hospital and was waiting for the bus at the bus stop, P. I. Gaikwad had called him to the police station. He could not recollect the name of person who had called him. That person was in a civil dress. The person who had called him had enquired with him about his name and had disclosed his identity as police personnel from detection branch. It is further elicited that another panch i.e. P. W. 2 was present throughout the raid till the action was completed. P. W. 3 has further admitted in the cross-examination that in his presence, P. I. Gaikwad had called the bogus customer by telephonic message. He has given the particulars of the bogus customer. The bogus customer was given instructions by P. I. Gaikwad at the police station. P. W. 3 identified the

accused before the Court. It is also admitted that he does not know what happened in the hall after the bogus customer and the panch went inside. P. W. 3 was present there. He has admitted that he did not have licence at the time when he was running the Chinese stall on the footpath. He has also admitted that police as well as B.M.C. had objections for his running the stall on the footpath. That from the spot, the police had taken custody of the accused and the girl who was found half clad with the bogus customer. He has also admitted that the police had not made enquiry with any person living adjacent to room no. 19 (A). That although, the hotel on the ground floor was open, people had not gathered on the spot at the time of raid. According to him, accused was arrested on the spot. P. W. 3 has proved the panchanama at Exhibit 31.

18) P. W. 4 Gajanan Tervankar is the power of attorney holder of the Saigal family and also works as their administrator. According to him, power of attorney was executed in his favour by Kamlesh Saigal. He has proved the contents of power of attorney which is at exhibit 36 (A). He has deposed before the Court that Maladas was the tenant in room

no. 19 (A) and that she is a tenant in the premises before the Saigal became the owner of property. According to him, Sameer and his family are staying in the said room. They used to issue rent receipt regularly. He has produced counterfoil of the rent receipts. Rent receipts were signed by P. W. 4. The electricity bill is in the name of Saira @ Maladas. He has deposed before the court that in the year 2004, police had effected the raid of room no. 19 (A) as the brothel was run in the said premises. In 2004, room was sealed by the orders of commissioner. He has proved the order issued by the commissioner which is at exhibit 38. Show cause notice was issued and the reply was filed by the tenant. It is admitted that the cabin of the restaurant is on the first floor. He has also admitted that the watchman of the building was present in the compound and that building is crowded up to 12 midnight. He has also admitted that owner of the restaurant is in need of the premises and he is interested in the premises. Original owner of the building is living abroad and he visits India once in a year. It is also admitted that there are civil cases pending between Mala Das and owner in respect of room no. 19 (A). That the visitors to the said building can be easily noticed

by the watchman. P. W. 4 does not reside in the same building. He resides in close vicinity but visits the building everyday, since his office is in that building on the first floor. The distance between room no. 19 (A) and his office is hardly 20 to 25 feet. He has also admitted in the cross-examination that room no. 19 (A) is not visible from his office. P. W. 4 has categorically admitted in the cross-examination that in the present case, police had not recorded his statement in the course of investigation and the same has been verified by this Court. P. W. 4 does not appear in the list of witnesses annexed to the charge-sheet.

19) It is pertinent to note that there is no averment made by the State/Prosecuting agency to record the evidence of P. W. 4 as a Court witness. P. W. 4 has been cross-examined. It is further pertinent to note that P. W. 4. is not a witness either to the raid which was conducted on 06/02/2009. He was neither a witness to any Panchanama nor a witness who could throw light upon any aspect of the prosecution case. It is further pertinent to note that witness P. W. 4 has categorically admitted that the mother of the accused happens to be tenant in the said room and that rent receipts were issued. The receipts bear his

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signature as the person issuing the rent receipts. In fact, investigating agency ought to have recorded his statement in the course of investigation. It is admitted by P. W. 4 that in the year 2009, police had effected the raid in the same room as there was some report that the room is being used as a brothel. In 2004, room was sealed by the order of Commissioner. P. W. 4 has produced the certified copy of the order. In the examination-in-chief, he has categorically stated "We had informed the police that brothel is run at that place". This Court cannot be oblivious of the fact that accused has been acquitted in the said case. The order sealing the said room was recalled. P. W. 4 has placed on record the power of attorney given to him by Kamlesh Saigal.

20) In the course of investigation, it had transpired that the mother of the accused is a tenant of the premises and that rent receipts are issued by P. W. 4. That P. W. 4 had personal knowledge about the earlier incidents of the year 2004, but despite this, Investigating Officer did not find it necessary to record his statement in the course of investigation. Prosecution had not made out a specific case before the Court as to why it was necessary to record the substantive evidence of

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P. W. 4.

21) Learned APP submits that in that eventuality, Advocate representing the accused ought not to have cross-examined him as there was nothing on record with which he could be confronted. The law of the evidence contemplates that once a party, even by mistake comes to the witness box and takes the oath and is examined about a document, he would become a witness and would be liable to be cross-examined by his opponent. There is no Rule or procedure which deprives a party of his right to cross-examine his witness in respect of the whole case, on the ground that evidence with regard to some issues has already been tendered.

22) Section 138 of Indian Evidence Act mandates that cross-examination need not be confined to the facts spoken about during during the examination-in-chief, the party has liberty to elicit anything from the said witness as long as it relates to the relevant facts. In light of this, it is pertinent to note that P. W. 4 has admitted that:

“It is true to say that room no. 19 (A) is not visible from my office. I visit the building daily. The distance between room no.

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19 (A) and my office is 20 to 25 ft. It is true to say that I had not lodged complaint in respect of any specific incident. It is true to say that in present case, police had not recorded my statement. It is true to say that cases are pending between one Mala Das and owner in respect of room no. 19 (A). It is true to say that restaurant owner is in need of the premises and he is interested in premises, if available. It is true to say that owner of the building is out of India and visits India once in a year. The watchman of the building is present in the compound. It is true to say that restaurant closes at mid night. It is true to say that there is crowd up to 12 midnight.”

23) Learned counsel for the applicant/accused rightly submits that in view of the above admissions, it is clear that applicant has been falsely implicated only to get the premises vacated.

24) P. W. 5 Priti Sawant is a police constable who was attached to Bandra Police Station on the day of incident. She has deposed before the Court that around 8.30 p.m. on the day of incident, senior inspector had called her to his cabin along with other staff members. Police personnels were informed that in room no. 19 (A) Gazebo House, minor girls are forced into prostitution and raid is to be effected. Said

information was given to the police staff inspector Gaikwad. Two panchas were called and information was given to them. Police personnels went towards the spot. Rahul Sonawane who was to act as bogus customer was called by the inspector Gaikwad before leaving the police station and was waiting near the said building. The *modus operandi* was explained to bogus customer Rahul Sonawane. P. I. Gaikwad had given him two currency notes of Rs. 500/- each to be paid as a trap amount. She has deposed that room was raided. Room was on the first floor. Inspector Gaikwad knocked the door of the room. Upon opening of the door, P.I. Gaikwad introduced the police staff to the person who opened the door because the police staff were in civil dress. Person had disclosed his name as Sameer Das. In the said room, they found two male persons and two female persons in the hall. Male members had disclosed their names as Chandan Suryawanshi and Rahul Bhattacharya. P. I. Gaikwad knocked the door of the rear room. The said door was opened by the bogus customer who informed P. I. Gaikwad that a barely clad girl is inside the room. P. W. 5 was sent inside the room. She asked the girl to dress up. The room was

inspected by the police. The girls had disclosed their names as Pooja Bhattacharya, Payal Suryawanshi and Sapna Das. According to P. W. 5, the girls had disclosed that out of the earning of prostitution, half amount is given to male members who were present in the room. Three persons were arrested on the spot. In the cross-examination, witness has expressed her inability to give the description of the room. She has categorically admitted before the Court that :

“It is true to say that no lady police officer was there. One lady constable with us.”

She has further admitted in the cross-examination that bogus customer Rahul Sonawane was never called to the police station. It is surprising that in the cross-examination the witness has stated that when her statement was recorded, she remembered the serial numbers of the currency notes which were given to Rahul Sonawane by P. I. Gaikwad but she could not recollect the serial numbers of the currency notes at the time of her deposition. She has stated that last two digits of notes are '14' and of another note are '55'. The admission elicited in the cross-examination is that she had not seen serial numbers of the

currency notes, but tallied the numbers mentioned in her statement. She has identified the currency notes before the Court. Learned counsel for the applicant submits that P. W. 5 was only a police constable and not police officer. All that she has proved is that premises were raided and that accused along with two male members and three females were found in the said premises.

25) At this stage, learned counsel for the applicant has drawn the attention of this Court to section 15 of The Immoral Traffic (Prevention) Act, 1956. More particularly clause 2 of section 15 which reads as follows:

“15. Search without warrant. (1) -----

(2) Before making a search under sub-section (1), the special police officer [or the trafficking police officer, as the case may be] shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do:

[Provided that the requirement as to the respectable inhabitants being from the locality in which the place to be searched is

situate shall not apply to a woman required to attend and witness the search.]”.

26) According to learned counsel, section 15 (2) of ITPA is a mandatory requirement and that the same has been violated. It is therefore submitted that Statute has not been followed in spirit and Law. Learned counsel has also drawn the attention of this Court to section 15 (6A) of the said Act which contemplates:

“The special officer or the trafficking police officer, as the case may be, making a search under this section shall be accompanied by at least two women police officers, and where any woman or girl removed under sub-section (4) is required to be interrogated, it shall be done by a woman police officer and if no woman police officer is available, the interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation”.

27) The Statute contemplates presence of police officers along with special police officer or the trafficking police officer. Learned APP submits that requirement of Law is that if the police officer is not present, the interrogation should be done in the presence of lady

member of a recognised welfare institution or organisation, and therefore, it can be said that there is non compliance. In the facts of the present case, the submissions do not hold any gravity since even according to prosecution no lady member of recognised welfare institution or organisation was present.

28) P. W. 6 Dhanraj Gaikwad was Police Inspector attached to Bandra Police Station on 06/02/2009. He has deposed before the Court that on 06/02/2009, the senior P.I. of Bandra Police Station passed on an information that a brothel is run in room no. 19 (A), Gazebo House, Hill Road, Bandra (W), Mumbai. He has directed P. W. 6 to verify the information and take necessary action. P. W. 6 had summoned two panchas to verify the information. He had called one Rahul Sonawane near the spot and act as bogus customer. He had taken permission of A.C.P to effect the raid. He had given two currency notes of Rs. 500/- to the bogus customer after noting down serial numbers in the panchanama. Necessary instructions were given to the bogus customer and raid was effected after he gave a signal. P. W. 6 has further deposed that they found the trap money in the rear room. The girl Pooja

informed the police that she earns her living by prostitution. She had allegedly disclosed that three male members present in the room were running the brothel and that she gives half the amount from the earnings. Persons found in the said room were taken into custody and then P.S.I. Sushil Parab lodged a complaint. He has further disclosed that he had referred the girls for medical examination. As per the orders of the Court, victims were sent to their native places. It is pertinent to note that P. W. 6 had further deposed that mother of the accused was tenant of that premises. He had taken into custody, the copy of power of attorney issued in favour of accused no. 1 by his mother. He had seized the rent receipt and light bills.

29) It is elicited in the cross-examination that trap money was given to the bogus customer at about 9.30 p.m. There is no station diary entry to that effect. He has further admitted in the cross-examination that he was not the special police officer but was authorised. Initially A.C.P. had given oral order and thereafter a written order was given. Authorisation was issued in favour of P. W. 6 in 2008 before the raid. It is further pertinent to note that in the cross-examination P. W. 6 has

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disclosed that he had called Gajanan Tervankar to record his statement and has accordingly recorded it. After being confronted with the charge-sheet, he has admitted that the statement of Gajanan Tervankar was not recorded. At this stage, learned APP had submitted that prosecution had filed an application under section 311 of Code of Criminal Procedure, 1973 and had summoned Gajanan Tervankar and had adduced substantive evidence. P. W. 6 has categorically admitted that he had not enquired with Gajanan Tervankar nor recorded the statement of the owner. It is also admitted that on the ground floor, there was a shop in the name of 'Godrej Nature'. He has further deposed that he was not aware as to whether there was a lift in the said building. He has denied that there were two entries. The most important aspect of the cross-examination is the admission by P. W. 6 that two victims found in the said room, had categorically stated that two male members were their respective spouses. He has admitted that he had the telephone number of bogus customer and that he was acquainted with him. Bogus customer is a labour. The social status of the bogus customer was not known. He had also not enquired about

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the social status of the panchas. He has admitted that lady police officer was not in the raiding team as no lady police officer was available in the police station. P. W. 6 had also admitted that in routine course, they visit the area in the close vicinity of the police station. It is also admitted that he made no enquiry with panchas. It is also admitted that he had not issued notice to any witness for recording the statement. P. W. 6 has further categorically admitted that he was not special officer, he was authorised by A.C.P. That he had effected the raid as per the oral directions and had taken written orders subsequently. He has admitted the entry in the case diary that raid is effected as per oral directions of special police officer. Case diary entry is at Exhibit 50. It is also admitted that case diary was prepared after registration of the offence. It is also admitted that police had first recorded the panchanama and then registered the offence. P. W. 6 has denied the suggestion that accused had filed complaint with the police that hotels in the said building were doing business illegally and that no action was taken against them. P. W. 6 has also admitted that to run a hotel, police licence is required, however, he had no knowledge as to whether

the hotels had licence. It is also admitted that there is no reference in the charge-sheet to the earlier case i.e. raid in 2004.

30) The bogus customer Rahul Sonawane was not examined by the prosecution as he was not alive at the time of trial. In fact, he would be the most important witness. That out of 6 witnesses examined by the police, P.W. 1, P.W. 5 & P.W. 6 are police personnels. P. W. 2 who acted as a panch has turned hostile. P. W. 3 claims to be businessman and is a witness to the raid. It cannot be said that P. W. 3 has proved the panchanama as he has admitted as follows:

“It is true to say that after bogus customer and another panch went inside the hall till I reached, I cannot say what happened there as I was not present there. It is true to say that there was no lady panch. That from the spot we had taken in custody Sameer and the girl who was with bogus customer.”

31) This statement by itself would show that P. W. 3 is not witness to the incident. P. W. 4 was called as a witness under section 311 of Code of Criminal Procedure, 1973. His previous statement was not recorded. That it is incumbent upon the prosecution to have independent

witnesses to prove the case in the said Act. The lady police officer was not present. There was no female member from any social organisation. Statement of the victim was recorded by P.W. 6. All this would show that there is non compliance of the mandatory provisions of the Statute. Learned counsel therefore submits that in view of this, conviction against the accused deserves to be quashed and set aside. That non examination of the material witness Rahul Sonawane would be fatal to the prosecution, irrespective of the fact that he was not alive. If there had been any independent panchas to the raid, probably the situation would be different.

32) In the case of **Tahsildarsingh and another V/s State of Uttar Pradesh**, Full Bench of Hon'ble Supreme Court has held as follows:

“The object of Legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be

used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e. the interest of the accused.”

It is further observed by the Hon'ble Apex Court that :

“except for a dying declaration and matters coming within the provisions of Section 27 of the Indian Evidence Act, 1872, no statement of any person made to a police officer in the course of investigation, if reduced into writing, could be used as evidence against accused. There was no restriction as to the extent of the right of an accused to cross-examine a prosecution witness concerning his statement to the police. Section 162 of the Code

of 1898 prohibited the use of a statement reduced into writing, as evidence except any statement falling within the provisions of Section 32 of the Indian Evidence Act, 1872. The proviso to this section, however, expressly stated that in spite of the prohibition in the main provision, the accused could use such a statement to impeach the credit of the witnesses in the manner provided in the Indian Evidence Act of 1872. It will be seen therefore that until 1898 there was no restriction imposed upon the accused as to the extent of his right of cross-examination.”

33) Statement of Rahul Sonawane recorded under section 161/162 of Code of Criminal Procedure, 1973 cannot be taken into consideration as it is not a substantive evidence and therefore, there is nothing on record to show as to what had actually transpired in the room just before the raid. There is no substantive evidence to show that Rahul Sonawane had solicited services of prostitute. It is apparent on the face of record that all the three victims were married. According to prosecution, they were earning their living by prostitution voluntarily. However, admission of P. W. 6 that two victims were the spouses of other two accused also cannot be ignored. Prosecution, at the time of

trial had not made any efforts to find out the whereabouts of the victims and to record their statements. Hence, it cannot be said that prosecution has proved the guilt of the accused beyond reasonable doubt.

34) It is true to say that the scope in revision application is limited and there is no occasion for re-appreciation of evidence. However, in the facts of the present case, more particularly since earlier the accused had been acquitted of the same charges and it is his defence that he is being falsely implicated only for getting him evicted from the said room. It becomes necessary to appreciate the evidence. There is a dispute between owner and the mother and the accused. Civil suit is pending and therefore, this Court has appreciated the evidence in the interest of justice. There is utter violation of mandatory provisions of the said act which goes to the root of the matter. Accused was convicted only because the police has made out a case against the accused. The case has to be tested on the anvil of independent evidence. The evidence so recorded has to inspire the confidence of the Court. In the present case, investigation as well as the manner in which

the trial is conducted does not inspire the confidence of the Court and hence, accused deserves to be acquitted.

35) Needless to say that since accused has been acquitted of the charges levelled against him, order passed under section 18 (2) of the said Act fails. The P. I. of Bandra Police Station shall de-seal the premises Room No. 19 (A), 1st Floor, Gazebo House, 133 Peerbhoy Building, Hill Road, Bandra (W), Mumbai.

ORDER

- (i) Revision application is allowed.
- (ii) Judgment and Order passed by Metropolitan Magistrate, Special Court for ITPA, in Case No. 822/PW/2009 convicting the applicant, partly allowed by Sessions Court in Criminal Appeal No. 383 of 2015 vide Judgment and Order dated 27/07/2015 is hereby quashed and set aside.
- (iii) Applicant is acquitted of the offence punishable under section 3 and 4 of the Immoral Traffic (Prevention) Act.
- (iv) Since the applicant is acquitted of all the charges levelled against him, the order of attachment u/sec 18 (2) of ITP Act is hereby quashed

and set aside.

- (v) Amount of fine, if paid, be refunded to the applicant.
- (vi) Revision application stands disposed of.

(SMT. SADHANA S. JADHAV, J.)