

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 18th JANUARY, 2016
DECIDED ON : 18th APRIL, 2016

+ **CRL.A.563/2003**

SHAIYARA

..... Appellant

Through : Mr.K.K.Sud, Sr.Advocate with
Mr.Subhash Chandra &
Mr.C.P.Nautiyal, Advocates.

versus

THE STATE

..... Respondent

Through : Mr.Vinod Diwakar, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 11.08.2003 of learned Addl. Sessions Judge in Sessions Case No.95/2001 arising out of FIR No.253/2001 PS Kamla Market by which the appellant – Shaiyara was convicted for committing offences punishable under Section 368 IPC read with Sections 366; 373 IPC and Sections 3, 4 & 5 Immoral Trafficking (Prevention) Act, 1956 (in short 'ITP Act'). By an order dated 18.08.2003, she was sentenced to undergo various prison terms with fine. The substantive sentences were to run concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that the appellant and her associate Bharti on or before 02.07.2001

concealed or confined the victims 'MT', 'MK', 'T', 'M', 'P', 'A', 'V' and 'AM' (changed names) on the first floor of 'Kotha' No.58, G.B.Road knowing that they were minors and have been kidnapped with the intent that they would be compelled or forced to illicit intercourse. These girls were recovered from the said 'kotha' on 02.07.2001 in a raid conducted by the police. On that day, Insp.Ashok Tyagi along with SI Satbir Singh and ASI Sarita was on patrolling duty. At about 06.30 p.m. when they were present near Kotha No.52, G.B.Road, a secret information was received that two girls namely 'MK' and 'MT' have been forcefully detained at Kotha No.58, G.B.Road. A raiding team was constituted and in the said raid at Kotha No.58, eight girls were recovered from different places. The Investigating Officer recorded victim's statement (Ex.PW-1/A) and lodged First Information Report by making endorsement (Ex.PW-9/A) over it. After recording statements of the other victims, they were medically examined; their statements under Sections 164 Cr.P.C. were recorded. Subsequent investigation was carried out by SI Satbir Singh. Statements of the witnesses conversant with the facts were recorded during investigation. The accused persons were arrested. Ossification tests were conducted to ascertain the age of the victims. Upon completion of investigation, a charge-sheet was filed against the appellant and her associate Bharti for commission of offences punishable under Section 368 IPC read with Section 366 IPC; 109 IPC read with Section 376 IPC; 373 IPC and Sections 3, 4 & 5 ITP Act. By an order dated 05.11.2001, they were charged for committing the aforesaid offences to which they pleaded not guilty and claimed trial. To bring home its case, the prosecution examined twenty-three witnesses. In 313 Cr.P.C. statement, the appellant denied her involvement in the crime

and pleaded false implication. On appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted Bharti of all the charges except Section 3 of ITP Act. It is relevant to note that State did not challenge her acquittal for commission of other offences. It appears that Bharti has not challenged her conviction under Section 3 ITP Act. The trial resulted in appellant's conviction and being aggrieved and dissatisfied, she has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that PW-9 (Insp. Ashok Tyagi) was posted as Addl. SHO PS Kamla Market at the relevant time. Whether Insp. Ashok Tyagi was competent to carry out investigation under ITP Act being Addl. SHO of PS Kamla Market during the relevant time has been discussed in detail in CrI.A.791/2003 decided by this Court on 02.02.2016 in '*Bhagti Ram Pandey vs. State NCT of Delhi*'. In that case, the investigation under ITP Act was carried out by Insp. Ashok Tyagi when he was working as officiating SHO of the said police station in the absence of regular SHO who had proceeded on leave. Para Nos. 5 & 6 are relevant :

“5. Undeniably, Section 13 of the ITP Act mandates State government to appoint Special Police Officer for dealing with the offences under the Act. Vide Notification (Ex.PW-17/A) all ACPs, (SDPOs), SHOs and Assistant Commissioners of Police of Crime Branch, Palam Airport and Railways have been designated as Special Police Officers for the purpose of enforcement of the Act. Apparently, Additional SHOs of the concerned police stations have not been

designated as Special Police Officers in the said notification. Record reveals that various correspondence took place to confer similar powers upon Additional SHOs under Section 13 of the Act but the request was repeatedly not acceded to (Ex.PW17/DA to Ex.PW17/DE). By a letter (Ex.PW17/DB), request was specifically made to designate Additional SHO, Kamla Market, to be the Special Police Officer as per the provision of the Act. Needless to say, Additional SHOs were not competent to carry out the investigation under the Act.

6. *Admittedly, in the instant case raid was conducted at Kotha No.56, G.B.Road on 21.06.2001 by PW-11 (Insp.Ashok Tyagi) posted as Additional SHO, P.S.Kamla Market. It was emphasized that concerned SHO had proceeded on leave and by oral/verbal directions /orders, Inspector Ashok Tyagi was directed to officiate as SHO of police station Kamla Market by PW 19 (Udhey Sahai), ACP, Central District on 19.06.2001. DD No.38 (Ex.PW-18/A) was recorded on 19.06.2001 by Insp.Ashok Tyagi taking over charge as SHO of Police Station Kamla Market. Admitted case is that no order in writing was issued authorizing Insp.Ashok Tyagi, to work as officiating SHO for any specific period. PW-18 (HC Rajya Vardhan) admitted in the cross-examination that in DD No.43 (Ex.PW18/DA) recorded subsequent to DD No.38 (Ex.PW-18/A), designation of Insp.Ashok Tyagi has been mentioned as Additional SHO, Police Station Kamla Market. In DD No.37-B (Ex.PW18/DB), recorded on 20.06.2001, Ms.Chhaya*

Sharma, IAS has been shown as officiating SHO of police station Kamla Market. PW-19 (Udhey Sahai) did not furnish any explanation as to why order in writing was not issued to authorize Insp.Ashok Tyagi to work as SHO of Police Station Kamla Market. The entire lot of documents on record disclose that investigation was carried out by Insp.Ashok Tyagi in his capacity as Additional SHO. No document on record pertaining to investigation reveals that he carried out the investigation in the capacity of an officiating SHO, police station Kamla Market. All applications moved before the court including application under Section 164 Cr.P.C; application for medical examination of the victims and accused persons; personal search memos and other various documents reflect that the investigation was carried out by Insp. Ashok Tyagi as Additional SHO, Kamla Market. Subsequently, investigation was also carried out by SI Satbir. In some memos prepared by him, Insp.Ashok Tyagi has been depicted as Additional SHO as witness. DD No.19/A dated 21.06.2001 has been written by Inspector Ashok Tyagi as Additional SHO, Kamla Market. It has not thus been established with certainty that the investigation was carried out by Insp. Ashok Tyagi as SHO of the concerned police station. Since Insp.Ashok Tyagi was not empowered under Section 13 of the Act to carry out the investigation, the entire proceedings conducted by him go to the very root, competence and jurisdiction and can't be sustained."

4. In the instant case also, above observations are fully applicable. PW-22 (Udhey Sahai) who was working as ACP Central District at the relevant date admitted in the cross-examination that Addl.SHO is not a Special Police Officer. In view of factual findings recorded above, it can safely be held that proceedings conducted by Insp.Ashok Tyagi under Sections 3, 4 & 5 ITP Act were without jurisdiction and can't be sustained.

5. Allegations emerging against the appellant are that she and her associate Bharti used to run a brothel at Kotha No.58, G.B.Road, Delhi, where the victims were forced to indulge in prostitution against their wishes for monetary consideration. It is further alleged that the appellant and her associate used to get money from the customers and it was shared by them to the deprivation of the victims. Apparently, the appellant was not instrumental in their kidnapping or abduction. No role has been assigned to the appellant in bringing them to the 'kotha'. Primarily the allegations against the appellant and her associate pertain to commission of offences punishable under Sections 3, 4 & 5 of the ITP Act.

6. PW-9 (Insp.Ashok Tyagi) informed that when he along with SI Satbir and ASI Sarita was on patrolling duty, at around 06.30 p.m. on the basis of a secret information, a raid was conducted on Kotha No.58 and eight girls were recovered from there. The FIR was lodged after recording victim's MT's statement (Ex.PW-1/A). PW-1, the complainant – 'MT' has, however, given a different and inconsistent version in this regard. She deposed that one day when the appellant came to know about her pregnancy, she sent her to a hospital along with Bharti, 'MK' and another boy. When she was coming out of the hospital, she met a Nepali boy who enquired as to where she was staying. When she disclosed to the said boy of her ordeal of

being pushed in prostitution in the 'kotha' against her wishes, he informed the police and her statement (Ex.PW-1/A) was recorded. She was cross-examined by learned APP after seeking Court's permission. In the cross-examination, she admitted that when she was taken to the hospital by Bharti and Padam, she attempted to escape but was caught hold by Bharti and was not permitted to go anywhere else. In her 164 Cr.P.C. statement (Ex.PW-1/B), the complainant disclosed that when she was taken to hospital by Bharti and Padam, she attempted to flee but was caught hold by Bharti. When she told them that she would not indulge in prostitution, they threatened to call the police. The police arrived and made enquiries from her. She disclosed the police that her friend 'MK' was in confinement at the 'kotha'. The police assured her that she would meet 'MK'. When they reached the 'kotha', 'MK' was found concealed in a bathroom. The prosecution has thus failed to reconcile the two versions about the registration of the First Information Report. None of the victims had lodged any complaint with the police before 02.07.2001. It has come on record that in the said raid besides eight girls whose statements were recorded, thirty five more girls were found present at the 'kotha'. The Investigating Officer did not record their statements. No independent public witness was associated at any stage of investigation despite their availability. The 'Nepali' boy to whom the complainant had allegedly met and apprised her plight has not been examined.

7. PW-1 'MT' on whose complaint (Ex.PW-1/A) FIR was lodged did not disclose her date of birth. In her Court statement, she merely stated that she had completed eighteen years of age. She was unaware as to when she completed eighteen years. She was working in a carpet manufacturing

factory along with her friend 'MK'. She disclosed that a boy namely Dil Kumar had met her there and brought her first to Dhangarhi and thereafter to Delhi on the pretext that his sister was living there. She was brought to Delhi about 10 - 15 days before her recovery and was kept nicely in a hotel. She was taken to the 'kotha' by Dil Kumar and Padam. Dil Kumar left her there telling that the appellant was his sister and she should stay with her for few days. Similarly, 'MK' was also brought by Dil Kumar to the appellant's 'kotha'. At the 'kotha', she was forced to indulge in prostitution and on her refusal to accede to the appellant's request, she was beaten. In the cross-examination, the complainant admitted that she was married and had one elder brother and three younger sisters. She was married about 6 / 7 months before her coming to Delhi. Dil Kumar had met her first time five days before bringing her to Delhi. She was already pregnant. She had stayed at the 'kotha' for about six days before lodging the report.

8. The Investigating Agency did not implicate Dil Kumar or Padam for kidnapping or abducting the complainant and her friend 'MK'. Their role in the entire episode has not been investigated. The complainant did not inform her husband or his family at the time of accompanying Dil Kumar to Delhi. She stayed with Dil Kumar for about 8 or 10 days in Delhi in a hotel but did not bother to lodge any complaint. She was taken to the 'kotha' where she stayed for number of days without raising any hue and cry. A married lady who had completed eighteen years of age is not expected to accompany an stranger against her wishes merely on the pretext to get a job in a different country. She has made vital improvements in her Court statement and has been duly confronted with her statement (Ex.PW-1/B) where all these facts did not find mention.

9. PW-2 'MK') in her Court statement deposed that Dil Kumar and a lady had brought her to Delhi from Nepal on the pretext to arrange a good job. First, she was taken to a hospital and thereafter, sold at GB Road to the appellant. On the 'kotha', the appellant, Bharti and Padam forced her to indulge in prostitution. She was saved by the complainant 'MT' because on her complaint the police arrived at the 'kotha'. Her statement (Ex.PW-2/A) was recorded before the learned Metropolitan Magistrate. In the cross-examination, she admitted that before coming to Delhi, she was married to one Kesar and had three brothers and two sisters. She was working in a factory for about 2 or 3 years in Nepal. She was kept in Delhi for about 6 / 7 days in a hotel by Dil Kumar comfortably.

10. PW-2 also did not reveal her age and date of birth. In her Court statement recorded on 09.11.2001 she claimed that she was aged around 18 years. She also did not raise any alarm when was kept in a hotel in Delhi for about 6 or 7 days by Dil Kumar after coming from Nepal on the pretext to get her a job. In the cross-examination, she admitted that she was pregnant before coming to Delhi. A married pregnant lady was not expected to accompany a complete stranger Dil Kumar without taking into confidence her husband and other family members. Nothing is on record to show if she was forced or beaten by Dil Kumar any time to prevent her from reporting the matter to the police. She on her own did not lodge any complaint for her ordeal with the police any time. She has deviated from her statement (Ex.PW-2/A) recorded before the learned Metropolitan Magistrate and has been confronted.

11. PW-3 'T' is a married lady aged 18 years. She was also working in a factory in Nepal. In her Court statement, she disclosed that she

was brought Delhi by one Raju and his associate on the allurements that they would arrange a good job for her. They took her to one Anita. They and Anita thereafter took her to the appellant's 'kotha' and was left there where she was forced to indulge in prostitution against her wishes. She was informed that Raju, Anita and her associate had sold her to the appellant for ₹45,000/-. She further disclosed that she, Bharti, 'MT' had gone to JPN Hospital where 'MT' disclosed her story to a Nepali boy and managed to slip. She was brought back to the 'kotha' by Bharti from where she was rescued by the police. In the cross-examination, she disclosed that she was married for about a year before coming to India. She had three sisters and two brothers. She did not inform any of her family members before coming to India. She did not inform her husband who had deserted her. She did not know Raju before coming to Delhi. She was brought directly to the appellant's 'kotha' from Nepal. The appellant and Anita both were running separate 'kothas'.

12. Again, the Investigating Agency did not collect any age proof of the victim. Raju, his associates and Anita were not implicated during investigation. Nothing has surfaced if any payment of ₹45,000/- was paid by the appellant to Raju for victim's sale. She too was confronted with the statement (Ex.PW-3/A) where the facts deposed in the examination-in-chief did not find mention. PW-4 (M) disclosed her age 17 years. She was brought from Nepal where she was working in a factory in Jorpati (Nepal) by one Santosh on the pretext to procure a good job for her in Delhi. Thereafter, she was left at G.B.Road on the 'kotha' of the appellant and Bharti. She later on came to know that she was sold for ₹90,000/-. In the cross-examination, she informed that she had one elder brother and parents

working in the same factory but had informed them before coming to Delhi. She did not intimate them about her presence in Nari Niketan in Delhi. She did not introduce Santosh to her parents. She stayed with Santosh in Delhi in a hotel for about 3 days. Once she was taken to a doctor for treatment of jaundice but she did not complain to the doctor that time.

13. PW-5 'P' a resident of Bangalore, deposed that two girls had brought her to Delhi on the pretext to arrange a good job. At the railway station, the appellant along with her associate came and she was taken to the 'kotha' in the burka and was compelled to indulge in prostitution by the appellant and her associate Bharti. On her insistence to go back to her native place, she was beaten. In the cross-examination, she admitted that she was a married lady. The 'girls' who had brought her met her 2 days before bringing her to Delhi. She was confronted with her statement (Ex.PW-5/DA) where she had informed that the girls had met her 20 days prior to coming to Delhi. She was married two years prior to her coming to Delhi. Her husband was working in a hotel. She had parents and one younger brother. She did not inform any of her family members before accompanying the girls to Delhi. The said girls were not known to her by name. She disclosed that she was also sent out for prostitution. She did not know her exact age.

14. Again, the prosecution did not furnish any cogent document on record to ascertain PW-5's date of birth. It is unbelievable that the victim would accompany the 'girls' without ascertaining as to what job was being made available by them in Delhi without informing her parents or in-laws. She never raised alarm against the appellant's conduct and behaviour of being pushed into prostitution against her wishes even when she was taken

outside the 'kotha' to the customers. She was confronted with her statements (Ex.PW-5/A and Ex.PW-5/DA) where substantial improvements were made by her in the examination-in-chief.

15. PW-10 'AM' is a resident of village Piliaur, Distt. Chittur (Andra Pradesh) aged around 20 years. She disclosed that one Luxmi met her in the village and brought her to Delhi on the assurance that she would earn ₹3,000/- per month in a factory. At the railway station, she was handed over to the appellant who forced her to indulge in prostitution. In the cross-examination, she disclosed that she had four brothers and five sisters; her parents were alive; she did not inform any of her family members before leaving her native place. She did not inform them about her whereabouts till date. She further disclosed that Luxmi met her only once about a week before coming to Delhi. She did not know any of her family members.

16. Similar is the testimony of PW-11 'A'. She in her Court statement disclosed that three months prior to her recovery by the police she was brought to Delhi by one Nandini on the pretext to get her a good job in Delhi. She was left at the appellant's room where other girls were present. She was pushed into prostitution. In the cross-examination, she admitted that the age disclosed to the doctor was 25 years and to the Magistrate was 20 years. She admitted that she was a married lady having a son aged around 3 years. She had come to Delhi after informing her husband.

17. PW-12 'V' has similarly deposed about allurement by Nandini to get her a good job in Delhi. From the railway station, she was taken to the appellant's 'kotha' and was forced to indulge in prostitution. In the cross-examination, she admitted that PW-11 'A' was her cousin's wife who came first and called her subsequently, after sending message. She came to

Delhi after about 20 days of her arrival and stayed in the 'kotha' for about a month before her recovery. She had two sons aged around 5 years and 3 years. She had come to Delhi after informing her husband.

18. Both PW-11 'A' and PW-12 'V' were related to each other closely. They were married ladies having issues. Both had come to Delhi with Nandini at different stages after informing their spouses. At no stage, PW-11 'A' or PW-12 'V' or their in-laws or family members complained about the appellant's activities in Delhi. PW-11 'A' rather called PW-12 'V' to Delhi who volunteered to come along with Nandini. Apparently, PW-11 'A' had no complaint about the activities being carried out by her in 'kotha'. Rather she induced PW-12 'V' to come to Delhi after about 20 days of her arrival. The testimonies of both these PWs rule out that they were forced to indulge in prostitution or that they were brought to Delhi on the pretext to provide good jobs.

19. From the statements of the victims referred above, it transpires that most of them were major on the day of their recovery from the 'kotha'. Others were on the verge of attaining majority. The investigating agency did not collect any authentic proof to ascertain their exact date of birth. PWs-10, 11 & 12 were from India and the Investigating Officer did not visit their native places to find out their date of birth. He did not examine their family members to ascertain as to how and under what circumstances they were brought to Delhi. None of them had lodged any missing report to find out their whereabouts. All the victim's had accompanied strangers from different places without informing their family members on the pretext to get good job. At no stage, any of them protested about their stay in Delhi or at the 'kotha'. Only when in a raid, these victims were recovered by the

police, in their statements they implicated the appellant and her associate for forcing them to indulge in prostitution. No customer was found present inside the 'kotha' at the time of raid. No tainted money was recovered either from the victim or the appellant. The identity of the customers who allegedly abused the victims for money was not ascertained. No evidence emerged on record to show if the appellant had any nexus with the individuals who kidnapped or abducted the victims. No evidence has emerged to infer if at any stage the victims were beaten. In the MLCs, no injuries whatsoever were found on their bodies including private parts to infer that any resistance was offered by any of them at the time of having physical relations with the so called customers against their wishes.

20. During investigation, ossification tests were conducted to ascertain the age of the victims. PW-19 (Dr.Madhu Sharma) proved her opinion (Ex.PW-19/A to Ex.PW-19/D) and the opinion given by Dr.Vijay (Ex.PW-19/E and Ex.PW-19/F). As per report (Ex.PW-19/A), age of victim 'AM' was estimated in between 15 to 17 years; that of 'P' (Ex.PW-19/B) 16 to 17 years; that of 'MT' (Ex.PW-19/C) more than 15 years but less than 17 years and that of 'T' in between 16 / 17 years (PW-19/D). Age of 'A' vide report (Ex.PW-19/E) was determined in between 17 to 19 years and that of 'V' that more than 19 years (Ex.PW-19/F). The other two victims were not sent for X-rays as they were pregnant. So their age could not be ascertained. If error of margin is added to the age determined in the above referred reports apparently, the prosecution was unable to establish beyond doubt that the victims were minor on the day of incident.

21. Allegations against co-accused Bharti were similar in nature. However, on the same set of evidence, the Trial Court acquitted her of all

charges except Section 3 of ITP Act. No reliable evidence was collected by the prosecution to find out as to who was owner in occupation of the 'kotha' in question. The prosecution relied upon the testimony of PW-16 (M.K.Garg), Senior Clerk alone who merely deposed that electricity connection in the property in question was in the name of the appellant. Installation of electricity connection in itself is not sufficient to establish ownership of the 'kotha' in question. The Investigation Officer did not gather any evidence of ownership of the 'kotha'. Investigating Officer admitted that 35 girls were found present at the time of raid. He, however, did not furnish any reason as to why they were not rescued. On 13.07.2001, the investigation was taken over by PW-15 (Insp.Satbir Singh) who conducted the subsequent proceedings despite the fact that he was not Special Police Officer. In the cross-examination, he contradicted PW-9 (Insp.Ashok Tyagi) and disclosed that 18 – 20 girls were found present at the time of raid. The victims have made vital improvements in their Court statements which are inconsistent & contradictory with their statements recorded under Section 164 Cr.P.C.

22. In the light of above discussion, the prosecution has miserably failed to establish that the victims have forcibly subjected to prostitution against their wishes. Possibility of the victims being a consenting party cannot be ruled out. No independent witness was examined by the prosecution. So much so, the victims' parents or family members were not examined or produced. The appellant deserves benefit of doubt.

23. The appellant's appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. Bail bond(s) and surety bond(s) of the appellant stand discharged.

24. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

APRIL 18, 2016 / *tr*

