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

\+ **CRL.REV.P. 143/2017**

YASHPAL MALIK ...Petitioner

Through: Ms. Rebecca John, Sr. Advocate with Ms. Poonam Anand, Advocate.

versus

STATE (NCT OF DELHI) & ANR …Respondents

Through: Mr. Akshai Malik, APP for the State/ respondent no. 1 with SI Sushila, PS-Tilak Nagar.

CORAM:

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

O R D E R

12.12.2017

1. The present Revision petition is filed by the petitioner under Section 397 and 401 read with Section 482 of The Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.') against ***the impugned order on charge dated 21.12.2016 and charges framed vide order dated 21.12.2016***, passed by the Additional Session Judge (hereinafter referred 'ASJ'), Tis Hazari Courts, West, New Delhi, in FIR No. 884/2015, under Section 323/ 376/506 of the Indian Penal Code, 1860 (hereinafter referred 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act and Section 23/26 of the Juvenile Justice, Act, 2000(hereinafter referred 'JJ'), whereby the charges were framed

against the petitioner for the offences under Section 370 IPC and Section 23/26 of the JJ Act, 2000.

2. The brief facts of the present case are that the FIR No. 884/2015 was registered against the present petitioner upon receiving of DD No. 33B dated 09.06.2015, wherein it was alleged by the complainant that she was engaged in the house of the Yashpal Malik, Tilak Nagar, as a domestic employee, through an agency named Reshma Domestic Helper Service on 02.01.2015, on monthly salary of Rs. 5000/-. It was alleged by her that the petitioner did not pay her the requisite salary as fixed by him, did not give her the food on time but whenever given it was adequate, did not allow her to go outside the house and threatened her along with Shikha/daughter in law that if she tried to leave the house then they will send her to such a place where even her family members will not be able to find her. Further, it was alleged, that one day when she was left with no clothes, then, she was paid 6,000/- by the petitioner and was sent with someone to buy clothes for her, that she was even beaten up by the petitioner, who, even during her illness did not take her for check up to the doctor. On perusal of the facts and circumstances of the present case, the learned ASJ framed the charges under Section 370 IPC and 23/26 of the JJ Act, 2000 against the petitioner. Hence, the present petition.

3. The learned senior counsel for the petitioner contended that the Trial Court has erred in passing the impugned order as the same is based on conjectures and surmises; that there is no material on record to substantiate charges under the Section 370 IPC; that the

prosecutrix was produced before the Chairperson of Child welfare Commission but no allegation was made by her against the petitioner and it was observed by the committee that "Pramila appears neat and happy"; that no allegation against the petitioner was made by her even while recording of her statement under Section 164 Cr.P.C; that the petitioner had not made any wrongful gain from the prosecutrix and had paid the entire salary to her before the Child Welfare Committee(CWC); that no offence under Section 23 of JJ Act is made out as the prosecution had failed to establish that he caused her unnecessary mental or physical suffering; that the petitioner was unaware that the prosecutrix was a minor as she even signed the requisite document and disclosed her age as 18 years while executing an agreement between her and the Reshma Placement Agency; that the present case has to tried by the Juvenile Justice Board as per clause(b) of Rule 10 of the JJ Rules, 2007; that to substantiate its case, she had placed reliance on ***Union of India v. Praful Kumar Samal & Ors***. reported in ***1979 (3) SCC 4***; that the Trial Court had erred in framing the charges against the petitioner and the same is liable to be set aside.

4. Per contra, the learned counsel for the State while opposing the present petition has contended that at the time of framing of charges, the court is only required to see that whether prima facie case is made out against the petitioner and not put weightage on the evidence on record and the offence under Section 370 IPC as well as Section 23 of JJ Act is clearly made out. As per this, the Trial

Court has rightly framed charges against the petitioner and the present petition is liable to be dismissed.

5. The submissions made by the both the parties have been considered and records perused.

6. Before adverting to the question raised in the revision petition for and against framing of charges under different provisions, it has to be clearly kept in view that a revisional Court must not interfere with the findings of a Trial Court on the ground of insufficiency or otherwise of the material on record, so as to substitute its own opinion unless some patent perversity or glaring illegality is brought to the notice of the Court.

7. In ***State vs Siddarth Vashisth & Manu Sharma*** reported in ***2001 CriLJ 2404***, it was observed by this court that:

> *"31. **If upon consideration of the material on record, documents and surrounding facts and circumstances of the case the Trial Judge considers that there are no sufficient grounds for proceeding against an accused he is under duty to order his discharge under Section 227 of the Code of Criminal Procedure. However, if upon the consideration of the material on record the Judge is of the opinion that there are grounds for presuming that the accused has committed the offence, he is under a legal obligation U/S 228 of the Code of Criminal Procedure to frame a charge against him and put him on trial.** The law as to under what circumstances the Courts should pass an order under Section 228 of the Code for framing a charge and on what ground a discharge should be ordered under Section 227 of the code has been the subject matter of deep deliberations by the High Courts as well as Apex Court in a number of cases. Leading judgments on the question are in*

Century Spinning & Manufacturing Co. Ltd. Vs. The State of Maharashtra, 1972 Crl. L.J. 329, Malkhan Singh & Another Vs. The State of Uttar Pradesh, , State of Bihar Vs. Ramesh Singh, Union of India Vs. Prafulla Kumar Samal & Another, , Rambilas Singh & Others Vs. State of Bihar, , Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijja & Others, , Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia & Another, , State of Maharashtra etc. Vs. Som Nath Thapa etc., 1996 Crl. L.J. 2448, Satish Mehra Vs. Delhi Administration & Another, 1996 (5) SCALE 523 and Sumitra Banik Vs. State of West Bengal,.."

In a ***State of Delhi v. Gyan Devi & Others [(2008) SCC 239],*** Hon'ble Supreme Court observed that "*at the stage of framing of charge the Trial Court is not to examine and access in detail the materials placed on record by the prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons."*

8. In the light of the principles governing the framing of charge by the Trial Court, it is observed by this court that the FIR was filed under Section 323/ 376/506 of IPC, Section 6 of the Protection of Children from Sexual Offences Act and Section 23/26 of the Juvenile Justice, Act, 2000 and subsequently, the Trial Court in the present case has framed the charges against the petitioner under Section 370 IPC as well as under Section 23/26 of JJ Act, 2000. It is pertinent herein to see the ingredients of the Section 370 and to ascertain whether prima facie the case is made out under the respective section against the petitioner.

Section 370 IPC, states as under:

> *"Whoever, for the purpose of exploitation, (a) recruits, (b) transports,(c) harbours, (d) transfers, or (e) receives, a person or persons, by—*
> *using threats, or using force, or any other form of coercion, or by abduction, or by practicing fraud, or deception, or by abuse of power, or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking."*

9. Perusal of the above Section shows that in order to prove the offence punishable under Section 370 IPC, it is incumbent upon the prosecution to prove beyond pales of reasonable doubt that accused got minor girls/victims transported/trafficked out from their lawful guardianship by inducement including giving or receiving of payments or benefits in order to secure consent of their lawful guardians / parents, for the purpose of their exploitation. In the facts and circumstances of the present case, it is observed that the prosecutrix has no where stated that she was transported or trafficked from her lawful guardian by the petitioner by using any kind of inducement. Rather, it has been stated by her at the time of lodging of the FIR that she had herself left her home and without informing her family members, she came to Ranchi along with a woman hailing from her village. Further perusal of the record shows that she had come to Delhi on her own. Thereafter, through an agency named Reshma Domestic Helper Service, she entered into a written agreement with the petitioner wherein the age of the

complainant has been shown as 18 years and it has been duly signed by the complainant herself. Even in the subsequent statements made by her, she has no where stated anything, so as to demonstrate, that any fraud, deception or abuse of power have been committed on her so as to bring the petitioner within the ambit of human trafficking as defined under Section 370 IPC.

10. Proceeding further with the case, it is now significant to observe that whether the charges under Section 23 & 26 of the JJ Act,2000 are made out against the petitioner.

Section 26 of JJ Act,2000 read as under:-

> ***26. Exploitation of juvenile or child employee*** *- Whoever ostensibly procures a juvenile or the child for the purpose of any* ***hazardous employment*** *keeps him in bondage and withholds his earnings or uses such earning for his own purposes shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine."*

On perusal of the facts and circumstances of the present case, it is observed that the prosecutrix was employed by the petitioner as a domestic employee for a salary of Rs.5,000/-. She has alleged that the petitioner did not pay her the requisite salary as fixed by him, did not give her the food on time, did not allow her to go outside the house and was threatened by him along with Shikha and daughter in law that if she tried to leave the house then they will send her to such a place where not even her family members will be able to find her. Further, it was alleged, that one day when she was left with no clothes, then, she was paid 6,000/- by the petitioner and was sent with someone to buy clothes for her and was even beaten up by the petitioner, who, even during her illness did not take her for check up to the doctor. In ***Faisal v. State of Kerala*** reported in ***[2015 (4) KLT 450]***, it is submitted that:

> *"prosecution under Section 26 of the Juvenile Justice Act can be sustained only when there is prima facie material to show that the juvenile or the child was <u>kept in bondage for the purpose of subjecting him to any hazardous employment</u> and also that the employer had withheld his earnings. In the absence of such allegations, the continuance of the proceedings is an abuse of process is the submission advanced ."*

11. Further, in order to bring the petitioner within the ambit of Section 26 of the Juvenile Justice Act, the prosecution must have a case that the juvenile was employed by the petitioner in some hazardous job and the meaning of the term "hazardous" used under S.26 of the Juvenile Justice Act may indicate a child engaged in an employment which involves hazardous process. Hazardous process has been defined under Section 2(cb) of the Factories Act, 1948, which states that ""hazardous process" means any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye- products, wastes or effluents thereof would cause material impairment to the health of the persons engaged in or connected therewith, or result in the pollution of the general environment. ***In the matter of an application for anticipatory bail under Section 438 of the Code of Criminal Procedure filed on 15.02.2016 in connection***

with Kalimpong P.S Case No. 332 of 2015 dated 28.10.2015 under Sections 26 of the Juvenile Justice (Care & Protection) Actread with Section 14(1) of the Child Labour Prevention & Regulation Act corresponding to G.R Case No. 420 of 2015 vs. Gay Tshering Shenga @ Gay TsheringBhutia reported in ***2016 SCC OnLine Cal 6714,*** it was observed by the court that:-

> *"3. It is only due to grudge and ill motive that he has been implicated. Section 26 of the 2000 Act will have no application as the victim was not engaged in any hazardous employment nor his earnings withheld. In fact, if at all, Section23 will apply which is bailable. Section 2(cb) of the Factories Act has defined* ***'hazardous' to be a process or activity which will cause impairment to the health of the person engaged. Such is not the case here as the victim's health has not been in any way impaired by either finished products or bye-products.*** *There is no hazardous process or activity involved. ...... Black's Law Dictionary, 8th Edition, has described '****hazardous employment' to mean high risk work and work involving extra peril. There is no question of any peril in the engagement of the victim nor was the work that he discharged, if any, of high risk.*** *Wharton's Law Lexicon, 15th Edition has described 'hazardous work' to mean any solid or liquid as defined in EEC Council Director in December, 1991. Hazardous substance has been defined in the Environment Protection (Protection) Act, 1986* ***to mean any preparation which is likely to cause harm to human beings and other living creatures.*** *None of these can be applied to the work that the victim was engaged in doing. Reliance has been placed on decisions reported in 2013 Criminal Law Journal 833 (Kerala) (Vinod S.*

Panicker v. Sub-Inspector of Police), 2016 SCC OnLine Ker 206 (Abdul Khader v. State of Kerala) and an unreported judgment of Delhi High Court in Crl. Rev. No. 454 of 2011 (Statev. Nayan Ahmad) and the Gujarat High Court in Criminal Misc. Application No. 5484 of 2011 (Virendra K Malik v. State ofGujarat). As Section 26 has no application, therefore, orders be passed as sought."

12. From perusal of definition of hazardous process, it is clear that same does not involve domestic work. After considering the said allegations, it is observed that she was employed as a house maid /domestic employee and there is no material on record to show that the petitioner had any role in giving her any hazardous employment. Merely because the petitioner employed her at his house as a domestic employee and allegedly withheld giving her the required salary, he cannot be charged for the offence under this section. Under the aforesaid circumstance, the offence under Section 26 of the Juvenile Justice (Care and Protection of Children) Act is not made out nor the same was pressed upon by both the parties during their respective submissions made before this court.

13. Section 23 of JJ Act,2000 read as under:-

*"**23. Punishment for cruelty to juvenile or child** - whoever, having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be*

punishable with imprisonment for a term which may extend to six months, or fine, or with both.

For the offence under Section 23 of the Juvenile Justice Act,2000, it is seen that the alleged offence must have been committed by a person having actual charge or control over the juvenile, and the juvenile must have been subjected to mental or physical harassment. The petitioner herein was under actual charge or control of the complainant and she has given specific instances in her complaint alleging that she was subjected to mental and physical harassment. Keeping in mind the allegations made in the complaint, it is found that the charge under Section 23 JJ Act, 2000 has been framed in accordance with law.

14. Resultantly, since no charge under Section 370 of IPC & Section 26 of JJ Act,2000 could have been framed, ***charges framed vide order dated 21.12.2016*** qua Section 370 of IPC & Section 26 of JJ Act,2000 are set aside**.**

15. The Trial Court shall on the basis of the specific allegations made by the complainant in her complaint that she was threatened and beaten up by the petitioner and as per the chargesheet, frame charges afresh and try the case as per law.

16. Ordered accordingly.

17. All the petitions and pending applications stand disposed of.

18. Copy of this Order be given dasti under the signatures of the Court Master.

SANGITA DHINGRA SEHGAL, J

DECEMBER 12, 2017//gr