

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 367 OF 2018

Rohan s/o Rajendra Kulkarni,
Age 28 years, Occupation Business,
(one of the Directors of an I.T. Firm -
M/s. Tirmurti Techserve Pvt. Ltd.,
Aurangabad(, R/o : House No.219,
Near Reliance Petrol Pump, N-7,
CIDCO, Aurangabad Tq. Dist.
Aurangabad.

...Applicant

Versus

1) The State of Maharashtra,
Through The Officer Incharge,
M.I.D.C., CIDCO Police Station,
Aurangabad Tq. Dist. Aurangabad.

2) The Police Sub Inspector
(Vidya Wamanrao Raner),
Special Branch, Aurangabad City,
Aurangabad, R/o. M.I.D.C.,
CIDCO Police Station,
Aurangabad Tq. Dist. Aurangabad.

...Respondents

Mr. R. S. Deshmukh, Advocate for applicant.

Mr. S. W. Munde, Addl. Public Prosecutor, for respondent No.1/
State.

WITH
CRIMINAL APPLICATION NO. 455 OF 2018

1) Swati Trimbak Khamkar,
Age 30 years, Occupation Private
Service, R/o Bhoom Tq. Bhoom Dist.
Osmanabad.

- 2) Rama Ashok Borade,
Age 26 years, Occupation Private Service,
R/o Brijwadi, Aurangabad. ...Applicants

Versus

The State of Maharashtra,
Through Police Station M.I.D.C. CIDCO,
Aurangabad Tq. Dist. Aurangabad. ...Respondent

Mr. H. P. Randhir, Advocate for applicants.
Mr. S. W. Munde, Addl. Public Prosecutor, for respondent/
State.

**CORAM : PRASANNA B. VARALE &
SMT.VIBHA KANKANWADI. JJ.**

DATE : 21-03-2018.

ORAL JUDGMENT : (Per SMT. VIBHA KANKANWADI, J.)

1. Rule. Rule made returnable forthwith with consent of both the parties.
2. Both these applications have been filed for invoking inherent powers of this Court under Section 482 of Code of Criminal Procedure. Applicants have prayed for quashing FIR No. 348 of 2017 registered with CIDCO Police Station and the charge-sheet based on said FIR, bearing No. 3 of 2018 i.e. Summary Criminal Case No. 1391 of 2018 filed before 15th Judicial Magistrate First Class, Aurangabad for the offence punishable under Section 3, 4, 5 and 6

of Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as PITA Act).

3. In short the prosecution story is that, PSI Raner of Special Branch, Aurangabad lodged the First Information report on 08-12-2017 stating that P. I. Patil had called her on 07-12-2017 in the office and informed that she has received secret information that illegal activity of supplying girls to the customers visiting for massage, are provided in Anantara and D-Stress Hub situated in Prozone Mall. The said work is done by Manager with the consent of shop owner and those persons earn on the basis of income derived by those girls. The said information was communicated to higher officers. They decided to conduct raid. Dummy customers and panchas were identified and they were given instructions. Two dummy customers were used for two different shops. Amount was given to them. Those dummy customers contacted Manager of both the shops and they requested Managers to supply them girl. Amount was paid to those Managers. After dummy customer gave signal, raid was conducted. It was found that under the guise of spa and massage centre, those persons were running brothel. In all 5 girls, who were foreign nationals were found in Anantara Shop. Three customers were also found there in half naked condition. One of the said customer was also foreign national. Police had also found 3 staff members in the Shop. They were arrested. Panchnama was

prepared and some articles were seized including contraceptive, Laptop, Mobile, Swipe Machine, etc. Worth Rs.4,84,430/- from that place. In the second raid, police found 4 girls of foreign national, one customer in half naked condition and 2 staff members from D-Stress Hub. Police also seized similar articles from that shop also worth Rs.8,62,645/-. Panchnama of that shop was also executed. Hence PSI Raner lodged FIR against all those persons on behalf of State.

4. Investigation has been carried out. Statements of the witnesses have been recorded. Certain documents in the form of sale-deeds or registered documents have been obtained on order to ascertain the ownership of the shops. After the completion of the investigation, charge-sheet has been filed.

5. Applicant in Criminal Application No. 367 of 2018 contends that he is one of the Director of an I. T. Firm viz. Trimurti Techserve Private Limited, Aurangabad. He is also holding post of Vice-President of a reputed N. G. O. By name Purnavadi Yuva Forum. Nothing has been recovered from him at the shop so as to show his nexus with crime. He has been falsely implicated. He had gone to the spa for manicure, pedicure as well as for shaving and hair cut. He had no knowledge about any illegal activity if at all carried out in the spa. He was sitting at the reception, when raid was conducted. He was not at all found in the room. No offence can be said to have

been attracted against him. Contents of the FIR do not attract ingredients of Section 3 to 6 of PITA Act against him. He has therefore prayed for quashment of proceedings.

6. Applicants in Criminal Application No. 455 of 2018 have contended that applicant No. 1 was earlier employed with Bharati Walmart India Private Ltd. She resigned from said job in May 2017. She joined the services of the Spa on 15th October 2017. She was not given letter of appointment though she had reminded the employer for the same. Applicant No. 1 was working as receptionist and No. 2 was working as beautician. Police have wrongly shown that they were serving as Manager and Asstt. Manager. None of the provision under which the charge-sheet is filed is attracted against them. Therefore, they have also prayed for quashment of the proceedings.

7. Heard learned Advocate Mr. R. S. Deshmukh for applicant in Criminal Application No. 367 of 2018, learned Advocate Mr. H. P. Randhir for applicants in Criminal Application No. 455 of 2018 and learned A. P. P. Mr. S. W. Mundhe for respondents. Perused the charge-sheet.

8. It has been vehemently argued by learned Advocate for applicant in Criminal Application No. 367 of 2018 that the applicant had gone to the spa for hair cut. He was waiting at the reception,

when the raid was conducted. He was not even gone to the rooms. He was not found in half naked condition. This fact ought to have been verified by Investigating Officer. Even if for the sake of arguments it is accepted that he was found in half naked condition in a room, then we can not forget that it is a spa. People go there for massage. Therefore, half naked condition can not be considered as his intention to solicit sexual favours. If he is categorized as customer then, provisions of Section 3 to 6 of PITA Act are not attracted. Statements of witnesses do not show that applicant had offered money or had given money to the manager to have sexual intercourse with the girl. applicant has been just found in the spa. Offences under Section 3 to 6 can not be said to be made out against him. Prosecution has not submitted copies of the statements of victims to the applicant. The victims, who were the foreign nationals have been deported back to their country. Thus, there is no evidence against the applicant. It would be a futile exercise to ask him to face the trial.

9. Learned Advocate for applicant has relied on the decision in ***Sushanta Kumar @ Hemanta Kumar Das and others v/s. State of Orissa [(2000) Cri. L. J. 2689]***. In the said case, three girls were found concealing themselves under a bed in the ground floor of a hotel. applicants therein were apprehended while they were trying to escape. Undergarments of applicants were not containing any

semen stains. Therefore, the Learned Single Judge of Orissa High Court held that offences under Sections 3 to 6 are not made. Further in that case the prosecution had failed to show that applicants had offered money to the girls to have sexual intercourse with them. Therefore, offence under Section 7 of the Act was also held to be not made. The order of taking cognizance under those Sections was therefore, quashed and set aside. Similar view was taken in ***Mohammed Shaheed v/s. State of Telangana [Cri. P. No. 16593 of 2014]*** decided by learned Single Judge of High Court of Telangana on 21-1-2015.

10. Learned Advocate appearing for applicants in Criminal Application No. 455 of 2018 submitted that prosecution has not produced any documentary evidence to show that these applicants were working as Manager and Asstt. Manager in the said spa. Applicant No. 1 was employed with another Company earlier. She had joined the services of the spa just prior to the alleged incident. No such article was found with them, which would connect them with the crime. They have been arrested and made accused merely because they were present in the said shop at the relevant time. The properties like condoms appear to be planted. They have not committed any offence.

11. Learned A. P. P. Submitted that the raid was conducted after

receipt of secret information. Dummy customers were used to seek truthness in the information. Statements of the dummy witness, who visited Anantara would show that he had talked to Shashank Khanna at the counter. He had expressed his desire and asked him whether he can get the girl. He paid the charges told by him and then went inside. There were 5 rooms inside. He was taken in one room and then when girl started to take out her cloths, he gave signal. Panchnama would show that there were condoms, disposable undergarments kept in each room. Condoms were also found at the counter. applicant was found in a room in half naked condition. Applicants in Criminal Application No. 455 of 2018 were the employees of Spa. They had the knowledge of business carried out in the spa. Therefore, there is evidence against applicants. In fact, the said business was carried out in one of the big malls in the city of Aurangabad under the guise of spa. No case has been made to quash the proceedings.

12. Applicant in Criminal Application No. 367 of 2018 has been posed as 'customer' visiting brothel. It is therefore required to be seen whether any case has been made against him by the prosecution or not. The charge-sheet has been filed for the offence punishable under Section 3 to 6 of PITA Act.

13. Section 3 of the said Act prescribes punishment for keeping a

brothel or allowing premises to be used as a brothel. Admittedly, as per the prosecution story, present applicant had not kept a brothel or allowed his premises to be used as a brothel.

14. Section 4 of PITA Act prescribes punishment for living on the earnings of prostitution. As regards present applicant is concerned, prosecution has not come with the said story that he was living on the earnings of prostitution.

15. Relevant portion of Section 5 of PITA Act runs as follows:

“5. Procuring, inducing or taking 4[person] for the sake of prostitution.—(1) any person who—

(a) procures or attempts to procure a person, whether with or without his consent, for the purpose of prostitution; or

(b) induces a person to go from any place, with the intent that he may for the purpose of prostitution become the inmate of, or frequent, a brothel; or

(c) takes or attempts to take a person, or causes a person to be taken, from one place to another with a view to his carrying on, or being brought up to carry on prostitution; or

(d) causes or induces a person to carry on prostitution;

shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees and if any offence under this sub-section is committed against the will of any

person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years:

Provided that if the person in respect of whom an offence committed under this sub-section,— (i) is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and (ii) is a minor, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years and not more than fourteen years;]

(3) -----"

16. Prosecution has not come with a case that present applicant had 'procured' or 'attempted to procure the girls', whether with or without their consent, for the purpose of prostitution in order to cover the case under Section 5 (1) (a) above. Further the prosecution has also not come with a case that present applicant had induced the girls to go from any place, with the intent that they may for the purpose of prostitution become the inmate of, or frequent, a brothel to cover the case under Section 5 (1) (b) above. In order to bring the case under Section 5 (1) (c) of the Act prosecution should have come with a case that applicant had taken or attempted to take the girls, or causes them to be taken, from one place to another with a view to their carrying on, or being brought up to carry on prostitution. Charge-sheet does not contain such

allegations. Now, Section 5 (1) (d) of the Act prescribes that if a person has caused or induced a person to carry on prostitution, then such person would be liable for punishment. Two main ingredients are necessary for a case to be covered under this provision. They are 'causing' or 'inducing'. Word 'Cause' has not been defined in PITA Act. The dictionary meaning of word 'cause' means 'A person or thing that gives rise to an action, phenomenon, or condition.' In law, the term carries different meaning taking into consideration different references. e.g. Good cause, reasonable cause, cause of action etc. Now we are required to see in what context the said word is used in this section. Taking into consideration the object of the Act, it can be said that the said word is used with a sense that those persons who are responsible to throw the victim in the flesh trade should be punished. Further there is element of use of force attached to the said meaning. Same is the case with the word 'induced'. Both these word connote that accused should not have left victim and created such situation that she would not have any option than to go into the flesh trade. Here the allegations against the applicant are that he had solicited sexual intercourse from the girl. As per the prosecution story the girls were already into the said business. There is no evidence in the form of statement of any person that present applicant had paid specified amount to the Manager for the act. As per the prosecution story, applicant was found in half naked

condition in a room. In fact, the dummy customer would not have any occasion to see where present applicant was before he gave signal. His statement also does not disclose that he had peeped in another room also, before giving signal, to see what is going on in that room. The position of applicant was allegedly traced only after raiding party arrived. That means except the fact that applicant was found in a room, there is nothing in the entire charge-sheet. Only on the basis of such statement, how it can be said that he had 'caused' or 'induced' any girl to take up prostitution? At the cost of repetition, it can be said that there is no evidence on record to show that applicant had paid the prescribed fee or charges at the counter before entering in the room. The person who had allegedly accepted the amount is an accused in this case. Therefore, even if he would have made a statement to that effect, it is inadmissible. Therefore, the case does not even fall under Section 5 (1) (d) of the Act.

17. Learned A. P. P. has not pointed out as to which section is attracted to the facts of the case of present applicant. Charge-sheet also does not make any kind of segregation. Another fact to be noted is that there was a proposed amendment to the Act. Central government had prepared "The Immoral Traffic (Prevention) Amendment Bill, 2006". Provision was made for punishment to the visitors of brothel. Section 5C in that Bill was proposed to be inserted as, "Any person who visits or is found in a brothel for the

purpose of sexual exploitation of any victim of trafficking in persons shall on first conviction be punishable with imprisonment for a term which may extend to three months or with fine which may extend to twenty thousand rupees or with both and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and shall also be liable to fine which may extend to fifty thousand rupees.”. However, it appears that this bill had lapsed. It did not take shape of law. Thus, it can be seen that since there was no law prescribing any punishment for the visitors of a brothel, legislature thought it fit to bring those persons into the ambit of punishment. But, when the said provision could not take shape of a law, it can be inferred that there is no law in existence to punish a visitor of a brothel. Therefore, in both the cases relied by learned Advocate, it has been held that the visitor to a brothel is not covered. Though these pronouncements are by learned Single Judge of different High Court, they discuss the legal position.

18. The facts of this case involving applicant are also required to be considered from another angle also. It is to be noted that even according to prosecution spa was run in that premises where raid was conducted. It consisted of facilities for massage centre and saloon. The spot panchnama shows that there was oil, lamp, etc. which is also used for massage. Now it is pointed out that there were disposable under garment. When it is a massage centre, then

availability of disposable under garment can not be objectionable. It is also stated in the spot panchnama that there were condoms kept in each room and at the reception centre. However, it is to be noted that such item was not found with applicant. Another fact is that applicant was not subjected to medical examination. His clothes were not seized. Therefore, no further investigation is done so as to show that applicant had any such intention to be with a girl. Which girl was found in the room of applicant has not been stated. Important point is that it has not been mentioned in the spot panchnama that the girl in the room of applicant was found in half naked condition. Statements of the girls, including the girl allegedly found in the room of applicant, were not provided to the accused. Those statements are taken under Section 164 of Code of Criminal Procedure by Special Judicial Magistrate. They have been made available. Perusal of those statements would show that none of them are supporting the prosecution story. Therefore, only on the basis of statement of dummy witness and alleged situation after raid, it can not be stated that applicant's presence at that place was with intention to 'cause' or 'induce' any girl for prostitution, so as to attract provisions of Section 5 (1) (d) of PITA Act.

19. Section 6 of PITA Act prescribes punishment for detaining a person in premises where prostitution is carried on. Facts of the present case does not say that applicant was the person who had

detained the girl in that premises.

20. Now turning towards the case of applicants in Criminal Application No. 455 of 2018, it is the prosecution story that they are the Manager and Asstt. Manager respectively. Except the contents of panchnama, that they both were enquired about their position, they had disclosed it; there is nothing to show that these two applicants were serving in that position in that spa. No document has been collected during the course of investigation showing that they are Manager and Asstt. Manager. No doubt, they have not produced any appointment letter issued to them, but it is for the prosecution to prove offence against them beyond reasonable doubt. Dummy customer does not say that he had made any kind of inquiry with any of these two applicants, in the capacity as Manager or Asstt. Manager. In fact, he does not disclose that there was any kind of dialogue between him and these applicants. Whatever communication has been made by dummy customer, it is with area Manager Mr. Khanna. Amount was also given to Mr. Khanna. There is absolutely no role attributed to these applicants. They were present at the spa, but there is no evidence to show that whatever was allegedly illegal going on in the spa, was with the knowledge of these applicants also. They appear to be mere employees. They can not be said to be dependent on the earnings of the victims, allegedly thrown in the flesh trade. Except the evidence in the nature of

statement of dummy customer and police personnel forming part of raiding party, there is no evidence at all.

21. Thus, taking into consideration the prosecution story and material placed along with charge-sheet would show that there is no evidence against applicants, so as to ask them to face trial. Merely because they were found in the shop at the time of raid, that does not mean that *prima facie* case is made out against them for the offence under Section 3 to 6 of PITA Act. It would be improper to ask them to face trial as their case is certainly covered under the parameters laid down in ***State of Haryana v/s. Ch. Bhajanlal [AIR 1992 SC 604]***. Their applications deserve to be allowed. In the result, following order is passed:

ORDER

1. Criminal Application No. 367 of 2018 and Criminal Application No. 455 of 2018 are hereby allowed.
2. Relief is granted in terms of prayer clause "B" and "C-1" as against applicant Rohan Rajendra Kulkarni.
3. Relief is granted in terms of prayer clause "B" as against applicants Swati Trimbak Khamkar and Rama Ashok Borade.
4. Rule made absolute in above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

(PRASANNA B. VARALE)
JUDGE