

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 564 OF 2018

Eimn Abdulamir Jassem Al-Allaf,
Age 28 years, Occupation Student,
R/o Bagdad, Iraq.
Presently staying in India,
C/o Sadhna Pandurangprasad Pande,
Plot No. 16/17, Builder Society,
Nandanvan Colony, Aurangabad. ...Petitioner.

Versus

The State of Maharashtra,
Through MIDC, CIDCO Police Station,
Aurangabad Dist. Aurangabad. ...Respondent

Mr. A. P. Bhandari, Advocate for petitioner.
Ms. D. S. Jape, Addl. Public Prosecutor, for respondent/ State.

WITH
CRIMINAL APPLICATION NO. 1081 OF 2018

Shashank Yashdeep Khanna,
Age 28 years, Occupation Business,
R/o. 52/410, Malvani, Gaykwad Nagar,
Malad (West) beside of Fair brigade,
Mumbai – 93. ...Applicant

Versus

The State of Maharashtra,
Through Police Station, MIDC Cidco,
Tq. and Dist. Aurangabad. ...Respondent

Mr. H. P. Randhir, Advocate for applicant.
Mr. D. S. Jape, Addl. Public Prosecutor, for respondent/State.

**WITH
CRIMINAL APPLICATION NO. 1039 OF 2018**

- 1) Derek Elias Machado,
Age 30 years, Occupation Business,
R/o. 301, A Wing, Plot No. 30,
Mhada Collony, Raj Building, Malvaini,
Malad, Mumbai.
- 2) Faizan Raees Shaikh,
Age 28 years, Occupation Business,
R/o. 8, A. R. Kulkarni Society,
S. G. Marg, Kurla (W), Mumbai.
- 3) Vishal Krishna Shetty,
Age 30 years, Occupation Business,
R/o Nisarga Society, Sion Mumbai. ...Applicants

Versus

The State of Maharashtra,
Through Police Station, MIDC Cidco,
Tq. Dist. Aurangabad. ...Respondent

Mr. H. P. Randhir, Advocate for applicants.
Ms. D. S. Jape, Addl. Public Prosecutor, for respondent/ State.

**CORAM : T. V. NALAWADE &
SMT.VIBHA KANKANWADI. JJ.**

**Date of reserving
the order : 24th September, 2018.**

**Date of pronouncing
the order : 01st November, 2018.**

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

1. Rule. Rule made returnable forthwith with consent of the both parties.

2. Both the criminal applications have been filed by original accused persons for invoking inherent powers of this Court under Section 482 of Code of Criminal Procedure and the Criminal Writ Petition has been filed for invoking powers of this Court under Article 227 of Constitution of India as well as under Section 482 of Code of Criminal Procedure. All the three accused persons 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. Petitioner in W. P. No. 564 of 2018 is the foreign national. He has submitted that nothing has been recovered from him at the shop so as to show his nexus with crime. He has been falsely implicated. He is a citizen of Iraq. He was prosecuting his studies in India. He had gone to the spa for 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. Applicant in Criminal Application No. 1081 of 2018 has submitted that he runs spas initially at Mumbai in partnership. His business was increased to Pune and then to Aurangabad. He and partners are looking after the affairs of spa from Mumbai. He was not present when the alleged raid was conducted. Police have contended that they had seized 50 to 100 contraceptive packets, but they have not found a single used condom. There is every possibility of planting of those articles. The CCTV footage of the mall has not been perused properly by the Police authorities. Both the shops i.e. Anantara and D-Stress Hub are spas and therefore, customer found in half naked condition can not be inferred to be related to any sexual offence. The inner wear of customers and so called victims

were not seized. There was nothing in those rooms which would disclose that prostitution activity was going on in those shops. Nothing has been recovered from him, in order to show that he has earned from such business. It has also been stated that Anantara Spa is located in Prozone Mall which is spread over 20 acres. Many people visit the Mall, under such circumstance, it is impossible to run a brothel at such a place. The arresting officer was also not the special officer appointed under the Act. He has also prayed for quashment.

7. Applicants in Criminal Application No.1039 of 2018 have contended that their names were not taken in the FIR. However, they have been added by the informant by saying that they are the partners in the business. Charge-sheet has been filed against them under Section 299 of Code of Criminal Procedure. They have contended that they are the owners of the spa and they look after the business from Mumbai. Shashank Khanna is looking after their spa. They had no knowledge about the raid. Other grounds raised by these applicants are the same as have been raised by applicant in Criminal Application No.1081 of 2018. Hence, they are not reproduced again.

8. Heard learned Advocate Mr. A. P. Bhandari for petitioner in Criminal Writ Petition No. 564 of 2018, learned H. P. Randhir for

applicants in Criminal Application No. 1081 of 2018 and 1039 of 2018 and learned A.P.P. Ms. D. S. Jape for respondents. Perused the charge-sheet.

9. It has been vehemently argued by learned Advocate for petitioner Mr. Bhandari that the petitioner 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 petitioner had offered money or had given money to the manager to have sexual intercourse with the girl. Petitioner 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 petitioner. The victims, who were the foreign nationals have been deported back to their country. Thus, there is no evidence against the petitioner. It would be a futile exercise to ask him to face the trial. He is also a foreign national. His studies are almost over. Investigating Machinery

has asked the Institution where he has taken studies not to release the degree and other certificates of the petitioner. Period of extension of his Visa has lapsed on 24-01-2018. He is unable to receive any money also and he can not go back to his country.

10. Learned Advocate for petitioner 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. Petitioners therein were apprehended while they were trying to escape. Undergarments of petitioners 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 petitioners 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.

11. Learned Advocate Mr. P. R. Randhir appearing for applicants in other two applications also advanced similar arguments stating that

though the applicants are not posed as customers, they were the owners of the spa. They were not present when the raid was conducted. The perusal of panchnama would show that the contraceptives appear to be planted. None of the girl in other rooms was found in naked condition. Whatever has been stated by the dummy customer, it has been taken as gospel truth. The prosecution has intentionally not produced the statements of the victims. There was difficulty in recording their statements. None of them have stated that they were forced by any of the owners or managers into the flesh trade. They have stated that they had come to Aurgangabad to see historic city. They ran out of money and therefore, they were doing job, to collect money to go back to their country. They have now been deported by State. No evidence has been collected by the prosecution to show that applicants were taking earnings of the girl from flesh trade. Ingredients of any of the offences have not been *prima facie* shown. It would be futile exercise to ask them to face the trial.

12. 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 (which is related to these petitions) 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. There is ample evidence against all the 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.

13. We will have to consider the case of petitioner in Criminal Writ Petition No. 564 of 2018 from the applicants in other two applicants. Petitioner has been posed as 'customer' visiting brothel; whereas other applicants have been posed as 'owners' of the brothel. Case of the petitioner is taken first for discussion, in order to see 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.

14. 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 petitioner had not kept a brothel or allowed his premises to be used as a brothel.

15. Section 4 of PITA Act prescribes punishment for living on the earnings of prostitution. As regards present petitioner is concerned,

prosecution has not come with the said story that he was living on the earnings of prostitution.

16. 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) -----

17. Prosecution has not come with a case that present petitioner 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 petitioner 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 petitioner 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 petitioner 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 petitioner had paid specified amount to the Manager for the act. As per the prosecution story, petitioner was found in half naked condition in a room. In fact, the dummy customer would not have any occasion to see where present petitioner 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 petitioner was allegedly traced only after raiding party arrived. That means except the fact that petitioner 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 petitioner 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.

18. Learned A. P. P. has not pointed out as to which section is attracted to the facts of the case of present petitioner. 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 5 C 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.

19. The facts of this case involving petitioner 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 petitioner. Another fact is that petitioner was not subjected to medical examination. His clothes were not seized. Therefore, no further investigation is done so as to show that petitioner had any such intention to be with a girl. Which

girl was found in the room of petitioner has not been stated. Important point is that it has not been mentioned in the spot panchnama that the girl in the room of petitioner was found in half naked condition. Statements of the girls, including the girl allegedly found in the room of petitioner, 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 petitioner'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.

20. 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 petitioner was the person who had detained the girl in that premises.

21. Therefore, taking into consideration the prosecution story and material placed along with charge-sheet would show that there is no evidence against petitioner so as to ask him to face trial. Merely because he was found in the shop at the time of raid, that does not mean that he has committed offence under Section 3 to 6 of PITA

Act. His petition deserves to be allowed.

22. The position of other applicants in two applications is different from petitioner in Writ Petition No. 564 of 2018. The applicant in Criminal application No. 1081 of 2018 says that he is also a partner of the business carried out in the name as Anantara. He has been posed as Manager in the charge-sheet. He was present in the shop at the time of raid. Statement of dummy customer would show that he had talked to this applicant and requested him to supply a girl. Dummy customer paid amount to this applicant. He was taken to the room by the girl supplied by this applicant and then he says that the girl started to undress herself. He had then given the signal to the raiding party. Therefore, there is *prima facie* evidence against him. When there is *prima facie* evidence is produced, the FIR as well as charge-sheet can not be quashed under Section 482 of Code of Criminal Procedure. Such a case will not fall under the guidelines issued in ***State of Haryana and others Vs. Ch. Bhajan Lal and others***, reported in ***AIR 1992 Supreme Court 604***. His petition deserves to be dismissed.

23. The applicants in Criminal Application No. 1039 of 2018 contend that they are the owners of the said spa and massage centre. They are claiming ignorance of the activities carried out in the spa. They have stated that they had asked applicant in Criminal

Application No. 1081 of 2018 to look after the business. Thus, they are harping upon the fact of 'knowledge'. However, in such situation burden lies on the applicants to prove 'absence of knowledge'. It can be only at the trial. We can not assess the said aspect at this stage. Appreciation of evidence from the point of view of assessment of knowledge is not contemplated in such proceeding in order to invoke inherent powers of this Court under Section 482 of Code of Criminal Procedure.

24. All these applicants can not take advantage of the statement of victims at this stage. Though those girls were not supporting the prosecution, yet the case is also based on the evidence in respect of happenings of the events on the day of raid. The statements of girls were taken later point of time. In the result, following order is passed:

ORDER

1. Criminal Writ Petition No. 564 of 2018 is hereby allowed.
2. Relief is granted in terms of prayer clause "B" as against petitioner Eimn Abdulmir Jassem Al-Allaf only.
3. Criminal Application No. 1039 of 2018 and 1081 of 2018 are hereby dismissed.
4. Rule is made absolute in above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

(T. V. NALAWADE)
JUDGE

vjg/-.