

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

% *Reserved on: 17th January, 2018*
Decided on: 24th September, 2018

+ **CRL.A. 912/2016**

KANCHI TAMANG

.....Appellant

Represented by: Mr. Sidharth Aggarwal,
Mr. Harshit Jain, Mr. Faraz
Maqbool, Ms. Rupali Samuel
Advocates.

versus

STATE OF G.N.C.T OF DELHI

.....Respondent

Represented by: Mr. Amit Gupta, APP with SI
Navdeep PS Kamla Market.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal, appellant Kanchi Tamang challenges the impugned judgment dated 29th August 2016 convicting her for the offence punishable under Section 3 of the Immoral Traffic (Prevention) Act, 1956 (in short 'ITP Act') and the order on sentence dated 2nd September 2016 directing her to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹2,000/- and in default thereof to undergo simple imprisonment for a period of six months.

2. Assailing the conviction, learned counsel for the appellant submits that the property situated at 'Kotha No.59, Second Floor, Right Side, G.B. Road, Delhi' has not been proved to having been used as a brothel and a mere submission that it was being used as a brothel is not sufficient to hold any person guilty of that offence. Therefore, the learned Trial Court has erred in convicting the appellant for the offence punishable under Section 3

of the ITP Act. The evidence on record amply demonstrates that the appellant is the owner of the 'top floor', that is, the 3rd floor, Kotha No.59, G.B. Road, New Delhi. The site plan prepared by the Investigating Officer is false and misleading inasmuch as it records that the building at Kotha No.59 only had two floors. Notwithstanding the same, the site plan is inadmissible in view of Section 162 Cr.P.C. inasmuch as the same has been proved through the Investigating Officer himself who inter alia deposed that he prepared the said site plan at the instance of one of the alleged prosecutrix. Reliance was placed upon the decision of the Supreme Court reported as (1962) 1 CriLJ 469 Tori Singh v. State of U.P., the decision of the Calcutta High Court reported as AIR 1944 Cal 339 Ibra Akanda v. Emperor and the decision of this Court reported as 1997 JCC 263 Narain Singh v. State. The entire evidence including the deposition of 'P'@'R' and 'M'@'M' shows that the appellant's property situated at the third floor had nothing to do with the running of the brothel. He further submitted that for an offence under Section 3 of ITP Act, it is essential that the learned Trial Court comes to a conclusion that an accused person keeps or allows a property to be used as a brothel. 'Knowledge' is an essential ingredient of Section 3 ITP Act. Hence, even if it is assumed that the property of the appellant is the same property as alleged in the prosecution story, mere fact that the appellant is the owner of the building/kotha in absence of any definite evidence to prove any specific instances of prostitution or that the said kotha was used for prostitution with the connivance of the appellant would not be sufficient to make out an offence under Section 3 ITP Act. Reliance was placed on the decision of this Court reported as 2003 Cr.LJ 533 (Delhi) Mumtax Alias Behri vs. State (NCT of Delhi).

3. Per contra, learned APP for the State submits that the appellant has been rightly convicted for the offence punishable Section 3 ITP Act. From the deposition of the two prosecutrix i.e. PW-1 and PW-2 it is proved beyond reasonable doubt that they were forcefully made to indulge into prostitution in the presence which was in occupation/possession of the appellant, which fact is admitted by the appellant as also proved from the evidence that the electricity bill was in the name of the appellant as consumer.

4. Brief facts of the case are that on 21st December 2014 at around 10:19 A.M., a PCR call was received from Satya Prakash regarding three girls who had escaped from a kotha situated at G.B. Road and were standing at the New Delhi Railway Station, Ajmeri Gate side. Aforesaid information was recorded vide DD No.10A (Ex.PW-3/A). Thereafter, on receipt of the above information, SI Padam Singh along with Ct. Vikram reached at the place of occurrence, that is, Gate No.1, Metro Station, New Delhi where prosecutrices 'B'@'S', 'M'@'M', 'P'@'R' were found present. They informed him that they have managed to escape from Kotha No.59, Second Floor, G.B. Road. They were taken to PS Kamla Market wherein they were produced before Insp. Binod Kumar Singh who called the counsellor from one NGO.

5. Statement of 'B'@'S' was recorded vide Ex.PW-5/A wherein she stated that about 4 months back she met a woman aged between 35-40 years named Sapna (declared 'Proclaimed Offender') at Gaudiya Railway Station. She became friends with her and used to talk to her on the phone frequently. She could neither recall Sapna's phone number nor her own. Sapna told her that she has a brother named Sagar (declared 'Proclaimed Offender') to

whom she wanted her to get married to. Thereafter, Sapna made her meet Sagar who was aged between 25-30 years where after they started talking to each other on the phone. She stated that she secretly married Sagar in a mandir and informed her parents over the phone regarding the same. Sagar then brought her to Delhi by train. They reached New Delhi Railway Station around 10:30 P.M. whereafter Sagar took her to a woman's house whose name she later found out as Sarika (declared 'Proclaimed Offender'). They took around 30 minutes by auto to reach Sarika's house. She was kept there for around 10 days and Sagar did '*galat kaam*' with her on multiple occasions while they were there and had done the same twice back in the village as well. Thereafter, Sagar told her that he cannot take her to his house right now as he had no money. He asked her to stay and work with Sarika at G.B. Road for 5 days after which he would take her to his house. She stated that she had not consented for the said '*galat kaam*' but due to the fear that he might leave her, she agreed and went with Sarika to work at Kotha No. 59, G.B. Road. On reaching there, Sarika handed her over to a woman named Kali who made her wear short clothes and made her do '*galat kaam*'. The money she received from the customers was taken by Kali and was further handed over to Sarika who came after every two to four days to collect it. At the Kotha, she met 'P'@'R' who was also from Bengal and the two became friends where after she found out that 'P'@'R' had also been brought there on false pretext. She stated that she was at the Kotha for around three to three and a half months. Three to four days before the complaint, Kali took her and 'P'@'R' to Sarika's house in Rohini. There she met 'M'@'M' who was also from Bengal and was brought to Delhi on false pretext by Sagar and Sarika in the same manner as her. On 21st December,

2014 the three of them planned to run away from the house. When everybody was sleeping they ran away and took an auto to New Delhi Railway Station where they met a taxi driver who called the police to help them. She stated that she can identify Kali, Sagar, Sapna and Sarika if brought in front of her.

6. Consequently, FIR No. 405/14 was registered for offences punishable under Sections 365/368/370/376/342/343/344/109/120B/34 IPC and Sections 4/5/6/7 ITP Act at PS Kamla Market vide Ex.PW8/A.

7. Thereafter, for further investigation of the case, Insp. Binod Kumar Singh along with SI Padam Singh, W/Ct. Shelly, HC Chandramani and the prosecutrixes went to Kotha No.59, Second Floor, G.B. Road for search of the accused persons but they could not be located. The site plan was prepared at the instance of 'B'@'S' vide Ex.PW-11/B.

8. Inspector Veena Kumari took the prosecutrixes 'B'@'S', 'M'@'M', 'P'@'R' to LNJP Hospital for their medical examination.

9. On 22nd December 2014, Insp. Binod Kumar Singh along with the prosecutrixes went to G.B. Road pursuant to the secret information received regarding the accused persons. Accused Farida @ Kali was spotted at the instance of the prosecutrixes who was arrested vide arrest memo Ex.PW-1/A. Her personal search was conducted vide Ex.PW-1/B and her disclosure statement was recorded vide Ex.PW-11/A. Minor child of 'P'@'R' was recovered from the kotha and handed over to her.

10. On 24th December 2014, Insp. Veena Kumari got the statements of the prosecutrixes recorded under Section 164 Cr.P.C. vide Ex.PW-1/C, Ex.PW-5/B and Ex.PW-6/B.

11. On 1st March 2015 on receiving an information by a secret informer,

Insp. Binod Kumar Singh arrested the appellant from her house at Majnu ka Tila vide arrest memo Ex.PW-10/A. Her personal search was conducted vide Ex.PW-10/B and her disclosure statement was recorded vide Ex.PW-10/C.

12. During the course of investigation, Insp. Binod Kumar Singh obtained certified copy of the writ petition (Ex.PW-11/C) filed by the appellant containing her affidavits with regard to her ownership of Kotha No. 59, Second Floor, Right Side, G.B. Road, Delhi. He also collected the electricity bill with regard to electricity connection installed in the name of the appellant at the given premises which was proved vide Ex.PW-11/D.

13. After completion of investigation, charge sheet was filed. Charge was framed for offence punishable under Section 3 ITP Act against the appellant.

14. 'P'@'R' (PW-1) in her testimony stated that she met one Raju who was living in her village in the month of June or July, 2014. He induced her to accompany him to Delhi by giving assurance that he will find her a good job of cleaning, sweeping etc. in Delhi. Raju also took away her phone along with some of her jewellery. She did not have cordial relations with her husband, therefore, she accompanied Raju to Delhi. She brought one of her daughters with her to Delhi and left the other one with her mother. After reaching Delhi, she was taken to one lady named Sarika who was living in Kotha No. 40, G.B. Road, Delhi. She was then handed over to a lady named Kali who was living at Kotha No. 59, right side at top floor at G.B. Road, Delhi. She stated that Kali forced her to work as a prostitute. On her refusal to do the same, she was beaten, and her daughter was taken away from her and given to someone else by Kali. She stated that about 6-8 customers established physical relations with her per day for which Kali used to charge

₹200 to ₹300 per customer. There were 10 to 20 other girls doing the same work in the said Kotha but she only knows 'B'@'S' amongst them. She was not aware of Sarika's house address to which she was taken along with 'B'@'S'. She met 'M'@'M' at Sarika's house and was there for about 2 days. Three of them then escaped on a Sunday and reached New Delhi Railway Station. They met a taxi driver at the station to whom they narrated the entire incident after which the taxi driver called the police and they were taken to the Police Station. In her cross examination she stated that the Kotha No.59, Right Side was on the second floor to which she was referring to as the top floor.

15. 'M'@'M' (PW-2) stated in her testimony that she met Sapna at Canning Railway Station while on her way to her aunt's house. Sapna took her mobile number where after Sapna's brother Sagar called her stating he wants to become her friend. She met Sagar at Sunar Pur Railway Station, West Bengal. He took her to Bokhali falsely stating that his mama had expired and wanted her to accompany him. Thereafter, he took her to a hotel in Bokhali and established physical relations with her without her consent. He also took away her mobile phone and took her to his friend's house and kept her there for one night. On the next day, Sagar brought her to Delhi by train stating he will marry her and will also find a job there. Thereafter, he took her to the house of Sarika where she stayed for 15 days and Sagar again established physical relations with her without her consent. Thereafter, Sarika's husband and Sagar took her to Agra after 15 days. She was kept in a Kotha at Kabari Bazar. Sagar left her there claiming that he will take her with him after a month but never returned. Geeta, who was the owner of the Kotha in Agra, told her that she had been sold to her by Sagar. She was

made to work as a prostitute there on the pretext that if she does this work then she will be allowed to go back to her village. She remained there for about 5 months. From Agra, she was taken to a Kotha in Meerut by Sarika's friend Prakash where she remained for a month and was again forced to work as a prostitute. On falling ill, she was taken to Sarika's house in Delhi where she was medically treated. One day Kali brought 'P'@'R' and 'B'@'S' to Sarika's house. Thereafter, she found out that 'B'@'S' was also brought to Delhi by Sagar. Thereafter, they planned and escaped from Sarika's house and went to New Delhi Railway Station. 'P'@'R' told her that her daughter had been taken by Sarika and then given to some other lady so she advised her to take help of Delhi Police. Then, they met a taxi driver who informed the police after they narrated all the facts to him.

16. Rajiv Verma (PW-9), Field Executive, BSES, Town Hall deposed that on 1st September 2015 he had visited Kotha No. 59, Second Floor, Right side of premises bearing number 5382/89, G.B. Road, Delhi. The meter number 11641212 installed at the aforesaid Kotha was in the name of the Kanchi Tamang. He had prepared a site inspection report which was proved vide Ex.PW-9/A and handed over electricity bill and photographs of the meter vide Ex.PW-9/B and Ex.PW-9/A respectively. He further stated that as per the electric meter connection record, the electricity connection had been in the name of the appellant since 30th September 2011 and was still in her name. He produced electricity bill dated 12th August 2015 vide Ex.PW-9/C which was also in the name of the appellant. In his cross-examination he stated that there are total of three floors at the premises in question including one mezzanine floor. The site that was inspected by him vide Ex.PW-9/A is the top floor, that is, the second floor.

17. The appellant in her statement recorded under Section 313 Cr.P.C. stated that she was residing at the third floor of the premises in question and on the said floor where her property is situated, that is, at the right side there were two premises including hers and the other one belonged to someone else. Kanchi Tamang appeared as DW-1 also and deposed that her room was situated on the top floor, that is, the third floor of Kotha No.59, G.B. Road, Delhi. There were four rooms on the same floor and all the rooms bear the same number i.e. Kotha No.59. She exhibited the photographs vide Ex.DW-1/A, however, she neither exhibited the negatives of the photographs nor exhibited the certificate under Section 65 B of the Indian Evidence Act.

18. Section 3 of ITP Act reads as under:

“3. Punishment for keeping a brothel or allowing premises to be used as a brothel.—

(1) Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.

(2) Any person who—

(a) being the tenant, lessee, occupier or person in charge of any premises, uses, or knowingly allows any other person to use, such premises or any part thereof as a brothel, or

(b) being the owner, lessor or landlord of any premises or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof is intended to be used as a brothel, or is wilfully a party to the use of such premises or any part thereof as a brothel, shall be punishable on first conviction with imprisonment for a term which may extend

to two years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine.

(2A) For the purposes of sub-section (2), it shall be presumed until the contrary is proved, that any person referred to in clause (a) or clause (b) of that sub-section, is knowingly allowing the premises or any part thereof to be used as a brothel or, as the case may be, has knowledge that the premises or any part thereof are being used as a brothel, if,—

(a) a report is published in a newspaper having circulation in the area in which such person resides to the effect that the premises or any part thereof have been found to be used for prostitution as a result of a search made under this Act; or

(b) a copy of the list of all things found during the search referred to in clause (a) is given to such person.

(3) Notwithstanding anything contained in any other law for the time being in force, on conviction of any person referred to in clause (a) or clause (b) of sub-section (2) of any offence under that sub-section in respect of any premises or any part thereof, any lease or agreement under which such premises have been leased out or are held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction.”

19. From the testimonies of prosecutrices, ‘P’@‘R’ (PW-1), ‘M’@‘M’ (PW-2) and ‘B’@‘S’ (PW-5) clearly proves that Kotha No.59, on the second floor right side, G.B. Road, Delhi was being used as a brothel. Furthermore, it is established from the deposition of Rajiv Verma (PW-9), Field Executive, BSES that meter number 11641212 installed at Kotha No. 59, Second Floor, Right side, G.B. Road, Delhi was in the name of Kanchi Tamang, thus, she was the user of the premises. As noted above, appellant though appeared as DW-1 and sought to exhibit the photographs of the various rooms on the second floor, however, neither the negatives nor

certificate under Section 65B of the Indian Evidence Act was proved. Thus conviction of Kanchi Tamang for offence punishable under Section 3 ITP Act is upheld.

20. With respect to the prayer of the appellant to de-seal the property of Kanchi Tamang being Top Floor, Right Side, Kotha No. 59, G.B. Road. Delhi, it would be appropriate to note Section 18 of ITP Act which reads as under:

“18. Closure of brothel and eviction of offenders from the premises.—

(1) A magistrate may, on receipt of information from the police or otherwise, that any house, room, place or any portion thereof within a distance of [two hundred metres] of any public place referred to in sub-section (1) of section 7, is being run or used as a brothel by any person or is being used by prostitutes for carrying on their trade, issue notice on the owner, lessor or landlord of such house, room, place or portion or the agent of the owner, lessor or landlord or on the tenant, lessee, occupier of, or any other person incharge of such house, room, place, or portion, to show cause within seven days of the receipt of the notice why the same should not be attached for improper user thereof; and if, after hearing the person concerned, the magistrate is satisfied that the house, room, place or portion is being used as a brothel or for carrying on prostitution, then the magistrate may pass orders—

(a) directing eviction of the occupier within seven days of the passing of the order from the house, room, place or portion;

(b) directing that before letting it out during the period of one year[,or in a case where a child or minor has been found in such house, room, place or portion during a search under section 15, during the period of three years,] immediately after the passing of the order, the owner, lessor or landlord or the agent of the owner, lessor or landlord shall obtain the previous approval of the magistrate:

Provided that, if the magistrate finds that the owner, lessor or landlord as well as the agent of the owner, lessor or landlord, was

innocent of the improper user of the house, room, place or portion, he may cause the same to be restored to the owner, lessor or landlord, or the agent of the owner, lessor or landlord, with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit of the person who was allowing the improper user therein.

(2) A court convicting a person of any offence under section 3 or section 7 may pass order under sub-section (1) without further notice to such person to show cause as required in that sub-section.

(3) Orders passed by the magistrate or court under sub-section (1) or sub-section (2) shall not be subject to appeal and shall not be stayed or set aside by the order of any court, civil or criminal and the said orders shall cease to have validity after the [expiry of one year or three years], as the case may be:

Provided that where a conviction under section 3 or section 7 is set aside on appeal on the ground that such house, room, place or any portion thereof is not being run or used as a brothel or is not being used by prostitutes for carrying on their trade, any order passed by the trial court under sub-section (1) shall also be set aside.

(4) Notwithstanding anything contained in any other law for the time being in force, when a magistrate passes an order under sub-section (1), or a court passes an order under sub-section (2), any lease or agreement under which the house, room, place or portion is occupied at the time shall become void and inoperative.

(5) When an owner, lessor or landlord, or the agent of such owner, lessor or landlord fails to comply with a direction given under clause (b) of sub-section (1) he shall be punishable with fine which may extend to five hundred rupees or when he fails to comply with a direction under the proviso to that sub-section, he shall be deemed to have committed an offence under clause (b) of sub-section (2) of section 3 or clause (c) of sub-section (2) of section 7, as the case may be, and punished accordingly.”

21. Learned Trial Court vide order dated 2nd September, 2016 directed that Kotha No.59, Second Floor, Right Side, G.B. Road, Delhi be sealed. Since the conviction of Kanchi Tamang is upheld, the property cannot be

directed to be de-sealed in favour of Kanchi Tamang. Though Kanchi Tamang has placed on record the copy of W.P. (Crl.) 217/2014 along with her affidavit vide Ex.PW-11/C claiming to be the owner of the aforementioned premises, it cannot be de-sealed in her favour since the period of three years as mandated under Section 18 of ITP Act has not elapsed.

22. Impugned judgment and order on sentence are upheld. Appeal is dismissed. Vide order dated 27th September, 2016 passed by this Court, the sentence of Kanchi Tamang was suspended. Kanchi Tamang is directed to surrender to custody and undergo the remaining sentence. Personal bond and surety bond furnished by Kanchi Tamang at the time of suspension of her sentence are discharged.

23. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

24. TCR be returned.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 24, 2018
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