

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2050 OF 2019**

Asiya Anwar shaikh	]	
Age-34 years, Occupation : Marketing,	]	
Residing at Goa Galli, Takai Nagar	]	
Near Bholenath Mandir, Daund, Dist. Pune	]	 Petitioner.

Versus

1] The State of Maharashtra,	]	
through the Pandharpur Taluka Police	]	
Station, Dist – Solapur	]	
	]	
2] XYZ....	]	 Respondents.

Mr. Satyavrat Joshi for the Petitioner.
Mr. A R Patil, APP for the Respondent/State.

CORAM : S. S. SHINDE, J
Reserved on : 24th June 2019
Pronounced on : 11th July 2019

JUDGMENT :

1 Rule, with the consent of the learned counsel appearing for the parties made returnable forthwith and heard.

2 At the outset it is required to be noted that since the crime registered by the Police is under the Immoral Traffic (Prevention) Act, 1956 so also under the Indian Penal Code and Respondent No.2 – Victim XYZ is alleged to have been compelled to involve herself in prostitution, the identity of Respondent No.2 herein needs to be concealed, and hence she is referred to as XYZ. The Registry is directed to maintain the record accordingly.

3 By this Writ Petition, the Petitioner takes exception to the order dated 20/03/2019 passed by the learned Additional Sessions Judge, Pandharpur by which order the Criminal Appeal No.17 of 2019 filed by the Petitioner herein came to be rejected and resultantly the order dated 23/01/2019 passed by the learned 2nd Joint Judicial Magistrate First Class, Pandharpur, District Solapur, in Crime No.19 of 2019 sending Respondent No.2 herein i.e. Victim XYZ in the aforesaid crime for a period of one year for her care and protection in Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune came to be confirmed.

4 Brief facts leading to filing of the present Writ Petition are as under:-

 It is the case of the prosecution that Respondent No.2 herein was found in a lodge in a raid effected by the Sub Divisional Police Officer, Pandharpur. FIR bearing CR No.19 of 2019 came to be registered with Pandharpur Taluka Police Station against 11 accused persons. Respondent No.2 – XYZ being victim of the crime was rescued and was temporarily kept in the custody of a social worker. The Pandharpur Taluka Police filed an application before the learned JMFC, Pandharpur praying therein to issue directions to keep Respondent No.2 – XYZ in the Corrective Institution i.e. Mahila Sudhargruh, Solapur for her care and protection. Thereafter the

Petitioner and Respondent No.2 have filed their respective applications before the learned JMFC, Pandharpur praying for granting custody of Respondent No.2 to the Petitioner, who is the believed mother (मानलेली आई) of Respondent No.2 - XYZ. The learned JMFC has recorded the statements of both the Petitioner and Respondent No.2. The learned JMFC also directed the Probation Officer to make an inquiry as contemplated by Section 17(2) of the Immoral Traffic (Prevention) Act, 1956 (for short “the said Act”). Accordingly the probation officer after making inquiry submitted his report to the learned JMFC. As indicated herein above, the learned JMFC rejected the applications of the Petitioner and Respondent No.2 by the impugned order dated 23/01/2019 thereby sending Respondent No.-XYZ to the above mentioned Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune for her care and protection for a period of one year.

5 Being aggrieved by the said order dated 23/01/2019 passed by the learned JMFC, the Petitioner herein has filed Criminal Appeal No.17 of 2019 before the learned Additional Sessions Judge, Pandharpur. The Petitioner has also filed application for interim custody of Respondent No.2. The Petitioner as well as the Prosecution have filed their written arguments in the said Appeal before the learned Additional Sessions Judge, Pandharpur. After hearing both the parties, the learned Additional Sessions Judge, Pandharpur has dismissed the Appeal by the impugned judgment and order dated 20/03/2019. It is the

said order dated 20/03/2019 passed by the learned Additional Sessions Judge, Pandharpur, rejecting the Appeal of the Petitioner which is taken exception to by way of the present Writ Petition.

6 Heard the learned counsel for the parties. The learned counsel for the Petitioner Mr. Satyavrat Joshi submitted that The Immoral Traffic (Prevention) Act is enacted by the Parliament of India in the year 1956 and the statement of Objects and Reasons, as was originally incorporated, is that the said Act was in the year 1950, the Government of India ratified an International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others. He further submitted that under Article 23 of the Constitution of India, traffic in human being is prohibited and any contravention of the prohibition is an offence punishable by law. He also submitted that the said Act has been amended further in the year 1978 (Amendment Act 46 of 1978) wherein an additional Statement of Objects and Reasons was incorporated, and in the year 1986 again the said Act was amended wherein further Statement of Objects and Reasons was incorporated. He further submitted that in view of the objects and reasons of the Act, certain amendments were made to the said Act, 1986 (Amendment Act 44 of 1986). The learned counsel for the Petitioner relying upon the scope and ambit of the said Act which provides for certain penal provisions in relation to exploitation of women running, owing, occupying brothels, living on the earning of

prostitutes etc. submitted that under the Scheme of the said Act, neither the victims nor the customers are liable to be prosecuted. The learned counsel for the Petitioner further submitted that the said Act provides various mechanism to curb trafficking and immoral traffic and one of the mechanism provided under the said Act is under Sections 16 and 17. He also submitted that section 16 of the said Act provides for rescue of victims whereas section 17 provides for mechanism which is to be followed by a learned Magistrate before whom such victims are produced and, if this provision is to be seen in the light of objects and reasons of the Act, the victim under the said Act is immune from prosecution. He further submitted that the mechanism which is provided under Sections 16 and 17 is not punitive, however, it is reformatory in nature. The question for determination is whether such mechanism can be used for the reform of a victim, more particularly an adult in absence of her willingness. The learned counsel for the Petitioner contended that it is the bounden duty of the State to protect the interest of the victim having organizations such as protection homes but at the same time in the absence of the willingness of an adult victim she cannot be kept in a protection home. He also submitted that Article 19 of the Constitution of India guarantees the right of freedom and Article 23 provides for abolition of beggar or slavery or forced labour. He also submitted that under the Constitution of India every Indian citizen has right to move freely through the territory of India as also has a right to choose a vocation, but at the same time, there are reasonable restrictions cast upon

them while exercising those fundamental rights. The learned counsel for the Petitioner further submitted that a person, who has attained the age of majority cannot be restricted or cannot be kept in home since he/she has a right to carry out his/her own vocation as also he/she has a right to freely move through the territory of India. He also submitted that the object of the said Act is to secure the ends of justice by ensuring that the victim is not further exploited and, whether a victim is required to be kept in a protection home needs to be decided by taking into consideration of the age of victim, examination of the social strata, examination of the economic condition of the victim as also examination of the facts of the case in relation to, which the victim is sought to be kept in protection home by prima facie recording a finding that a person who is demanding custody of such woman, should not be indirectly or directly connected with the offence in question. He submitted that mental capacity and understanding of such victim is also required to be ascertained prior to passing the order by consulting panel of psychologists who may ascertain the mental condition of the women as also whether reasons behind the victim being subjected to prostitution/immoral traffic. He further submitted that legal assistance at each and every stage should be provided to the victim and panel of eminent persons from the legal fraternity should be appointed so as to ascertain (i) whether the victim was exploited and the reasons as to why she is exploited; (ii) the probation officer should be assisted by at least one such eminent person from the field of law. Relying upon the

objects and reasons of the said Act, the learned counsel for the Petitioner submitted that immoral trafficking is a stigma not only upon a victim but upon the society as a whole, and therefore, the record of the victim should be maintained with all police stations throughout the State. In so far as the minors are concerned, custody should be only given to those persons after making a detailed inquiry through a probation officer as regards the circumstances under which all such minors were forced into prosecution, the compelling reason behind the minor being inducted into the racket of prostitution. Ordinarily custody should not be granted of minors only because the same is claimed by parents or natural guardians, however, antecedents of parents, natural guardians and persons who are claiming custody of such minors should be verified by (a) the Police Station Officers investigating the case; (b) antecedents may also be verified by an independent police agency such as the Local Crime Branch which is the Central Investigating Agency in rural areas as also by the Crime Branch of Police Commissionerate; (c) before granting custody of minors based on the report of these Two agencies, the Court concerned prior to granting such custody should be satisfied by recording reasons that grant of custody would not be prejudicial in any manner to the interest of the victim/child. He submitted that Sections 14 and 15 contemplate Special Police Officers. However, the police officers are not equipped or are not adequately trained for the purpose of handling victims at the time of carrying out investigations pertaining to offences under the said Act and the paramount

consideration should be given to the rescue of the victims as also the investigating officers must adopt a sensitive approach towards the well being of the victim, more specifically if the victims are minors, hence special training in that regard has to be given to the special police officers. It is further submitted that the offences under the said Act should be investigated by one Central Agency, and such a similar arrangement can also be made in district places as investigations of such crimes require specialized care and attention, and it is apt that Senior Police Officers, preferably Lady Police Officers supported by trained staff of police officers should investigate into such offences. It is also submitted that Section 17 of the Act has also to be construed from the point of securing the presence of victim at the time of trial and hence before a victim is released, her details regarding her names and addressed can be verified and record thereof can be maintained.

7 The learned counsel for the Petitioner also submits that the learned JMFC has not complied with the mandate laid down in Section 17(5) of the said Act, and the direction being mandatory in nature, non - compliance of the same would render the impugned order liable to be quashed and set aside. He further contended that though Respondent No.2 has nowhere stated that Petitioner had compelled her to do prostitution, both the Courts have erred in recording a fact that the Petitioner had compelled Respondent No.2 to do prostitution. It is the contention of the learned counsel for the Petitioner

that the wish of Respondent No.2 to stay with the Petitioner, as Respondent No.2 is a major of 22 years, has to be considered, however, both the Courts below have ignored the said fact. It is further contended that though the Probation Officer, after taking into consideration various factors, in his report opined that the custody of Respondent No.2 may be given to the Petitioner, both the Courts below have ignored the report of the probation officer. It is also contended that Respondent No.2 has stated in the statement recorded by the learned JMFC that she was doing the work of cooking in the said lodge and therefore there is no material to show that the Petitioner had compelled Respondent No.2 to do prostitution. The learned counsel for the Petitioner submitted that, Respondent No.2 has one and half year old child and the Petitioner has expressed her desire to maintain Respondent No.2. The learned counsel for the Petitioner in support of the aforesaid contentions relied upon the unreported judgment of the Division Bench of this Court (Coram : Mrs. Roshan Dalvi & Mrs. Shalini Phansalkar-Joshi, JJ) in **Criminal Public Interest Litigation No.4 of 2015** in the matter of **Freedom Firm v/s. Commissioner of Police, Pune and ors.**, and another unreported judgment of the Division Bench of this Court (Coram : A.S.Oka & A.A.Sayed, JJ) in **Criminal Writ Petition No.3184 of 2016** in the matter of **Krishna Surendra Singh v/s. State of Maharashtra and anr.** He therefore submitted that the present Petition may be allowed by quashing the impugned orders passed by both the Courts and the custody of Respondent No.2 herein may be handed over to the Petitioner in the

interest and welfare of Respondent No.2 herein.

8 The learned APP relying upon the reasons assigned by the learned JMFC as well as the learned Additional Sessions Judge submitted that both the Courts below upon appreciation of the material place on record and keeping in view the interest of victim has passed the orders sending Respondent No.2 herein for her care and protection for a period of one year in a the said Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune.

9 Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. I have perused the grounds taken in the Writ Petition and annexures thereto as also the reasons assigned by both the Courts below and the material place on record. It appears that the Petitioner herein posed her as a real mother of the Respondent No.2 - Victim XYZ, and it was stated before the learned JMFC that Respondent No.2 - Victim is her daughter. However, the learned JMFC, on interaction with the Petitioner, found that she is not the real mother of Respondent No.2 - Victim. It appears that the Petitioner told before the learned JMFC that she did not give birth to Respondent No.2 - Victim XYZ, but she maintains her since her childhood. The learned Additional Sessions Judge has also taken note of such conduct of the Petitioner in paragraph 12 of the impugned Judgment and order. The said

conduct of the Petitioner not to disclose the true facts before the learned JMFC cannot be countenanced. A person approaching the Court shall approach the Court with clean hands and shall disclose all true and relevant facts. Suppression of vital information or telling lie before the Court that the Petitioner is a real mother of Respondent No.2 - Victim cannot be countenanced by any standard. This Petition can be rejected on the said ground alone. However, keeping in view the interest of Respondent No.2 Victim, the contentions of the learned counsel for the parties needs to be considered on merits.

10 It appears that the probation officer, who was appointed, has submitted his inquiry report and opined that it is appropriate to give custody of the Victim to the Petitioner. It appears in spite of the report of the probation officer, the learned JMFC deemed it appropriate to send Respondent No.2 – Victim for her care and protection in the said Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune. Upon careful perusal of the reasons assigned by the Trial Court as well as the Appellate Court it can be safely stated that the learned JMFC, keeping in view of the interest of Respondent No.2 – XYZ, has passed the order sending her to the said Corrective Institution for her care and protection with a hope of reformation of the victim. It appears that the learned JMFC has also taken care of the contention of the Petitioner that Respondent No.2 Victim has one and

half year sucking child.

11 However, the important question that has been raised in this Petition is that, Respondent No.2 - Victim being major can be sent to the said Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune against her wishes. The learned counsel for the Petitioner submits that Respondent No.2 -Victim has a right to reside at the place of her choice, to move freely through out the territory of India and to chose her vocation.

It is true that every citizen has right to chose his/her vocation, to move from one place to another through out the territory of India, and other fundamental rights enshrined in the Constitution of India. Under Clause (1) of Article 19 all citizens shall have the right ---

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form association or unions (or co-operative societies);
- (d) to move freely through out the territory of India;
- (e) to reside and settle in any part of the territory of India,

and

[***]

- (g) to practise any profession, or to carry on any occupation,

trade or business.

12 Indisputably Respondent No.2 Victim XYZ is major, therefore it is imperative to consider her wishes. There is no doubt that the State Government within its power under the said Act, keeping in view of the interest of the victim, can seek appropriate directions from the Court to send the victim to Corrective Institution. It is true that the fundamental rights conferred upon the citizen of India in Part III of the Constitution of India are with reasonable restrictions mentioned in each Article. The fundamental rights of the citizen enshrined in Part III of the Constitution of India stand on higher pedestal vis-a-vis statutory right or any other rights conferred by the general law. Therefore I find considerable force in the submission made by the learned counsel for the Petitioner that the victim being major, her fundamental right to move from one place to another place, reside at the place of her choice and to chose her vocation has to be considered, and contrary to her wishes she cannot be asked to reside in the said Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune.

13 It is pertinent to mention at this stage that the police machinery has not brought on record any material suggesting that Respondent No.2 Victim XYZ is suffering from disability or her case is covered by reasonable restrictions under Article 19 of the Constitution of India, and setting her free

would cause danger to the society. It is also required to be noted that nothing is placed on record by the police which would show that her right to move from one place to another place or reside at the place of her choice is hampered due to restrictions imposed in Article 19 of the Constitution of India.

14 In the facts of the present case, Respondent No.2 - Victim XYZ was sent and/or kept in the Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune for her care and protection, by order dated 23/01/2019 passed by the learned JMFC. Prior to passing the order by the learned JJMC, a raid was conducted by the Taluka Police Station Pandharpur at Hotel Sangam Lodge, Pandharpur and during the said raid, the victim was found in the said lodge and, as alleged by the concerned Police Department, Respondent No.2 - Victim XYZ along with other victims was involved in the prostitution. The accused are being prosecuted by registering Crime being C.R.No.19 of 2019 under Sections 370, 343 of the Indian Penal Code and, under Sections 5, 6, 7 of the Immoral Traffic (Prevention) Act, 1956, and in the said Crime Respondent No.2 – Victim XYZ is treated as victim and sent in Corrective Institution for her care and protection. Therefore, it can be said that she was sent in the said Corrective Institution for her care and protection.

15 Respondent No.2- Victim XYZ is in the said Corrective Institution

i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune. for more than six months. Therefore considering the report of probation officer and also considering the fact that Respondent No.2 - Victim XYZ has spent a period of more than six months in the said Corrective Institution, the ends of justice would be met in the present case, if the directions are given to release Respondent No.2 - Victim XYZ from the said Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune.

16 However, it needs to be mentioned at this stage that during inquiry by the learned JMFC, it is found that the Petitioner is not the real mother of Respondent No.2 - Victim XYZ and, Respondent No.2 Victim is major and therefore, no restrictions can be put upon Respondent No.2 Victim by issuing direction to give her custody to the Petitioner. Since Respondent No.2 – Victim XYZ is major after her release she is free to move as per her wish.

17 In the light of the discussion in foregoing paragraphs, the ends of justice would be met, if the impugned orders passed by the Courts below are modified to the extent mentioned herein below. Hence the the following order is passed :-

1] The direction issued by the 2nd Joint Judicial Magistrate First Class, Pandharpur, District Solapur, sending/keeping the Victim XYZ in the said

Corrective Institution i.e. Shaskiya Mahila Rajya Gruh, Prerana Mahila Wasti Gruh, Baramati, Dist. Pune for one year stands modified/curtailed to the period already spent by Respondent No.2 - Victim XYZ in the said Corrective Institution, however, subject to clause (2) mentioned herein under, and upon completion of usual procedural formalities.

2] Respondent No.2 - Victim XYZ should be set at liberty and to be released forthwith, however, after ascertaining her wish, whether she desires to continue her stay in the said Corrective Institution for remaining period or wants to be set at liberty/freed from the said Corrective Institution.

3] The prayer of the Petitioner to handover the custody of the Respondent No.2 - Victim XYZ to the Petitioner stands rejected, and as observed herein above after Respondent No.2 - Victim XYZ is released, she is free to move as per her wishes.

4] With the aforesaid directions, the Writ Petition is disposed of. Rule is made absolute to the aforesaid extent.

[S. S. SHINDE , J]