

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1688 OF 2020

1. Mohhammad Arshad Sajid Ali
Age: 39 Years, Occu.: Service,
R/o. Chikhalthana MIDC, Aurangabad
 2. Amol s/o Damu Shejul
Age: 29 Years, Occu.: Service,
R/o. Mhada Colony, Mukundwadi,
Aurangabad
- ... Petitioners

Versus

The State of Maharashtra

... Respondent

WITH
CRIMINAL WRIT PETITION NO.1708 OF 2020

1. Dnyaneshwar Sarjearao Jarhad
Age: 42 years, Occ.: Business,
R/o. Railway Station Road,
Badnapur, Dist. Jalna.
- ... Petitioner

Versus

The State of Maharashtra

... Respondent

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Mr. A. K. Bhosale, Advocate for petitioners in both the writ petitions.
Ms. V. S. Choudhary, APP for the respondent – State.

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 16.03.2021

Pronounced on : 08.06.2021

JUDGMENT :-

. Rule. Rule made returnable forthwith. Heard finally, with
consent of both the parties.

2. Present writ petitions have been preferred by original accused Nos.7, 8 and 9 in Sessions Case No.209 of 2020 challenging the order of rejection of their applications for discharge under Section 227 of the Code of Criminal Procedure below Exhibit-11 and 16 respectively by learned Additional Sessions Judge, Aurangabad on 15.12.2020. The petitioners have invoked the constitutional powers of this Court under Article 227 of the Constitution of India and inherent powers under Section 482 of the Code of Criminal Procedure to challenge those impugned orders.

3. Heard learned Advocate Mr. A. K. Bhosale for petitioners in both the writ petitions and learned APP Ms. V. S. Choudhary for the respondent – State.

4. It has been vehemently submitted on behalf of the petitioners that the investigation is over and charge-sheet has been filed. Accused Nos.7 to 9 came to be arrested on 08.12.2019. The FIR was lodged by Madhukar Sawant, Police Inspector of Crime Branch, Aurangabad for the offences punishable under Section 370(a)(2) of Indian Penal Code, Section 3, 4, 5 and 6 of the The Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as the 'PITA Act'), Section 67 and 67(a) of Information Technology Act, 65(K) of the Bombay Prohibition Act against about 10 accused persons. Accused No.10 is still absconding.

Accused Nos.1 to 5 were also arrested on the same day i.e. 08.12.2019, whereas accused No.6 came to be arrested on 11.12.2019. Accused No.2 had filed application seeking regular bail before this Court bearing Bail Application No.366 of 2020, which came to be rejected on 07.08.2020. Though she was not party to these criminal writ petitions, when said applicant i.e. original accused No.2 had approached the Hon'ble Supreme Court by filing Miscellaneous Application No.656 of 2021 in Special Leave Petition (Crl) No.4420 of 2020, initially the Sessions Case was expedited, however, by order dated 29.04.2021, time to dispose of Sessions Case was extended by one year. In that order itself, it was observed that this Court should decide these two criminal writ petitions expeditiously.

5. Learned Advocate for the petitioners vehemently submitted that if the allegations are considered, then only offence under PITA Act, that too by showing accused Nos.7 to 9 i.e. present petitioners as customers, have been alleged. Therefore, we need not go into the other allegations. While deciding the applications, the learned Additional Sessions Judge has come to the conclusion that offence under Section 5(1)(a) of PITA Act can be said to have been committed by the present petitioners and thereupon on 24.12.2020, vide Exhibit-31, charge has been framed against the present petitioners for the offence punishable under Section

5(1) of the PITA Act. It has been *prima facie* held that the act attributed to the present petitioners would show that they have “procured” the victim girls. It has been observed in the order passed below Exhibit-11 and 16, after taking note of the dictionary meaning of the word “procure”, that the customers i.e. the present petitioners did take some pains by using electronic media for booking and obtaining the victim girls and buying them for satisfaction of lust by contracting the remaining accused. This appears to be the imagination of the learned Trial Judge as there is no further evidence attached in the form of CDR. So also, when there is no evidence collected regarding payment of money by the customers to the brothel owner, it is stated that it would be the part of the evidence at the time of trial. When that evidence does not form the part of charge-sheet, it was not appropriate on the part of the learned Trial Judge to arrive at the said conclusion. The present petitioners ought to have been discharged taking into consideration the evidence that has been gathered.

6. Learned Advocate for the petitioners relied on the decision in *Eimn Abdulamir Jassem Al-Allaf Vs. The State of Maharashtra* in Criminal Writ Petition No.564 of 2018 with companion matters decided by the Division Bench of this Court on 01.11.2018, wherein the petitioners therein were also posed as customers and it has been

elaborately considered as to what could be the intention for using word “procured”. The decision by the Division Bench was cited before the learned Additional Sessions Judge, yet by giving a bypass to the said decision, the learned Additional Sessions Judge has come to the conclusion that *prima facie* offence under Section 5(1)(a) of the PITA Act has been made out. Further, reliance has been placed on the decision in ***Chandru S and another Vs. The State by Malleshwaram Police Station and another*** decided by Karnataka High Court in Criminal Writ petition No.5059 of 2017 on 07.12.2017 on the same line. Similar view has been taken by the Karnataka High Court once again in ***Mohammed Rafi Vs. State of Karnataka, (2016 (2) AIR KAR R 263)***, wherein the offences under the PITA Act read with Section 370 of Indian Penal Code was held to be not made out against the customers and therefore, the petition was allowed and the offence was quashed by invoking the inherent powers. Similar view was taken by Telangana and Andhra Pradesh High Court in ***Goenka Sajan Kumar Vs. State of Andhra Pradesh, (2015) (3) crimes 281)***. Further, in order to cut short it can be said that many other decisions have also been quoted by the learned Advocate for the petitioners on the same line by Andhra Pradesh High Court as well as Karnataka High Court. He, therefore, prayed that the petitioners should be discharged.

7. Per contra, the learned APP strongly submitted that there is ample evidence against the present petitioners. The petitioners who are original accused Nos.7 to 9 have not denied their arrest at the place of offence at the time of raid. The informant had received a secret information and upon the said information they had conducted the raid on the house of accused – Kavita Jadhav. They had made arrangement for a fake customer (Punter) and after he had given them the signal, all the persons had entered and the present petitioners were found with the victim girls. Further, statements of the said fake customer, police persons as well as the victims would show that promise was made to the victims that if they indulge themselves in flesh trade, they would earn good amount. It was told by the fake customer that he was told that he will have to pay amount of Rs.3,000/- in the form that amount of Rs.1500/- should be given to the girl and equal amount would require to be given as rent for the room. The girls are from Kolkata and Hyderabad. Definitely, they would have been procured and with some false promises, they have been thrown in the flesh trade. The offence is against the society at large and it is immoral act. Therefore, no case is made out to discharge the petitioners. Learned Additional Sessions Judge has rightly considered that the *prima facie* offence under Section 5(1)(a) of the PITA Act has been made out against the present

petitioners. Now, since the charge has also been framed, there is no necessity to discharge the petitioners.

8. At the outset, we are required to consider the prosecution story as well as material collected and presented by way of charge-sheet by the investigating agency against the present petitioners as to whether they are making out such offence under Section 5 of PITA Act. It will not be out of place to mention here that the order below Exhibit-11 and 16 respectively could definitely be challenged before this Court under the above said constitutional as well as inherent powers. Therefore, framing of charge by the Trial Court within few days of the order i.e. even without giving much time to the petitioners to approach this Court will not be a hurdle in this matter. As per the FIR, as aforesaid secret information was received. It was to the extent of that even the charge that is charged for a victim girl was also quoted in the said secret information. Thereafter the panchas were arranged and also the fake customer. The currency note numbers were taken down and that amount was given to the fake customer and the instructions were given to him. The fake customer acted as per the instructions and gave indication/signal to the raiding party, thereupon the police as well as the panchas entered the house. Those persons found two ladies, four gents in the front room. One lady and one man in kitchen room. When the

police had knocked the door of a closed room, from that room the punter and a lady came out. Thereafter, punter i.e. the fake customer gave what dialogues were exchanged and then the raiding party could also get the names of the victims girls, who were from Kolkata and Hyderabad. Thereafter, search was taken. Certain amount was recovered from almost all the persons present there, so also the mobile phones. If we see the statements of the police officers, who were the members of raiding party, then they have given almost the same statements. If we further consider the panchanama executed on 11.12.2019 between 14.15 to 15.15 hours, then we could get the chats from Whatsapp between present petitioner – Amol Shejul and one Manoj Jadhav, who has been said to be the agent. That chat is of date 07.12.2019 at 12.48 hours. It says that five photographs of victims were sent by Manoj Jadhav on the mobile of petitioner – Amol. It appears that both the petitioners from Writ Petition No.1688 of 2020 were knowing each other and in between their chat which had taken place on 03.12.2019, it was seen that two photographs of ladies were sent by Amol to Mohammad Arshad. If we consider the entire chat on that day, we cannot get that it is for the sake of sexual intercourse with the girls. Further, on 07.12.2019, accused – Amol had sent five photographs of girls to accused Mohammad Arshad. Similar reflection is seen in the mobile of

Mohammad Arshad. Only on the basis of these chats, we cannot come to the conclusion that the girls would have been “procured”. Except this there is nothing. If we see the statement of witness Police Constable – Sarita Bhopale, she is only disclosing presence of the petitioners in the room. She does not say that they were along with a particular lady in separate rooms and she has also not disclosed about the clothes on the person of the petitioners. Clothes on the person of the petitioners have also not been disclosed in the FIR. Similar is the statements/material in the panchanamas and statements of other police officers. As regards the petitioner in Writ Petition No.1708 of 2020 is concerned, except his presence, there is nothing. Important point to be noted is that statement of said punter/fake customer has not been taken and not been annexed in the entire charge-sheet, which can be said to be the statement under Section 161 of the Code of Criminal Procedure. Whatever he had stated before the informant, panchas and other members of the raiding party and which has been reflected in the FIR, panchanama and the respective statements of those members of the raiding party, cannot be taken as statement of said fake customer under Section 161 of the Code of Criminal Procedure. Another important fact is that statements of victims have not been recorded under Section 161 of the Code of Criminal Procedure. Unless the girls/ladies disclose as to how they were brought

from Kolkata to Aurangabad and by whom, it cannot be said that the petitioners, who have been posed as customers, had in any way “procured” the girls for illegal business.

9. This Court, while deciding Criminal Writ Petition No.564 of 2018 with companion matters in *Eimn Abdulamir Jassem Al-Allaf (Supra)*, wherein also those petitioners were the customers, had observed thus :

“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 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 cannot be 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.”

10. The other High Courts are also on the similar lines. The learned Trial Judge has not weighed the evidence before it, which it has to come to a conclusion as to whether *prima facie* case has been made out to frame the charge or not. In ***Sajjan Kumar Vs. CBI, [(2010) 9 SCC 368]***, after considering various pronouncements of the Hon’ble Apex Court Apex Court in the past, it has been observed thus :-

[“21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out. The test to determine *prima facie* case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in

framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion,

the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

11. Thereafter, in ***State of Tamil Nadu By Inspector of Police Vigilance and Anti-Corruption Vs. N. Suresh Rajan and others, [(2014) 11 SCC 709]***, it has been observed thus :-

“29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have

committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.”

12. Therefore, taking into consideration these pronouncements, it can be seen that what was required for the learned Trial Judge to consider at the time of framing of charge as to whether *prima facie* any offence has been made out or not. For that purpose, the evidence can be scanned to a very limited extent. When there was absolutely no evidence about the contact between accused No.7 and the persons who were arrested at the said place, though accused No.7 was found at that place, that does not mean that he was there for committing any offence or he would have been there to procure any victim for the purpose of offence that can be described under PITA Act. At the cost of repetition, it can be said that whatever from the chat that could be found between the petitioners in Writ Petition No.1688 of 2020, that was not sufficient to invoke the ingredients of offence punishable under Section 5(1) of the PITA Act. The learned Trial Judge also failed to consider that there is absolutely no statements of the victims under Section 161 of the Code of Criminal Procedure, so also the statement of dummy customer has not been recorded and therefore, whatever evidence that was collected was not

sufficient to come to the conclusion that *prima facie* offence under Section 5(1)(a) of PITA Act could be made out against the present petitioners. The applications ought to have been allowed by the learned Trial Judge.

13. Though the Hon'ble Apex Court has expedited the trial and made it time bound, the petitioners need not be asked to undergo the trial with the evidence that has been collected and, therefore, the constitutional powers and/or the inherent powers of this Court deserves to be invoked while allowing the writ petitions. Hence, the following order :-

ORDER

- I) Writ Petition Nos.1688 of 2020 and 1708 of 2020 stand allowed.
- II) The order passed below Exhibits-11 and 16 by learned Additional Sessions Judge, Aurangabad in Sessions Case No.209 of 2020 on 15.12.2020 is hereby set aside as against the present petitioners.
- III) Present petitioners stand discharged from the offence punishable under Section 5(1)(a) of the PITA Act.
- IV) Their bail bonds stand cancelled.
- V) Rule is made absolute in the above terms.

[SMT. VIBHA KANKANWADI, J.]

scm