

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1349 OF 2023

Child Welfare Committee, Palghar,
through its Chairperson
Rajkanya Dinkar Adole, Age 48 years,
Occ.Chairperson, having its office at
Child Welfare Committee, Classic Corner Bldg;
Flat No.202, Near Government Hospital,
Navali Fatak Road, Palghar-401 404.

Petitioner

versus

1. The State of Mharashtra.
2. Rescue Foundation, Boisar
through its Superintendant,
Phulacha Pada, Village Lalonde,
Boisar-401304.
3. Nnachebe Yashuova Iso, age 28 years,
R/o.201, Supreme Building,
Naigaon, Tal.Vaisai, Dist.Palghar.

Respondents.

Adv.Ashley Cusher with Ms.Priyanka Tiwari,
Advocate for Petitioner.

Adv.Asif Naqvi for Respondent no.2.

Adv.Swati Dube for Respondent no.3.

Adv.Anamika Malhotra, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 15th June 2023

PC :

1. This petition is filed by Child Welfare Committee, Palghar through its Chairperson appointed by Women and Child Welfare

Development Department, Government of Maharashtra. Petitioner has challenged the order dated 16th January 2023 passed by Special Judge, Vasai directing that custody of victim be handed over the power of attorney holder. Respondent no.2 is the Rescue Foundation who is presently custodian of the victim. The victim is the original resident of Nigeria. The Rescue Foundation is having its shelter home at Boisar, District Palghar.

2. Respondent no.3 is purportedly the power of attorney holder of parents of victim. He preferred an application before Trial Court seeking custody of victim. The said application has been allowed vide order dated 16th January 2023 which is challenged in this petition.

3. The prosecution case is that the first informant is working in the Anti Human Trafficking Cell. On 12th July 2022 information was received by the first informant that one Nigerian person was providing girls for prostitution to the customers. Thereafter trap was laid. Decoy customer was arranged, panch witnesses were arranged, pre-trap panchanama was recorded, decoy customer contacted the Nigerian through what's app. He was called at a place. The customer went to the spot of incident. The raiding party apprehended the persons. Two Nigerian girls were rescued. One of them was major and another was minor aged around 16 years. FIR was registered for the offences u/s.366A, 370(1), 372 of IPC, Sections 3,4,5 of Immoral Traffic (Prevention) Act, 1956 and Sections 17, 18 of Protection of Children from Sexual Offences Act, 2012 with Achole Police Station, Mira-Bhyander, Vasai-Virar Police Commissionerate vide C.R No.331 of 2022. The victim was

produced before Child Welfare Committee. She was referred for medical check-up by the Child Welfare Committee. She was directed to be admitted to Child Rescue Foundation, Boisar. Her stay at the Rescue Foundation was extended from time to time.

4. Respondent no.3 preferred an application before Sessions Court on 13th December 2022 stating that he is the President of All India Nigerian Students and Community Association, Mumbai. He has filed a Special Power of Attorney executed in Nigeria by Mr.Yesufu Aminu and Mrs.Fatima Aminu, dated 2nd November 2022. The said Power of Attorney was annexed to the application preferred before Sessions Court. The said application was allowed.

5. Learned advocate for Petitioner has submitted as under :-

(a) The impugned order is contrary to law. It is without jurisdiction;

(b) Learned Sessions Judge erred in giving undue significance to the Special Power of Attorney;

(c) Learned Sessions Judge has failed to consider factual aspects of the case and the objections of Rescue Foundation while allowing the application;

(d) The provisions of Sections 28,29,30 of Juvenile Justice (Care and Protection of Children) Act, 2015 were ignored;

(e) Learned Sessions Judge did not take into consideration the provisions under Rule 19, sub-Rule 16 of Juvenile Justice (Care and Protection of Children) Rules, 2016;

(f) Section 3 of Juvenile Justice (Care and Protection of Children) Act, 2015 relates to general principles and sub-Section

(xiii) relates to repatriation of juveniles. These provisions were not taken into consideration by learned Judge while passing impugned order;

(g) The victim girl was minor aged around 16 years;

(h) All the requisite steps about repatriation of minor girl from foreign country are required to be taken by Child Welfare Committee.

6. Learned APP supported the grounds urged by Petitioner. It is submitted that order passed by learned Sessions Judge is required to be set aside and custody or repatriation of the child in conflict with law is required to be dealt with in accordance with law.

7. Learned advocate for Respondent no.2 also supported the prayers sought in this petition. It is submitted that victim is required to be repatriated to her country and custody is required to be given to her parents. The victim is minor. Passport of the victim is fake. The Sessions Court had no jurisdiction to decide the issue relating to custody of minor child.

8. Learned advocate for Respondent no.3 submitted that application was preferred by Respondent no.3 in the case of victim child. Respondent no.3 has no personal interest. If the Court is of the opinion that victim child is to be repatriated or any other direction is required to be issued in respect of victim child, respondent no.3 has no objection in that regard.

9. The FIR dated 13th July 2022 was registered for various offences. The victim was the minor child aged around 16 years. She was produced before Special Judge, Vasai on 13th July 2022. Learned

Special Judge vide order dated 13th July 2022 directed that victim be referred to protective home. Report of Probation Officer in respect of victim be called for. Probation Officer is directed to refer the victim to C.W.C. C.W.C to take further steps for protection and rehabilitation of victim. Investigating Officer to take steps for medical examination of victim. The investigating agency and DLSA-Thane to report in regard with medical assistance, compensation and/or other rehabilitation assistance to victim.

10. The victim child was kept with Rescue Foundation, Boisar/Respondent no.2. Correspondence exchanged by Police Inspector, Achole Police Station with respondent Foundation is annexed to this petition. Orders passed by Child Welfare Committee are also part of this petition. The victim child is from Nigeria. Respondent no.3 preferred an application by relying upon power of attorney seeking custody of the minor child. The power of attorney was purportedly issued by parents of the victim child. Learned Sessions Judge vide order dated 16th January 2023 directed that custody of the child be handed over to the power of attorney holder/respondent no.3 with an undertaking that he will take every care for upbringing of the victim and not to indulge the victim in similar offence and produce the victim before the Court as and when directed. The order also indicate that prosecution had given no objection for giving custody of the victim to respondent no.3. The order also makes reference to the fact that parents of the victim are residing in Nigeria. Victim came to India on education Visa.

11. Petitioner has relied upon Office Memorandum dated 1st May 2012 issued by Government of India relating to advisory on

preventing and combating human trafficking in India dealing with foreign nationals. The memorandum states that it has come to the notice of Ministry of Home Affairs that foreign nationals are associated in some instances of human trafficking among women and children. It has been decided with the approval of the competent authority that in cases of foreign nationals who are apprehended in connection with human trafficking, the State Governments/UT Administrations may follow the procedure enumerated therein. The procedure enumerates that the victims and persons actually involved in human trafficking should be treated differently by the police authorities. This is in line with SAARC Convention which advocates a victim-centric approach. It is further mentioned that in general foreign victims of human trafficking are found without valid passport or visa. If, after investigation, the woman or child is found to be a victim, she should not be prosecuted under the Foreigners Act. If the investigation reveals that she did not come to India or did not indulge in crime out of her own free will, the State Govt/UT Administration may not file a charge sheet against the victim. If the chargesheet has already been filed under the Foreigners Act and other relevant laws of the land, steps may be taken to withdraw the case from prosecution so far as the victim is concerned. Immediate action may be taken to furnish the details of such victims to the Ministry of External Affairs (Consular Division), Patiala House, New Delhi, so as to ensure that the person concerned is repatriated to the country of her origin through diplomatic channels. During interim period, pending repatriation, the victim may be taken care of in an appropriate children's home, or 'Ujjawala' home or appropriate shelter home either of the State Government concerned or of any NGO aided by the Government of India/State Government.

12. Section 17 of Immoral Traffic (Prevention) Act, 1956 relates to Intermediate custody of persons removed under Section 15 or rescued under Section 16. Sub-Section 3 provides that the Magistrate may, while an inquiry is made into a case under sub-section (2), pass such orders as he deems proper for the safe custody of the person. Provided that where a person rescued under section 16 is a child or minor, it shall be open to the magistrate to place such child or minor in any institution established or recognized under any Children Act for the time being in force in any State for the safe custody of children.

13. Learned Sessions Judge ought not to have handed over custody of the minor girl child to Respondent no.3 on the basis of purported power of attorney executed by parents of minor child.

14. Chapter-II of Juvenile Justice (Care and Protection of Children) Act, 2015 relates to general principles of care and protection of children. Section 3(xiii) relates to principle of repatriation and restoration. As per said provision, every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in is best interest.

15. Section 29 of Juvenile Justice (Care and Protection of Children) Act, 2015 refers to powers of Committee. It provides that Committee shall have the authority to dispose off cases for the care,

protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection. Sub-section (2) enumerates that where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.

16. Rule 19, Sub-rule 16 of Juvenile Justice (Care and Protection of Children) Rules, 2016 provides that where a child has to be sent or repatriated to another district or state or country, the Committee shall direct the District Child Protection Unit to take necessary permission as may be required, such as approaching the Foreigners Regional Registration Offices and Ministry of External Affairs for a no-objection certificate, contacting the counterpart committee, or any other voluntary organisation in the other district or state or country where the child is to be sent.

17. In the light of the aforesaid provisions, the scope and object of Juvenile Justice (Care and Protection of Children) Act, 2015, the powers of Child Welfare Committee, the petitioner ought to have been permitted to take all the necessary steps in consonance with aforesaid provisions and more particularly Rule 19, sub-rule 16 of Juvenile Justice (Care and Protection of Children) Act, 2015 for repatriating the victim (minor child) to her country for being in custody of her parents. Merely on the basis of power of attorney, the learned Sessions Judge ought not to have directed to hand over custody of victim child to respondent no.3. Rule 19, sub-Rule 16 of

Juvenile Justice (Care and Protection of Children) Rules, 2016 stipulated that where child has to be sent or repatriated to another country, the Committee has to take appropriate steps enumerated therein. The victim in the present case being minor girl, the Child Welfare Committee is the authority who is required to adopt such measures for repatriating the child to the country of child for handing over custody to victim's parents.

18. In the circumstances, impugned order is required to be set aside.

ORDER

- (i) Writ Petition is allowed and disposed off;
- (ii) Impugned order dated 16th January 2023 passed by Special Judge, Vasai in Miscellaneous Criminal Application No.175 of 2022 is quashed and set aside;
- (iii) The Child Welfare Committee of District Child Protection Unit is directed to take all the appropriate steps for repatriating the victim child to her parents who are residing at Nigeria.

(PRAKASH D. NAIK, J.)

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