

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL WRIT PETITION NO.76 OF 2023

1. Raja S/o Hiralal Kol
Aged about 45 years, Occu: Private Work

2. Riya Raja Kol
Aged about 19 years, Occ: Bislery Water
Work, Both R/o. At Hanuman Nagar, New
Basti, Ranji Monegaon, Jabalpur, Madhya
Pradesh

...PETITIONERS

---VERSUS---

State of Maharashtra,
PSO, Parshioni, Police Station, Parsioni,
Dist. Nagpur.

...RESPONDENT

Shri A.A. Mardikar, Advocate for the petitioner.
Shri A.R. Chutke, APP for respondent.

**CORAM : G.A. SANAP, J.
DATED : JUNE 8, 2023.**

ORAL JUDGMENT :

. **Rule.** Rule made returnable forthwith. Heard finally by
consent of the learned advocates for the parties.

2. In this writ petition filed under Articles 226 and 227 of
the Constitution of India, the petitioners have questioned

correctness of the order dated 16.11.2022 passed by the learned Additional Sessions Judge-16, Nagpur in Criminal Revision No.247/2022, whereby the learned Additional Sessions Judge dismissed the revision application filed by the petitioners and confirmed the order dated 14.09.2022 passed by the learned Judicial Magistrate First Class, Parseoni in Criminal M.A. No.72/2022. The learned Judicial Magistrate First Class, Parseoni by order dated 14.09.2022 was pleased to reject the application filed by the petitioners for handing over the custody of the petitioner no.2 to the petitioner no.1.

The facts necessary for the decision of the writ petition are as follows:

3. The Police Station Officer, Parseoni Police Station, at about 6:35 pm on 23.08.2022, received a secrete information with regard to the prostitution activity carried out by one Ramdas, who is sole accused in the crime, at his premises. Pursuant to this information, raid was conducted at the said premises and the accused was arrested. Petitioner no.2, who is a victim, was rescued from the said place. After raid, a crime bearing Crime No.252/2022

under Sections 3, 4, 5 and 7 of the Immoral Traffic (Prevention) Act, 1956 (for short, 'PITA Act') was registered.

4. It is the case of the prosecution that the victim was forced to indulge in prostitution. Alongwith the victim, six more girls were found at the said premises. The victim girls were produced before the learned Magistrate on 24.08.2022. The learned Magistrate handed over custody of the victim girls to Karuna Mahila Vasti-Gruha, Nagpur till completion of the enquiry. Learned Magistrate, in the process of enquiry, recorded the statement of the victim. The learned Magistrate called report of the Probation Officer, report of Police Officer as well as report from one NGO. Father and sister of the victim applied before the learned Magistrate for handing over custody of the victim. According to them, the victim is major and they are capable to take care of the victim and the victim would be safe in their custody.

5. Learned Magistrate after hearing the parties, found that considering the tender age and nature of the crime, the possibility of indulgence in prostitution by the victim, cannot be ruled out, and

therefore, the stage was not safe to hand over custody of the victim to her father. The father and the victim challenged the said order before the Sessions Court. The learned Additional Sessions Judge recorded his agreement with the view taken by the learned Magistrate and dismissed the revision. The petitioners are, therefore, before this Court against this order.

6. I have heard learned advocate for the petitioners and learned Additional Public Prosecutor for the respondent-State. Perused the record and proceedings.

7. It is seen on perusal of the order passed by the learned Magistrate that in the process of enquiry, in order to ascertain the age of the victim, apart from placing reliance on document of the birth date of the victim, medical officer was directed to conduct ossification test of the victim. As per report of the ossification test, the victim was found between the age group of 16 to 17 years old including error of margin. On the basis of this documentary evidence, learned Magistrate opined that the victim was not minor. The learned Magistrate, on the basis of material, found that though the victim is not minor, handing over of custody of the victim to her

father would not be in the interest of the victim. On the basis of the material, learned Magistrate found that the possibility of the victim indulging in prostitution could not be ruled out. The learned Magistrate further found that in order to protect the interest of the victim in all respect, the custody of the victim for 12 months should remain with Karuna Mahila Vasti-Gruha, Nagpur, a Government of Maharashtra institution.

8. Learned advocate for the petitioners placing heavy reliance on a decision in the case of ***Kajal Mukesh Singh and another Vs. State of Maharashtra*** (Criminal Writ Petition No.6065/2019, judgment and order dated 24.09.2020, Principal Seat of Bombay High Court), submitted that in this case the learned Magistrate did not ensure compliance of mandatory provisions of Sections 17(4) and 17(5) of the PITA Act. The learned advocate, relying upon the decision, submitted that without compliance of mandatory provisions of sub-section 5 of Section 17, the fundamental right of life and liberty enshrined in the Constitution of India has been violated. The learned advocate pointed out that the Coordinate Bench of this Court in the case of ***Kajal Singh***

(supra) has considered the decision of the Delhi High Court in the case of *Kumari Sangeeta Vs. State of Delhi and others* reported in *Criminal Report,P-129 (Delhi)*. The learned advocate further submitted that the victim is major. The father of the victim has come forward and established *bonafides*. The learned advocate, therefore, submitted that, in the facts and circumstances, no fruitful purpose would be served by continuing custody of the victim with Karuna Mahila Vasti-Gruha, Nagpur.

9. The learned APP submitted that on the basis of the available material on record, keeping in mind the paramount aspect with regard to the care and protection of the victim, in the fact situation the learned Magistrate opined that the custody of the victim should be with the institution. Learned APP, in all fairness, submitted that the learned Magistrate did not obtain assistance of the panel of five respectable persons for passing the order. Infact, learned APP drew my attention to the decision of the Coordinate Bench of this Court in the case of *Khushi Harkishan Malhotra Vs. State of Maharashtra* reported *2006 ALL MR (Cri) 443* and the decision rendered by learned Single Judge of the Madras High Court in the case of *Pavithra Vs. The Inspector of Police* reported in

MANU/TN/1010/2012, wherein it is held that keeping the woman in a protective home without any concrete material curtails free movement of the victim and as such amounts to infringement of the fundamental right guaranteed under Article 21 of the Constitution of India. It is also held that the fundamental right of life and liberty cannot be curtailed without following the due process and procedure provided under the law.

10. In this case, admittedly, there was no compliance of sub-section 5 of section 17 of the PITA Act. The Coordinate Bench, in the similar set of facts, has held in *Kajal Singh's* case (supra) that such non-compliance vitiates the enquiry, which ultimately leads to passing of the order of custody. It is also held that failure to follow the procedure, contemplated under the Act in the process of passing the order of custody, vitiates the order.

11. It needs to be stated that if the victim is minor and there is evidence of commission of offence against minor victim, the learned Magistrate, in terms of sub-section 3 of section 17 of the PITA Act and more particularly in respect of child or minor rescued under section 16 of the PITA Act, can place such child or minor in

any institution established or recognized under the Children Act, for the safe custody of the child. It is to be noted that as far as major victim is concerned, an order has to be passed depending upon the material placed on record during the course of enquiry. In order to warrant the detention, the Magistrate must be satisfied that for the care and protection of the victim, in all respect, release of the victim would not be proper. Therefore, in such cases the Magistrate can order the detention. The period for detention has been provided. It is to be noted that the material placed on record before the learned Magistrate during the course of enquiry must be such to satisfy the learned Magistrate that the victim, in case of her release, might indulge in commission of the offence under the Act.

12. In this case, the victim is major. Her father has come forward to take her custody. The victim has been ordered to be kept in the institution for a period of 12 months. So far 8 months have been passed from the date of the order. The father of the victim, who is required to take care of the victim, for well being of the victim in all respect in future life, has been knocking the doors of the Court for her custody. The victim has also stated in this petition

that her father is capable in all respect to take her care. It is stated that the apprehension placed on record that the victim might indulge in such crime in future is ill-founded. In my view, therefore, keeping in mind the mandate of the law, as has been considered in the ruling cited supra, the Court has to balance the interest of the victim as well as fundamental right of life and liberty of the victim. It is to be noted that unless and until there is cogent and concrete material to curtail such fundamental right, detention cannot be ordered and continued. In the facts and circumstances, I am of the view that the father of the victim, who is capable in all respect, to take care of well-being of the victim, can be allowed to take custody of the victim. Accordingly, the orders passed by learned Additional Sessions Judge-16, Nagpur and the learned Judicial Magistrate First Class, Parseoni, are quashed and set aside. The application made by petitioner no.1 is allowed. Petitioner no.2 be enlarged and set at liberty from Karuna Mahila Vasti-Gruha, Nagpur.

13. Petitioner no.2 – victim be handed over in the custody of her father petitioner no.1. The petitioners shall furnish their permanent address in the Court of the learned Magistrate as well as

to the Investigating Officer with their mobile numbers, if any.
Petitioner no.2- victim shall remain present before the trial Court during the course of the trial for the purpose of recording her evidence, if summoned.

Criminal Writ Petition is allowed and disposed of in above terms. Rule is made absolute in above terms.

Pending civil application (s), if any, stand disposed of.

JUDGE

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