

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

Date of decision: 13.04.2012

+ **W.P.(CRL) 296/2012**

TARA Petitioner
Through : Sh. Anand Grover, Sr. Advocate with
Ms. Tripti Tandon, Ms. Liyi Marli Noshi and Ms.
Amritananda Chakravorty, Advocates.

versus

STATE Respondents
Through : Sh. Pawan Sharma, Standing Counsel
with Sh. Harsh Prabhakar and Sh. Sahil Mongia,
Advocates, for Govt. of NCT of Delhi.
SI Jagdish Prasad, P.S. Kamla Market.
Sh. M. Lakshmi Naidu, DSP, CID, A.P. State.
Ms. Aparna Bhat and Ms. Rajkumari Banju,
Advocates, for NCW.
Ms. Pammi Handa, Advocate, for DCW.

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The writ petitioner seeks declaration that the petitioners are in illegal detention and custody of the Andhra Pradesh Police (A.P. Police); she also

impugns the order of learned M.M., Tis Hazari Court dated 22.02.2012 in FIR No. 40/2011, P.S. Hyderabad.

2. The 15 petitioners before this Court, claim to have been illegally picked-up along with 41 others, by the A.P. Police. The brief facts necessary for the disposal of this petition are that the A.P. Police had approached the Metropolitan Magistrate, Tis Hazari Court, through the Dy. Superintendent of Police (DSP) Sh. M. Lakshmi Naidu, claiming that a Search Warrant had been issued by the Principal Judicial First Class Magistrate, Anantapur on 20.02.2012 in the course of criminal investigation. It is alleged that during investigation, the statement of one Parvathi had been recorded under Section 164, Cr.PC in which she implicated several individuals and also stated that a large number of minor girls had been lured with false promises and introduced into prostitution. The details of the racket were revealed in the order and application moved before the Principal Judicial First Class Magistrate on 22.02.2012, requesting for permission to take the victims to Anantapur, in terms of Sections 16 and 17 of the Immoral Traffic (Prevention) Act, 1956 (hereafter called “the Act”).

3. The concerned Magistrate, by the order impugned in this case, disposed of the application in the following terms:

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Mr. M. Laxmi Naidu, Deputy Superintendent of Police, CID, RCIU, Kurnool, Andhra Pradesh has moved present application for permission to take the above mentioned victims to Anantpur, Andhra Pradesh. This application was moved before Ld. CMM and same has been marked to me for disposal. Mr. M. Laxmi Naidu has submitted a photocopy of order dt. 29.12.2011, passed by Principal Judicial Magistrate, Anantpur, Andhra Pradesh in case Cr.M.P. 233/2011 in Crime no.

40/2011 of CID P.S. Hydrabad. Vide said order Mr. M. Laxmi Naidu was authorized and required to search of victim girls and the offenders in H. No. 41, GB Road, New Delhi and neighbouring houses.

In the present application, it has been stated that the above mentioned girls are belonging to Andhra Pradesh State and they have been rescued in pursuance of above mentioned order of Principal Judicial Magistrate, Anantpur and Mr. M. Laxmi Naidu, Dy. SP has sought permission to take them Anantpur of Andhra Pradesh. Ld. Counsels for rescued girls have opposed any transit order with say that these rescued girls are major and they are not willing to go Anantpur. Ld. Counsels for rescued girls have further submitted that rescued girls have not been produced before the court just after their rescued but has been produced after more than 24 hours from their rescued.

My opinion above mentioned rescued girls are being produced before me U/s 17(1) of Immoral Traffic (Prevention) Act, 1956 for necessary order for their safe custody until their production before appropriate Magistrate, i.e. Principal Judicial Magistrate, Anantpur, Andhra Pradesh. I have no option except grant permission to Mr. M. Laxmi Naidu to keep above mentioned girls in safe custody and produce them before Principal Judicial Magistrate, Anantpur as early as possible. These rescued girls be kept in Nari Niketan before departure from Delhi to Anantpur, Andhra Pradesh in condition of none availability of train ticket or in other unavoidable circumstances.

Application is disposed off accordingly.

Copy of this order be given dasti to Mr. M. Laxmi Naidu, Deputy Superintendent of Police, CID, RCIU, Kurnool, Andhra Pradesh, Incharge Nari Niketan, Delhi as well as Ld. Counsels for rescued girls.

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4. As is evident, the rescued women were represented before the Magistrate. It had been urged on their behalf that they opposed any transit order and stated that they were unwilling to go to Anantapur. It is an admitted fact that all the 15 petitioners have crossed the age of majority and are not minors. Since their submissions did not find favor, they approached this Court, claiming various reliefs which included the quashing of the order of the Magistrate dated 22.02.2012. This Court, by its interim order dated 24.02.2012 suspended the operation of the impugned order. The Court later was of the opinion that having regard to some of the issues which seem to arise in this case, it would be appropriate to issue notice to the National Commission for Women (NCW) and the Delhi Commission for Women (DCW) to seek their assistance and explore the possibility of rehabilitation of the petitioners.

5. Sh. Anand Grover, learned senior counsel urges that the impugned order is unsustainable. He argues that contrary to the scheme of the Act, which visualizes a rehabilitation order and transitory orders as a part of that process under Section 17 of the Immoral Traffic (Prevention) Act, 1956, in this case, the petitioners were neither rescued pursuant to an order or proceeding under Section 16 of the Immoral Traffic (Prevention) Act, 1956 nor were they rescued pursuant to search without warrant. It was emphasized that in these circumstances, the rescue made by the A.P. Police virtually uprooted the petitioners from the places where they lived in Delhi and subjected them to forcible transportation against their consent, which violates their rights under Articles 14 and 21 of the Constitution of India.

6. Learned counsel for the State as well as the National Commission for Women, however, urged that the legality of the order cannot be challenged in the manner suggested by the petitioners. It was urged that the application by the A.P. Police was in terms of Sections 16 and 17 of the of the Immoral Traffic (Prevention) Act, 1956, which enables the Magistrate to take appropriate measures. In this context, it was submitted that the A.P. Police had in fact named several victims but pin-pointed only 15 of them who were residents of Andhra Pradesh (A.P.), who could be rehabilitated by them. Therefore, it was contended that the differentiation between those who did not belong to the A.P. State and those who did, for whom rehabilitation measures could be undertaken, was very much part of the Magistrate's appreciation of facts and the orders have to be understood as part of Section 17 (1) of the Act.

7. Learned counsel for the NCW further submitted that the petitioners were counseled individually during the course of the day and the Commission is yet to formulate a concrete plan for their rehabilitation. It was suggested that such a plan would take some time to be effective and the Court should duly consider this aspect while making this order.

8. The above facts would reveal that all the petitioners are majors. It has also transpired during the course of pendency of the proceedings, their statements under Section 164 Cr.PC were individually recorded by the Magistrate. They unequivocally recorded their desire to continue to stay in Delhi. According to the submissions made on behalf of the petitioners, a large number of them have children and some even have two children; some of these children are studying in schools in Delhi. In view of these and the other circumstances, such as their continued stay in Delhi, they do not wish

to return to their hometown or to A.P. State.

9. The relevant provisions of the Act are as follows:

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15. Search without warrant .—(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer [or the trafficking police officer as the case may be], has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.

(2) Before making a search under sub-section (1), the special police officer (or the trafficking police officer, as the case may be) shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search and may issue an order in writing to them or any of them so to do:

[Provided that the requirement as to the respectable inhabitants being from the locality in which the place to be searched is situate shall not apply to a woman required to attend and witness the search].

(3) Any person who, without reasonable cause, refuses or neglects, to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860).

[(4) The special police officer or the trafficking police officer, as the case may be, entering any premises under sub-section (1) shall be entitled to remove therefrom all the persons found therein.]

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16. Rescue of person—(1) *Where a Magistrate has reason to believe from information received from the police or from any other person authorised by State Government in this behalf or otherwise, that [any person is living, or is carrying, or is being made to carry on, prostitution in a brothel], he may direct a police officer not below the rank of a sub-inspector to enter such brothel, and to remove therefrom such person and produce him before him.*

(2) *The police officer, after removing the person shall forthwith produce him before the Magistrate issuing the order.*

17. Intermediate custody, of persons removed under Section 15 or rescued under Section 16 .—(1) *When the special police officer removing a person under sub-section (4) of Section 15 or a police officer rescuing a person under sub-section (1) of Section 16, is for any reason unable to produce him before the appropriate Magistrate as required by sub-section (5) of Section 15, or before the Magistrate issuing the order under sub-section (2) of Section 16, he shall forthwith produce him before the nearest Magistrate of any class, who shall pass such orders as he deems proper for his safe custody until he is produced before the appropriate Magistrate, or, as the case may be, the Magistrate issuing the order:*

Provided that no person shall be,

- (i) *detained in custody under this sub-section for a period exceeding ten days from the date of the order under this sub-section; or*
- (ii) *restored to or placed in the custody of a person who may exercise a harmful influence over him.*

(2) *When the person is produced before the appropriate*

Magistrate under sub-section (5) of Section 15 or the Magistrate under sub-section (2) of Section 16, he shall, after giving him an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under sub-section (1) of Section 16, the age, character and antecedents of the person and the suitability of her parents, guardian or husband for taking charge of him and the nature of the influence which the conditions in his home are likely to have on him if he is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958, to inquire into the above circumstances and into the personality of the person and the prospects of her rehabilitation.

(3) 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 recognised under any Children Act for the time being in force in any State for the safe custody of children:

Provided further that no person shall be kept in custody for this purpose for a period exceeding three weeks from the date of such an order, and no person shall be kept in the custody of a person likely to have a harmful influence over him.

(4) Where the Magistrate is satisfied, after making an inquiry as required under sub-section (2),—

- (a) that the information received is correct; and*
- (b) that she is in need of care and protection,*

he may, subject to the provisions of sub-section (5), make an order that such person be detained for such period, being not less than one year and not more than three, as may be specified

in the order, in a protective home, or in such other custody, as he shall, for reasons to be recorded in writing, consider suitable:

Provided that such custody shall not be that of a person or body of persons of a religious persuasion different from that of the person, and that those entrusted with the custody of the person, including the persons in charge of a protective home; may be required to enter into a bond which may, where necessary and feasible contain undertakings based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the person as well as supervision by a person appointed by the Court, which will be in force for a period not exceeding three years.

(5) In discharging his functions under sub-section (2), a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women, to assist him; and may, for this purpose, keep a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in persons.

(6) An appeal against an order made under sub-section (4) shall lie to the Court of Session whose decision on such appeal shall be final.

17-A. Conditions to be observed before placing persons rescued under Section 16 to parents or guardians .—
*Notwithstanding anything contained in sub-section (2) of Section 17, the magistrate making an inquiry under Section 17, may, before passing an order for handing over any person rescued under Section 16 to the parents, guardian or husband, satisfy himself about the capacity or genuineness of the parents, guardian
or husband to keep such person by causing an investigation to be made by a recognised welfare institution or organization.*

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10. In this case, the police machinery swung into motion and culminated in the order of 22.02.2012, set in place through the statement recorded by the complainant Parvathi, under Section 164 Cr.PC before the Anantapur Court. She mentioned about the prevalence of a regular racket in which young girls were lured and transported to Delhi, among other places. The statement also specified names of the victims. It is not in dispute that all the petitioners as well as 41 others, (who were set at liberty by the separate order dated 22.02.2012) are in fact victims and not wanted as accused in any case. This aspect assumes some importance because in terms of the Act, keeping a brothel or allowing any premises to be used as brothel or living on the earnings of prostitution or trafficking or inducing or the taking of persons for prostitution are offences. Section 6 of the said Act also criminalizes the detention by one person of another for the purpose of prostitution. If one understands the scheme of this enactment and its perspective, Sections 15 to 17 of the Act are part of the mechanism to assist the law enforcement machinery towards achieving its objective. Section 17 is a special provision which enables the Magistrate to pass, in the exercise of his discretion, appropriate orders for rehabilitation. It is premised upon the knowledge derived through search without warrant (Section 15) or rescue of a person on the basis of a complaint or otherwise, and a direction to the police officer not below the rank of a Sub-Inspector, to rescue the victim (Section 16). In this case, the order has, in our opinion, completely ignored this aspect; the application itself mentions that a warrant had been issued. Therefore, the case was not covered by Section 15. It is also no one's case that the Magistrate acted independently and not upon an application or complaint

made in that regard. All that seems to have happened is that the police entered the premises and rescued the petitioners, who are before this Court.

11. The mechanism under Section 17 enables the Magistrate to first issue an order enabling the rescue of victims, and their intermedia custody through a transit arrangement [Section 17(2)] which cannot exceed 10 days under any circumstances. The holding of enquiry under Section 15 requires the involvement of five individuals, including three women to assist the Magistrate in the passing of appropriate orders. Now, the impugned order dated 22.02.2012 is singularly silent about the measures which prompted the Magistrate to satisfy himself about the requirement of rehabilitation of the appellants before the Court. The Court is of opinion that when this was neither a case covered by Section 15 nor Section 16, the Magistrate should not have exercised his power of transit remand as was done in the present case. Furthermore, in the present case, the rescue of the petitioners was further to a search warrant under Section 93 Cr.PC.

12. Apart from the above discussion, this Court is of the opinion that the coercive manner in which the police dealt with the victims are offensive of their rights under Articles 14 and 21 of the Constitution of India. In a rights-based society like ours, the mandate of these guarantees is constant and unaltered in content without any regard to the general or any of the other traditionally perceived differences that human beings see amongst themselves. This Court also is of the opinion that the order to the extent it virtually ordered transportation, without consent, of petitioners amounts to treating them as less than human beings and belittling their dignity.

13. We were informed during the hearing that the issue of rehabilitation of sex workers is engaging the attention of the Supreme Court in an ongoing

litigation, namely *Budhadev Karmaskar v. State of West Bengal* CrI.A. 135/2010. The Court has issued series of orders. Although it would be beyond the scope of this Court to discuss in detail the content of those orders, however, it would be worthwhile to notice some of them. For instance, the order of 14.02.2011 states as follows:

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17. Although we have dismissed this Appeal, we strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed.

18. As already observed by us, a woman is compelled to indulge in prostitution nor for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body.

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Similarly, the order dated 02.08.2011 reflects as follows:

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11. We again reiterate that this exercise is because we are of the opinion that sex workers are also human beings and hence they are entitled to a life of dignity. It has been well-settled by a series of decisions of this Court that the word ‘life’ in Article 21 of the Constitution means a life of dignity and not just an animal life. We are of the opinion that sex workers obviously cannot lead a life of dignity as long as they remain sex workers.

12. *Sex among human beings is different from sex among animals. Sex in humans has a cultural aspect to it also, and is not just a physical act. A sex worker who has to surrender her body to a man for money obviously is not leading a life of dignity. Ordinarily, no woman will willingly surrender her body to a man unless she loves and respects him. A sex worker is obviously not surrendering her body to a man because she loves and respect him, but just for sheer survival. As Nancy says in Charles Dicken’s novel ‘Oliver Twist’, “you adapt or you die.”*

13. *Apart from that, sex workers are always in danger of getting sexually transmitted diseases (STD), and they are often abused and beaten by the proprietors of the brothel and others who give them a pittance out of her earnings. A woman becomes a sex worker not because she enjoys it but due to abject poverty. One estimate suggests that there are 3 million sex workers in India, many even from Nepal, Bangladesh, and even the former Soviet Union. This is due to massive poverty in the country, and abroad.*

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14. The Supreme Court had appointed a panel and even directed some of the States to deposit amounts to assist in its functioning. It also had, in the course of the proceedings, directed various authorities, including the appellants and several States as well as the NGOs to present periodic reports. In the order dated 24.08.2011, the Court directed all State Legal Services Authorities to provide helpline numbers to the NGOs and to the State machinery as well as to sex workers and victims of sex trade who are in distress and who are compelled to continue with sex trade. The Court, very presciently noted that one of the barriers for rehabilitation efforts is the prevailing fear of sex workers that opting for rehabilitation might land them in worse situation. The Court observed as follows:

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We are further of the view that all the State Legal Services Authorities should provide a helpline number to the NGOs and to the State machinery as well as to the sex workers and victims of sex trade who are in distress and who are compelled to continue with the sex trade, so that they can avail the benefit of the helpline number for providing legal assistance, to get them rescued or any further assistance which may be offered to them by way of 8 Free Legal Aid. The State Legal Services Authorities thereafter may direct them to the concerned and appropriate authorities for taking remedial measures in that regard and also report the matter to the Panel which has been constituted by us.

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16. There is always a prevailing fear that by opting for rehabilitation they may be worse off by losing their old livelihood and also not being able to survive in the alternative vocation unless there is ready acceptance of the former sex workers in the mainstream.

17. As regards the State of West Bengal, it is well known that Calcutta has a huge number of sex workers in Sonagachi, Free School Street etc. The Government of West Bengal stated that there is no convincing data available in respect of the number of sex workers rehabilitated so far and it will take time to collect the same from the service providers. However, they are running 17 homes under the Swadhar Schemes and two Homes under the Ujwala Scheme and 43 Short Stay Homes. These Homes give shelter to rescued sex workers.

18. In this connection we wish to say that providing short stay homes to sex workers is hardly a solution to their problem. They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies. Merely sending them to homes is sending them to starvation. We were, therefore, disappointed by

the approach of the State of West Bengal, where the problem is most acute. Much more needs to be done by the State Government.

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d) It was emphasized that the so-called Homes run under the Government sponsored projects virtually operate as prison houses so much so that even if a sex worker may not be willing to leave the profession they would not like to live in the so-called Homes. The reluctance is not so much due to loss of earning but more because they do not want to be imprisoned or to lose their freedom.

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15. As far as the submissions of the NCW are concerned, whilst we do not entertain any doubts about its motive which are altruistic, to say the least, yet the suggestion given, that the petitioners be kept in the intermediate custody arrangement till such time a plan is evolved or regular counseling is conducted, is both unfeasible and unpragmatic. We are of the opinion that once the Court concludes that continued detention is contrary to law, the only course would be to allow the petitioners to exercise their choice, to the extent the law permits. If the NCW or any other State machinery is of the opinion that realistic measures of rehabilitation are possible only by continued access, it is upto the agencies to seek the assistance of law. The present order would not be in any manner construed as prejudicial to their responsibility in any manner.

16. In view of the conclusions that the petition has to succeed, the writ petitioners shall be released forthwith from the place where they are held in custody, i.e. Nirmal Chhaya.

Order dasti under signatures of the Court Master.

S. RAVINDRA BHAT
(JUDGE)

S.P.GARG
(JUDGE)

APRIL 13, 2012
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