

**IN THE SUPREME COURT OF INDIA
(CRIMINAL APPELLATE JURISDICTION)**

IN

CRIMINAL APPEAL NO(s). 135 OF 2010

IN THE MATTER OF:

BUDHADEV KARMASKAR .. Appellant (s)

VERSUS

STATE OF WEST BENGAL .. Respondent(s)

AND IN THE MATTER OF:

DURBAR MAHILA SAMANWAYA COMMITTEE

Through

Secretary

12/5, Nilmoni Mitra Street

Kolkata 700006

... Impleaded Respondent

**AFFIDAVIT IN RESPONSE TO THE APPLICATION FILED BY
THE UNION OF INDIA DATED 04/05/12 FOR THE
MODIFICATION OF THE ORDER OF THE HON'BLE COURT
DATED 19/07/2011**

MOST RESPECTFULLY SHEWETH:

I, Bharti Dey, Secretary of the Respondent Society above-named,
having its office at 12/5, Nilmoni Mitra Street, Kolkata 700006, do
hereby solemnly affirm and state as under;

1. That I am the Secretary of the Respondent Society and am duly authorized to affirm and swear this affidavit on behalf of the Impleaded Respondent.
2. That the Respondent Society was impleaded as a 'necessary party' by this Hon'ble Court in proceedings in the present case which concerns sex workers, vide its order dated 04/05/2011, which read as follows:

"Mr. Pradeep Ghosh, learned amicus curiae informed us that in the Red Light Areas of Kolkata, there are some NGOs and Co-operative Societies like Durbar Mahila Samanwaya Committee and Khush Co-operative Society of the Sex Workers in Kolkatta. We direct that they be impleaded as necessary party in this case and service on them be effected through Mr. Tara Chand Sharma, learned Standing Counsel for the State of West Bengal which shall file their response in this case after serving a copy of the same on the learned amicus curiae."

3. That the Respondent Society was impleaded by this Hon'ble Court *suo motto* as a 'necessary party' because it is an association of sex workers themselves. That in doing so, this Hon'ble Court affirmed that sex workers' involvement is essential to the present case, which stems from concern over the right to life with dignity of a sex worker under Article 21.

4. That pursuant to this Hon'ble Court's order dated 04/05/2011, the Respondent Society filed an affidavit dated 15/07/11 highlighting its activities in the areas of health, education and rehabilitation of sex workers, shortcomings of existing schemes and offering suggestions for making rehabilitation more effective and meaningful to sex workers.

5. That subsequently, by its order dated 19/07/11, this Hon'ble Court constituted a Panel and inducted the Respondent Society as a member, which order reads as follows:-

"We hereby constitute a Panel for assisting us in this matter consisting of the following:-

(i) Mr. Pradip Ghosh, Senior Counsel who will be the Chairman of the Panel

(ii) Mr. Jayant Bhushan, Senior Counsel

(iii) Usha Multipurpose Co-operative Society through its President/Secretary

(iv) Durbar Mahila Samanwaya Committee through its President/Secretary

(v) Roshni, through Ms. Saima Hasan 152, Golf Links, New Delhi."

6. That since then, the Respondent Society has been attending to the proceedings before this Hon'ble Court and participating in Panel meetings, offering the critical perspective and practical insights of sex workers, who are the subject matter of the present case, while also making constructive suggestions.

7. That in its order dated 02/08/11, this Hon'ble Court asked the Chairman of the Panel to co-opt suitable members from Mumbai and Chennai, as there was no representation from these cities in the Panel and the Hon'ble Court had directed that the problems of sex workers in the four cities of Delhi, Kolkata, Mumbai and Chennai be taken up first.

8. That subsequently, the Chairman of the Panel co-opted the following members to the Panel:- a) South India AIDS Action Programme, Chennai represented by Ms. Indumathi Ravi Shankar; b) PRERANA, NGO based in Mumbai; c) SHAKTI VAHINI, NGO based in Delhi, represented by Mr. Ravi Kant and, d) Mr. Tariq Khan, social activist, based in Lucknow. The induction of these new members to the Panel was duly recorded by this Honb'le Court in its order dated 24/08/11.

9. That unlike the abovementioned members of the Panel, the Respondent Society is a party to the case and was inducted on the Panel by this Hon'ble Court itself.

10. That the Respondent Society draws its membership from and represents over 65,000 female, male and transgendered sex workers across West Bengal. It is the one of the largest organizations of sex workers not only in India but all over the world.

11. That the Respondent Society values the inherent dignity, worth and potential of sex workers and strives towards their social, economic, political and legal empowerment. The Respondent Society's interventions are pillared on the '3Rs – Respect, Reliance and Recognition', that is, respect for sex

work and sex workers, reliance on sex workers' knowledge and wisdom and, recognition of their human and professional agency.

12. That in the 1990s, the Respondent Society pioneered the peer-based or community-led approach to HIV prevention in Sonagachi, Kolkata, which is now an established model for delivering health services to marginalized communities under the country's National AIDS Control Programme.

13. That the community-led paradigm spearheaded by the Respondent Society is distinct from other conventional programmes on sex work in that it does not consider sex workers' as 'objects' to be 'saved'. Instead, the Respondent Society strives to enhance sex workers' consciousness and capacity to effect changes in their individual lives as well as the larger structural environment. This approach has proven successful in reducing HIV transmission among female sex workers and consequently antenatal women in the country.

14. That the Respondent Society has adopted the same strategy of self-regulation in preventing trafficking of underage and unwilling women and supporting those who wish to give up sex work. It is this unique experience and perspective that the Respondent Society brings to the Panel that has been tasked with advising this Hon'ble Court on meaningful policies and programmes for sex workers.

15. That the Union of India's contentions in its Additional Affidavit dated 17/04/12 and the Application dated 04/05/12 for the Modification of this Hon'ble Court's order dated 19/07/11 are unfounded and based on a

misunderstanding of the Respondent Society's goals and the Panel's mandate as decided by this Hon'ble Court in the order dated 19/07/11.

16. That the Union of India has opposed the Respondent Society's membership to the Panel on the ground that the Respondent Society has challenged the constitutional validity of certain provisions of the Immoral Traffic (Prevention) Act, 1956 (hereinafter "ITPA") in W.P 10155(W)/2010 before the Hon'ble High Court of Calcutta and that it has a stated view on women in prostitution and ITPA.

17. That the case in WP 10155(W)/2010 before the Hon'ble Court of Calcutta is entirely different from the case before this Hon'ble Court. The former concerns itself with the compatibility of some ITPA provisions with Part III of the Constitution of India. The present case arose from a criminal appeal on behalf of the appellant – Budhadev Karmaskar who was sentenced to life for murdering a sex worker. It transformed into a public interest litigation, on the basis of this Hon'ble Court's observation in its order dated 14/02/11 that sex workers are human beings and are entitled to a life of dignity under Article 21.

18. The present case does not involve the *vires* of ITPA, nor does the case before the Hon'ble Calcutta High Court involve the question of rehabilitation of sex workers. The two are entirely different. Therefore, the potential conflict of interest contended by the Union of India in Para 4 and Para 6 of the Application dated 04/05/12 is unfounded and incorrect.

19. That having a stated view on women in prostitution and ITPA cannot be a ground for ousting the Respondent Society from the Panel.

20. That some of the other members of the Panel also have a stated view on women in prostitution and ITPA and have been involved in litigation against the Union of India on the said subject. (*Shakti Vahini v Union of India and Ors*, Writ Petition (C) No. 190 of 2002, before this Hon'ble Court and, *PRERANA v Union of India and Ors*, Writ Petition (C) No. 70/2003, also before this Hon'ble Court. Both petitions were concerned with prostitution and trafficking under the ITPA.)

21. That the Union of India has not questioned or objected to the nomination of other members on the Panel, despite their involvement in litigation and advocacy on ITPA. That the Respondent Society is being unfairly singled out for being a sex workers' collective and voicing opinions, that are often critical of the State's response to sex work.

22. That the Respondent Society is the only sex workers' organization represented on the Panel, whose scrutiny and insights are necessary for the formulation of meaningful recommendations. That the participation of citizens and communities in decisions that affect their lives is an important constituent of good and democratic governance, as recognized in international and domestic laws, in consonance with the principles of natural justice. At the cost of repetition, it is contended that the recommendations of the Panel and subsequent directions passed by this Hon'ble Court on rehabilitation will be effective only if sex workers' accept them and extend their full participation.

23. That the Union of India is opposing the third terms of reference of the Panel, namely conditions conducive for sex workers who wish to continue working as sex workers with dignity, on the ground that it tacitly amounts to 'legalization' of sex work, which is contrary to the law of the land. That the Union of India's contention is totally unfounded is evident from the fact that time and again, this Hon'ble Court has reiterated that the observations made and orders passed by the Bench do not imply 'legalization' of sex work, that is, the regulation of sex work by law. Further still, this Hon'ble Court cannot, even if it wanted to, change public policy on sex work, which is the sole prerogative of the legislature.

24. That the Union of India's contention in Para 5 of its Application dated 04/05/12 that sex work is intrinsically linked to trafficking is inaccurate. In Para 7 of the said Application, the Union of India has itself admitted to persons entering and engaging in sex work voluntarily, without coercion, deception or fraud – which are the constituents of human trafficking.

25. That the Union of India's contention that sex work is unlawful is incorrect. Neither the ITPA nor any other law for the time being in force criminalises prostitution, that is, the sale and purchase of sexual services by consenting adults. On the contrary, provisions under the ITPA have been carefully drafted so as not to punish prostitution or prostitutes. For example, Section 3 of the Act prohibits keeping or managing or acting in or assisting in the keeping or management of a brothel or offering premises for use as a brothel but does not criminalise working in a brothel as a sex worker. Section 4 punishes persons living off the earnings of prostitution of another person but does not criminalise a sex worker for making a living from prostitution.

Section 5 penalises procuring or inducing a person for prostitution but does not criminalise a sex worker for engaging in sex work. In the same vein, Section 6 of ITPA criminalises detaining a person in a brothel or premises for prostitution but does not condemn a sex worker for being present in premises for prostitution.

26. That the remit of the Panel, as endorsed by this Hon'ble Court in its order dated 19/07/11 is not contrary to ITPA or any other law for the time being in force in the country.

27. That the three terms of reference of the Panel, as laid down in this Hon'ble Court's order dated 19/07/11 must be read together and not in isolation. That this Hon'ble Court has rightly entrusted the Panel with an all-encompassing mandate concerning entry, exit and continuation in sex work, premised on consent or the lack thereof, of the individual concerned. It is expected that when the Panel deliberates on measures to prevent trafficking, it will examine means to stop the entry of unwilling persons in sex work. Similarly, when the Panel makes recommendations for rehabilitation, it will review the needs and concerns of those who want to discontinue sex work. The Panel would then deal with the remaining problem, that is, the condition of sex workers who are neither trafficked nor seek rehabilitation. In Para 7 of its Application dated 04/05/12, the Union of India has itself alluded to sex workers who enter and remain in sex work voluntarily. Only when the Panel addresses the three aspects of preventing entry, supporting exit and ensuring safety of those in sex work will its submission to this Hon'ble Court be cogent and complete.

28. That this Hon'ble Court sought a comprehensive response to the problems in sex work is evident from the observations made early on, in the order dated 14/02/11, which read as follows:-

"This is a case of brutal murder of a sex worker. Sex workers are also human beings and no one has a right to assault or murder them. A person becomes a prostitute not because she enjoys it but because of poverty. Society must have sympathy towards the sex workers and must not look down upon them. They are also entitled to a life of dignity in view of Article 21 of the Constitution."

The above mentioned observation requires that sex workers be protected from violence, disease, intimidation, harassment and discrimination, in other words, be accorded with the right to life with dignity.

29. That with respect to rehabilitation, it is incumbent on the Union of India, State Governments as well as the Panel to observe the following instruction of this Hon'ble Court's in the order dated 02/08/11:-

"We make it clear that any rehabilitation of the sex workers will not be coercive in any manner and it shall be voluntary on the part of the sex workers."

It is amply clear that rehabilitation cannot be forcibly imposed on sex workers. While sex workers can be encouraged to seek alternatives, forcing

them to do so would frustrate the very aims of the directions passed by this Hon'ble Court, which has been guided by the beacon of the right to life with dignity of sex workers under Article 21.

30. That the Union of India's contention in Paras 9 and 10 of the Application dated 04/05/12 is incorrect. That the provision of services for the health, safety and education of sex workers and their children, is not in conflict with efforts to counter trafficking or support rehabilitation.

31. That the averment made in Para 11 of the Application dated 04/05/12 that the Government has no policy or scheme for those who willingly enter and engage in sex work is incorrect. That the Department of AIDS Control/ National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India supports "Targetted Interventions" among groups at high risk of HIV transmission, including female sex workers. Under this programme, a female sex worker is understood to mean "an adult woman who engages in consensual sex for money or payment in kind, as her principal means of livelihood." (National AIDS Control Organisation, Targetted Interventions under NACP III, Operational Guidelines, Volume I, Core High Risk Groups at page 10). Services offered to such women include outreach, education and the safe space of a drop-in centre, clinical care through regular medical check ups, screening and treatment for sexually transmitted infections, referral to HIV counseling and testing and anti retroviral treatment, supply of condoms for safer sex and support for an enabling environment with mobilization and capacity building of sex workers. At the end of March 2012, the National AIDS Control Programme was reaching over 7 lakh female sex workers through 490 targetted interventions across the

country. (Department of AIDS Control, Ministry of Health & Family Welfare, Annual Report 2011-12 at page 12). The Ministry of Health and Family Welfare annually spends approximately Rupees 63.7 crores on preventing HIV infection among female sex workers.

32. That in light of the above submissions, the Respondent Society prays before this Hon'ble Court to dismiss the Application dated 05/05/12 by the Union of India for the modification of this Hon'ble Court's order dated 19/07/11. Leave of this Hon'ble Court is also sought to file additional affidavits, submissions and documents, if the need arises.

DEPONENT

VERIFICATION

I, Bharti Dey, the deponent above-named and the authorised signatory for the Impleaded Respondent above named do hereby verify and state that the contents from paras 1 to 32 of the above affidavit are true and correct to the best of my knowledge and information, no part of it is false and nothing material has been concealed there from and I believe the same to be true.

Verified at Kolkata on day of July, 2012.

DEPONENT