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THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3390 of 2023

(In the matter of an application under Section 482 of the Criminal Procedure Code, 1973)

Bikash Kumar Jain & another **Petitioners**

-Versus-

State of Odisha **Opp. Party**

For the Petitioners : Mr. Amit Prasad Bose, Advocate

For the Opp. Party : Mr. B.K. Ragada, AGA

CORAM:

THE HONOURABLE SHRI JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 02.02.2024: Date of Judgment: 09.02.2024

S.S. Mishra, J.

1. An FIR No. 212 dated 19.05.2018 in UPD, Bhubaneswar Capital Police Station was registered against many accused persons under Sections 3, 4, 5, 6 and 7 of Immoral Traffic (Prevention) Act, 1956. The present petitioners were also named in the FIR. The allegations against the petitioners in the

FIR in precise were that being the customers, they were availing services from a Spa Centre. Under the guise of running a Spa Centre, a brothel is being run from the same place. One Surendra Kumar Mohapatra under the managership of Sanjay Kumar Rana was running the Spa in the name and style of “H2O Spa And Hamam”. It is alleged that they procure the girls and using them for prostitution. On 19.05.2018 a raid was conducted by the Police, eight young girls were found inside the Spa, out of them seven girls were found to have been doing sexual activities with seven persons. They were found in a compromising position. It is alleged that the present petitioners were also engaged in sexual activities with two girls. All the girls were confronted. They stated that Rs. 2,000 each has been charged for giving sexual favour to the clients by the Manager of the Spa. The girls disclosed their identities. On verification of the passports and visa, it was ascertained that all these girls were from Thailand. The FIR indicates that the girls were of the age range from 27 to 35. The passports of the girls were confiscated, and they were subjected to investigation and were let off.

2. After the investigation, the Police have filed the charge sheet on 17.06.2021. In the charge sheet apart from the offences under Sections 3,4,5,6 and 7 of Immoral Traffic (Prevention) Act,1956, two more higher offences are added i.e. the offences under Sections 370(3) and 370A (2) IPC. Relevant would be reproduced the provisions: -

“Section-370. Trafficking of person-

(1)xxxxxx

(2)xxxxxx

(3) Where offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4)xxxxxx

(5)xxxxxx

(6)xxxxxx

(7)xxxxxx

Section-370(A).Exploitation of a trafficked person.-

(1)xxxxxx

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.”

3. Perusal of Section 370A (2) of the Act indicates that whoever knowingly by or having reason to believe that a person having trafficked, engaged such person for sexual exploitation in any manner shall be punished with the imprisonment for a term which shall not be less than three years but which may extend to

five years and shall also be liable for fine. However, the issue as to whether the customer has the knowledge that the person/women is trafficked or engaged for sexual exploitation needs to be adduced from the material on record. In the light of the aforementioned provisions the allegation against the petitioners in the charge sheet is analyzed in the succeeding paragraphs.

4. The petitioners are primarily aggrieved by the addition of aggravated/higher offences under Sections 370(3) and 370A (2) of IPC.

5. Mr. Amit Bose learned counsel for the petitioners submits that the addition of aforementioned two offences and taking cognizance for the said offences by the trial Court is misplaced under law. The petitioners are neither the owner of the Spa nor the Managers, rather they were the customers. They had no clue regarding the identity of the victim girls. Equally they are not aware and there was no occasion for them to inquire or know the age of the girls providing services in the Spa. From the allegations made in the FIR and the charge sheet, even if the allegations are taken at its face value, no offences under the

aforementioned aggravated provisions of law are attracted *qua* them.

6. Perusal of the statement under Section 161 Cr.P.C. of various witnesses placed on record also indicates that the petitioners are indeed the customers. They had no role to play insofar as running the Spa is concerned or for that matter, they are not the owner of the Spa.

7. Mr. Ragada, learned counsel appears for the State submits that the Court below has rightly taken cognizance of the offences under Sections 370(3) and 370A(2) of IPC apart from the other offences. When similarly situated accused person approach this Court for quashing of the cognizance order against him, the coordinate Bench vide its order dated 01.09.2023 in CRLMC No. 3384 of 2023 has been pleased to record as under.

“3. The petitioner was on bail. Subsequently, on charge sheet being submitted the offence under Section 370(A)(2) of IPC was added. He therefore, apprehends that he may be taken to custody on his appearance.

4. In this context, the ratio decided in **Pradeep Ram v. State of Jharkhand**, reported in (2019) 17 SCC 326 is relevant since higher offence has been added. It is necessary for the petitioner to appear before the Court below and to move for continuance of the bail. It is further submitted that the offence under Section 370(A)(2) of IPC is not made out as against the petitioner because he is not the owner of the building in which the prostitution was allegedly carried out.

5. In such view of the matter, the CRLMC is disposed of granting liberty to the petitioner to appear before the Court

below within a week and to make a motion for bail, which shall be considered on its own merit as also having due regard to the fact that he was on bail earlier and that he claims not to be the owner of the building in question, for which the 370(A)(2) of IPC would not be prima facie attracted.”

8. The State counsel contended that the coordinate Bench has already taken a prima facie view that against the similarly situated accused offence under Section 370A(2) of IPC is made out. Therefore, no interference in the present case is called for. He further opposes the prayer of the petitioners relying upon a judgment of Telangana High Court passed in *Mohammad Riyaz vrs State of Telangana in Criminal Petition No. 5803 of 2018*. He submits that in the similar circumstances when a customer challenged the order of taking cognizance of offence under Section 370A(2) of IPC, the High Court has declined to grant relief and formed the view that every customer in such situation would be treated to have employed the trafficked girls exploited sexually, therefore, the offence under Section 370A(2) is attracted. He supplies emphasis to certain paragraph of the judgment, which reads as under: -

Learned Public Prosecutor for the State of Telangana supported the case while contending that in view of the judgment of this Court rendered in “S.Naveen Kumar @ Naveen v. State of Telangana1” the customer is also liable to be prosecuted for the

offences punishable under Sections 370, 370 (A) (2) of I.P.C. and under Sections 3 to 5 of Prevention of Immoral Traffic Act.

In view of Section 370 A (2) of I.P.C., the petitioner, who was found along with a sex worker in a room, is liable to be prosecuted for the offence punishable under Section 370 (A) (2) of I.P.C.

This Court in “*S.Naveen Kumar @ Naveen v. State of Telangana*” and “*Sahil Patel v. The State of A.P.*” (referred *supra*), consistently held that the customer is also liable to be prosecuted for the offence punishable under Section 370-A of I.P.C.

The same view is also expressed by the High Court of Gujarat at *Ahmedabad in “Vinod v. State of Gujarat”* (referred *supra*), which is as follows:

“b) However, that is not end of the matter. A perusal of the charge sheet would show that the police while charge sheeting A1 and A2 for the offences under Sections 3, 4, 5 and 6 of PIT Act and under Section 370A IPC, HC-NIC Page 22 of 24 Created On Sat May 06 01:34:48 IST 2017 surprisingly charge sheeted petitioner/A3 only under Section 4 of PIT Act, but not under Section 370A IPC. Section 370A IPC reads thus: Section 370A - Exploitation of a trafficked person (1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine. (2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine. c) The phraseology engages such minor/such person for sexual exploitation in any manner employed in sub- sections (1) and (2) of Section 370A IPC in clear terms indicates that the flesh customer who hires the victim woman for sexual exploitation also falls

within the fold of Section 370A as an offender.
d) It shall be noted that in the wake of gang rape of Nirbhaya in Delhi which arose an unprecedented public furore, Government MSM,J CrI.P_5803_2018 8 considered it fit to drastically amend several provisions of IPC and in that direction appointed a Committee under the Chairmanship of late Justice J.S.Verma, the former Chief Justice of India. The Committee after interacting cross sections of stake holders submitted its detailed report suggesting amendments and introduction of various provisions in penal laws like IPC, Cr.P.C., Evidence Act etc. Consequent upon the said report sub-clause (2) of Section 370 IPC was amended and Section 370A IPC was introduced. Having regard to the avowed object with which report was submitted and amendments and new provisions were introduced in several acts, it cannot be presumed for the moment that Legislators considered customer as an innocent victim in the flesh trade. Therefore, Section 370A takes in its fold the customer also. So, despite the police charge sheeting petitioner/A3 only for the offence HC-NIC Page 23 of 24 Created On Sat May 06 01:34:48 IST 2017 under Section 4 of PIT Act and the Committal Court accepting the same, it is evident from the charge sheet that the petitioner/A3 is prima facie liable for charge under Section 370A though not under Section 4 of PIT Act with which he was charge sheeted."

In view of the law declared by the Single Judge of this Court and reiterated by the other Courts and the judgments referred supra, the customer is liable to be prosecuted for the offence punishable under Section 370 A (2) of I.P.C.

9. Per contra, the learned Counsel for the petitioners relies upon the judgment in the case of *Pradeeban vrs State By*

Ashoknagar P.S. in CRL.P No. 10222/2017, the Karnataka High Court confronted with the similar case has held as under.

“4. It is also evident from reading of the above said provisions, which are invoked in this particular case. Section 370A(2) of IPC provides-Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine. Section 370(3) of IPC provides where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. Further, Section 294 of IPC provides Obscene acts and songs – Whoever, to the annoyance of others (a) does any obscene act in any public place, or (b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Therefore, the above said provisions are in no way attract for punishment so far as the customers are concerned. Though it is felt by this Court though customers virtually encourage prostitution and exploit the victim for money, but in the absence of any specific penal provision, it cannot be said that is liable for any prosecution for the above said offences.”

10. I have perused the entire record including the statements of the witnesses under Section 161 Cr.P.C. It is found from the record that all the alleged victim girls those who are apprehended from the spot are foreigners namely from Thailand. All of them were adults. They were deported from the country. Surprisingly, statements of none of the victim girls are recorded by the police U/s 161 of Cr.P.C. They are also not cited as

witnesses to the prosecution case. Therefore, the allegation that the girls were trafficked and thereafter sexually exploited is a matter found mentioning in the narration of the charge sheet but there is no evidence collected and placed before the Court. In the absence of such evidence likely to come on record, securing conviction against the petitioners is impossible.

11. Taking the allegations at its face value no case is made out against the present petitioners insofar as the allegations of 370(3) or 370A (2) of IPC. Because this court while dealing with the present matter have kept in mind the admitted position on facts that the petitioners are customers of the Spa where allegedly other accused persons were running a brothel. Therefore, on the allegation no case or evidence is illuminating from record that they were indulging in trafficking the women who were allegedly sexually exploited. All the alleged victim girls were from Thailand, and they were adults. Nothing has come on record to suggest that they were sexually exploited; rather they were into prostitution out of their own volition. That's what is borne out from record.

12. If the evidences collected by the investigation are analyzed at this stage, it could be safely inferred that neither the petitioners have trafficking the women nor they have exploited the “trafficked” women. Benefit would be to rely on the two judgments of Karnataka High Court matching the facts situation of the present case. The relevant part of the judgment of Karnataka High Court in the matter of *Chandru S vs The State by Malleshwaram P.S* are quoted below :

1.*****

2. On careful perusal of the entire charge sheet papers, it is seen that these petitioners are the customers in brothel house found by the police at the time of raid. This Court had an occasion to deal with similar matters in the following cases:

- i) 2015(3) Crimes 281 (AP) (Goenka Sajan Kumar Vs. State of A.P. Rep by P.P. high Court of A.P.)
- ii) Crl.P. No.7056/2014 [Mohammed Rafi Vs. State of Karnataka]
- iii) Crl. P. No. 7110/2011 [Suraj Vs. State of Karnataka]
- iv) Crl. P. 5808/2016 [Pravesh Chatri Vs. State of Karnataka]
- v) W.P. No.56504/2015 [Mahesh Hebbar @ Mahesh Vs. The Station House Officer, Banaswadi Police Station]
- vi) Crl.P. No.9682/2016 [Aswath @ Naveen Vs. State of Karnataka]
- vii) Crl.P. 8055/2016 [Raghavendra @ Raghu Vs. State of Karnataka]
- viii) Crl. P. No.200782/2016 [Shivaraj Vs. State of Karnataka]

3. In all the above said decisions, this Court has considered that the offences under Sections 3,4,5 and 7 of the ITP Act and Section 370 IPC are not attracted, so far as the customers of a brothel house is concerned. In fact, this Court has consistently come to the conclusion after analyzing the above said provisions in the above said cases, that the constitution of the

offences are not made-out so far as the customers are concerned.

4.*****

5. Therefore, none of the above said provisions are attracted so far as the customers are concerned. Though it is felt by this Court on various occasions that the customer virtually encourages prostitution, but in the absence of any specific penal provision, it cannot be said that he is liable for any prosecution for the above said offences.

6. In the above said circumstances, I do not find any strong reason to differ from the above said consistent view taken by this Court. There is no legal impediment to quash the proceeding.

7.*****

8.*****

9.*****

In the second judgment *Sri Roopendra Singh vs State of Karnataka* reported in *2021 SCC online Karnataka 306*, the Karnataka High Court *paragraph No.1,7,9* has held as under:

“1. This petition is filed under Section 482 of Cr.P.C. seeking to quash the entire proceedings in C.C. No. 10669/2015 renumbered as S.C. No. 19/2017 of Koramangala Police Station, Bengaluru pending on the file of the LXXI Additional City Civil and Sessions Judge, Bengaluru for the offences punishable under Section 188, 370(3), 370(A), 294 read with Section 109 of IPC and Section 35 of the Karnataka Excise Act, 1965 in so far as the same relates to the petitioners.

2.*****

3.*****

4.*****

5.*****

6.*****

7. I have perused the FIR and the orders relied on by the learned counsel for the petitioners. The sole ground on which the petitioners herein are arrayed as accused Nos. 42, 43, 44 and 49 in the above crime is that they were present at the spot during the raid, indicating that they were the customers who had gone to the spot.

8.*****

9. Accordingly, the criminal petition is allowed. The proceedings insofar as the petitioners are concerned in C.C. No.

10669/2015 renumbered as S.C. No. 19/2017 pending on the file of the LXXI Additional City Civil and Sessions Judge, Bengaluru stands quashed.”

13. The Law relating to sex work in our country is guided by Immoral Traffic (Prevention) Act, 1956, the said Act originally designed as “Suppression of Immoral Traffic Act”. It was subsequently amended in the year 1986. The act of sexual intercourse for consideration is not illegal *per se* under the Immoral Trafficking (Prevention) Act, 1956. But the intent of legislation is only to ensure that women/girls are not illegally trafficked for the purpose of prostitution, and they are exploited. Soliciting or inducing or seducing for the purpose of prostitution is illegal but prostitution *per se* is not illegal. Though exception to the judicial trend of exonerating the customers under the Act, 1956 are limited, but on the strength of weak evidence the customer cannot be tried for under the provisions under Sections of Immoral Traffic (Prevention) Act, 1956. It is only when the customer performs his role of procuring the women for another, the offence under Section 370A IPC could be employed into action against the customer. In the instant case none of the sex workers have stated that they have been exploited sexually or

abused sexually or they are trafficked. In the absence of material that women are trafficked for the purpose of engaging for sexual exploitation, the offence under Section 370A (2) of IPC will not be attract against the customer. Further, it is for the prosecution to bring on record the evidence that the customers are also having reason *inter alia* to believe that the victims are trafficked by engaged persons for sexual exploitation. No such material is illuminating.

14. Moreover, none of the girls apprehended from the spot have been examined by the Police under Section 161 Cr.P.C. Therefore, it may not be possible for the prosecution to prove the factum of trafficking of women and their sexual exploitation beyond reasonable doubt in the absence of the women being examined. In the absence of any material on record the trial Court was absolutely wrong in taking cognizance of offences under Sections 370(3) and 370A (2) of the IPC, *qua* the present petitioners.

15. Therefore, I am of the considered view that this is a fit case where this Court in exercising the inherent jurisdiction under Section 482 Cr.P.C. quash the cognizance order insofar as

offences under Sections 370(3) and 370A (2) of IPC against the present petitioners are concerned. However, the present petitioners have to face the trial insofar as the other offences as alleged in the charge sheet and cognizance is taken by the court below are concerned.

16. The CRLMC is partly allowed and disposed of.

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S.S. Mishra
(Judge)

Orissa High Court, Cuttack.
The 09th February, 2024/Monalisa Swain, Junior Stenographer

