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IN THE COURT OF THE SESSIONS JUDGE, BASMATHNAGAR
AT - BASMATHNAGAR.

(PRESIDED OVER BY M.B.LAMBE, ADDITIONAL SESSIONS JUDGE.)

Criminal Appeal No. 11/2020
Exhibit No.

Balaji Dagadu Kokate,	}	
Age-26 years, Occupation-Labour,	}	
R/o.-Gangakhed Naka, Parbhani,	}-	<u>Appellant</u>
Taluka and District-Parbhani	}	(Original Applicant)

Versus

The State of Maharashtra	}	
Through Hatta Police Station	}	
Taluka-Aundha (Nagnath),	}-	<u>Respondent</u>
District-Hingoli	}	(Original Prosecution)

Appeal against the Order dated 12/02/2020 Passed by the
Judicial Magistrate, First Class, Aundha (Nagnath)
(Court No. II) in the Crime Register No. 23/2020.

Appearance

Shri. R. H. Potdar	:	Advocate for the appellant.
Shri. N. H. Nayak	:	Additional Public Prosecutor for the respondent.

J U D G M E N T

(Delivered on : 09/07/2020)

Nature of the Appeal.

1. This is an appeal filed by the appellant against the order dated 12/02/2020 (for short 'impugned order') passed by the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II) (for short the 'Magistrate') on the application filed by the appellant seeking custody of the victim (for short the 'custody application') in the Crime Register (for short 'C.R.') No. 23/2020.

Identity of the Victim Is Not Disclosed

2. The identity of the victim and other information by which the identity of the victim may be revealed is not disclosed.

Reference of the Parties and Exhibits.

3. The applicant in the custody application is the appellant in this appeal. The State of Maharashtra (for short 'prosecution') in the custody application is the respondent in this appeal.

4. The appellant and the respondent for the sake of convenience, are referred to by their original status in the custody application.

5. The Exhibits, if any, for the sake of convenience, are referred to by the numbers marked in the custody application.

Nature of the C.R. No. 23/2020.

6. The C.R. No. 23/2020 was registered as per report lodged by the informant-Dnyaneshwar Shinde, Police-Sub-Inspector (for short 'informant') under Sections 3, 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 (for short 'ITPA').

Contents in the Case of the Prosecution.

7. In the first information report (for short 'F.I.R.') lodged by the informant, against the accused-Laxmibai Narwade, Anita

Chandankar and Sahil Sabuddin (for short 'the accused') it is alleged that when he along with other police staff effected raid on 18/01/2020 at about 21.50 hours at Jawala Bazar in the area of '*Satara mal tekdi*', they found that the accused were running a brothel in a house and has forced nearly seven victims to work there as prostitutes and they were living on the earnings of prostitution. Thereafter, the informant lodged report at Hatta Police station.

8. On the basis of the report lodged by the informant C.R. No. 23/2020 came to be registered against the accused under Sections 3, 4 and 5 of the ITPA.

Rescue of Victims.

9. The informant removed the victims from brothel and produced them before the Magistrate.

Nature of the Custody Application.

10. The applicant filed custody application in C.R. No. 23/2020.

Contents in the Custody Application.

11. The applicant has contended that the victim was working with him as sugar-cane labour. She has no concern with the offence. She was detained by the police merely on suspicion. He is entitled to receive her custody.

12. On these grounds the applicant has prayed to grant the custody application.

The Magistrate Rejected the Custody Application.

13. The Magistrate, after making an inquiry found that as no one is there to take care of the victim it is necessary to send her to the Woman's Rehabilitation Home for one year.

14. The Magistrate, therefore, passed the impugned order under Section 17(4) of the ITPA as here-in-below :-

- The victims be sent to Women's Rehabilitation Home for one year from the date of production before the Court.
- The Probation Officer is directed to observe the victims for one year and submit report, accordingly.

The Grounds of Appeal.

15. The impugned order passed by the Magistrate is challenged by the applicant mainly on the following grounds :-

- That the impugned order passed by the Magistrate is wrong and erroneous.
- That the Magistrate has failed to appreciate the documents and affidavit filed by the applicant in its proper perspective.
- That the Magistrate has failed to consider the facts which were brought to her notice by the victim and the applicant during inquiry.
- That the Magistrate has not considered the delay in lodging F.I.R.
- That there is no cogent and convincing evidence to prove that victim was living with the accused and the accused were living on her earnings earned as a prostitute, as alleged by the prosecution.
- That there is no evidence to prove that the victim was procured by the accused for the purpose of prostitution, as alleged by the prosecution.

- That the Magistrate has not considered the fact that the applicant is the close relative of the victim.
- That the detention of the victim in a Protective Home is not justified.
- That the impugned order passed by the Magistrate is harsh and excessive.
- That the impugned order is not legal and tenable in the eye of law.

The Argument.

16. I have heard, Shri. R. H. Potdar, advocate for the applicant and Shri. N. H. Nayak, Additional Public Prosecutor (for short 'A.P.P.') for the prosecution, in extenso.

17. They argued in consonance with the contentions in the application, say and referring the documents produced on record.

18. In order to avoid repetition, I will deal with the argument at the time of discussing the points taken for consideration.

Points and Findings.

19. Upon hearing the following points arise for my determination and I record my findings thereon as under for the reasons to follow :-

	Points	Findings
1)	Whether the prosecution proves that the Magistrate has given an opportunity of being heard to the victim before conducting an inquiry as prescribed under Section 17 of the ITPA, as alleged ?	No.
2)	Whether the prosecution proves that the Magistrate made an inquiry as prescribed under Section 17 of the ITPA, as alleged ?	No.

3)	Whether the prosecution proves that the information received under Section 16 (1) of the ITPA is correct, as alleged ?	Redundant.
4)	Whether the prosecution proves that the victim is in need of care and protection, as alleged ?	Redundant.
5)	Whether the impugned order is legal, proper and correct ?	No.
6)	Whether this court is required to interfere with the impugned order of the Magistrate ?	Yes, partly. As per final order.
7)	What order ?	Appeal is allowed, partly. As per final order.

**Relevant Statutory Provision in
Respect of Jurisdiction and Powers of the Appellate Court and
Under Sections 15, 16, 17 and 17-A of the ITPA.**

20. Before proceeding to discuss the merits of the points, for better appreciation, let me reproduce the relevant statutory provision in respect of jurisdiction and powers of Appellate Court and under Sections 15, 16, 17 and 17-A of the ITPA.

20.1. So far as powers of the appellate court are concerned the Cr.P.C. does not make any distinction between an appeal from acquittal and an appeal from conviction.

20.2. There is a distinction between a revision and an appeal. **In an appeal, the appellant is given a statutory right to demand an adjudication from the court either on a question of fact or on a question of law or upon both.** When a matter comes up in revisional jurisdiction, the petitioner has no right whatsoever beyond the

right of bringing his case to the notice of the court. It is for the court to interfere in exceptional cases where it seems that some real and substantial injustice has been done. That is the main point which the court has to consider. A revision is not to be regarded as in some sort a second appeal on a question of law. A revision is a procedural facility afforded to a party but it is not a continuation of the suit, appeal or trial while an appeal is a statutory right conferred on a party. In revision, the main question which the Revisional Court has to consider is whether substantial justice has been done. **In the case of an appeal, the appellant no doubt is entitled to demand an adjudication upon all questions of fact or law which he wished to raise**, but in revision the only question is whether the Revisional Court should interfere in the interest of justice. Additional evidence cannot be taken by Revisional court. The words 'finding', 'sentence', 'order' and 'proceedings' cover everything, which may be remedied in revision. No part of the subject-matter of revision falls outside these words. There is nothing capable of revision which is not either a finding or a sentence, or an order, or a proceeding. The words, taken together are coterminous with the things which revision may reach. That, therefore, is the scope of revision in so far as its subject-matter is concerned. **No appeal will lie from mere findings which are not convictions or acquittals, or from any proceedings which are not convictions, acquittals, sentences, orders or mere findings. Now, inasmuch as proceedings in this sense, and mere finding and convictions, sentences and orders from which no appeal lies to the High Court are capable of revision by the High Court, the subject matter of revision is wider than the subject-matter of appeal.** A revision dismissed for default of appearance can not be restored to the file. Order dismissing revision application for

default, which may not be regarded as a final order under Section 362 of the Cr.P.C. and can be set-aside by High Court exercising powers under Section 482 of the Cr.P.C.

20.3. Section 15 of the ITPA, is extracted below for an easy reference :-

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.
- (5) The special police officer or the trafficking police officer, as the case may be, after removing the person under sub-section (4) shall forthwith produce him before the appropriate Magistrate.

(6) to (7) x x x x x x

20.4. Section 16 of the ITPA, is extracted below for an easy reference :-

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.

20.5. Section 17 of the ITPA, is extracted below for an easy reference :-

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.

20.6. Section 17-A of the ITPA, is extracted below for an easy reference :-

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 recognized welfare institution or organization.

21. The ITPA aims at abolishing traffic in human beings for prostitution. It, therefore, penalizes brothel keeping, pimping, procuring, detention of women or girl for prostitution and seduction of a woman in custody.

22. The ITPA does not seek to abolish prostitutes or prostitution per se and hence the practice of prostitution individually, independently and voluntarily by a woman does not constitute an offence. But it treats soliciting for prostitution and prostitution in public place as offences. Importantly, the client is not an offender under the ITPA.

23. These provisions are based on an understanding which assumes that women in prostitution must be removed from prostitution. Although she is not supposed to be criminalized, as soon as she chooses to get involved in prostitution and is detected, she is to be removed from the area and placed into rehabilitative care.

24. Section 15 of the ITPA empowers the Special Police Officer, where he has got a reason to believe that an offence under the ITPA has been or is being committed, to search the premises without warrant; and the police officer entering any premises shall be entitled to remove therefrom all the persons found therein; that the Special officer after removing the person shall forthwith produce him before the appropriate Magistrate; that any person produced before the Magistrate shall be examined by a registered medical practitioner for the purpose of determination of the age of such person or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually

transmitted diseases.

25. Section 16 of the ITPA, postulates that where a Magistrate receives any information from the Police or any other person authorized by the Government that any person is living or is carrying on 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; and that the Police officer after removing the person shall forthwith produce him before the Magistrate issuing the order.

26. Section 17 of the ITPA contemplates inter mediate custody of persons removed under Section 15 of the ITPA or rescued under Section 16 of the ITPA. Section 17(4) of the ITPA empowers where the Magistrate is satisfied after making an inquiry, he may make an order that such person be detained for such period being not less than one year and not more than three years as may be specified in the order in a protective home or in such other custody as he shall consider suitable for reasons to be recorded in writing. The Magistrate is further empowered to call for a report from the Probation Officer after conducting inquiry into the age, character and antecedents of the persons for the purpose of handing over the rescued women to the husband or the relatives etc. Section 17 (5) of the ITPA obligates the Magistrate to 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.

27. By reading the Sections 15, 16 and 17 of the ITPA, it is manifest that the Magistrate has got ample power to pass orders in

respect of the rescued women either releasing them or for handing over them to their kith and kin or send them to rehabilitation centers or protective homes. The Section 17(4) of the ITPA empowers sending such women to protective homes for not less than one year and not more than three years to rehabilitate them without trial and conviction if it reaches to conclusion that they need care and protection subject to the opinion of panel of social workers as provided under Section 17 (5) of the ITPA. **This is a salutary provision for reformation of the women who are forced into prostitution. This requires strict enforcement as one of the welfare measure in the ITPA.**

28. **The ITPA is a Social Welfare legislation to abolish the commercial sex activity carried on by the brothel keepers by using innocent and illiterate women and also to remove the social evil for the good of the society. Therefore, the provisions of the ITPA has to be read as reasonable restrictions on the fundamental rights as per the Article 19(5) of the Constitution of India.** It is always permissible for the State to enact laws and impose reasonable restrictions on the fundamental rights in the larger interest of the society. **Where there is a conflict between the individual fundamental right and the larger interest of the society, in the interest of social economic good of the society to achieve constitutional goal the individual fundamental right has to yield to the larger interest of the society.** The provisions of the ITPA which are imposing reasonable restrictions are procedures laid down by law and the said procedure cannot be said to be unfair. Therefore, Section 17(4) of the ITPA is not unconstitutional and the same is not violative of Article 21 of the Constitution of India.

29. In the case of State of Uttar Pradesh Vs. Kaushailiya, [1964] 4 SCR 1002 and in the case of Ajay Canu Vs. Union of India, AIR

1988 SC 2027, the Hon'ble Supreme Court and in the case of Lucy S. D'Souza Vs. State of Goa, AIR 1990 Bom 355, a Division Bench of the Hon'ble Bombay High Court and in the case of N. Mohan Patnaik v. Government of A. P., 1997 (1) ALT 504 (FB) the Hon'ble Allahabad High Court have observed that public interest must yield to the individual interest. These observations can be summarized as here-in-below :-

"Where there is a conflict between the right of an individual and public interest, the former must yield to the latter.

There cannot be any fundamental right against any act aimed at doing some public good.

Where there is a conflict between the individual fundamental right and the larger interest of the society, public morality and for social good of public health of the society, the individual right yields to the larger interest of the society."

30. The word 'person' is defined under Section 3 of the General Clauses Act, 1897 as follows :-

Person shall include any company or association or body of individuals, whether incorporated or not.

Reasons as to Point Nos. 1 and 2.

31. The applicant has challenged the impugned order alleging that the Magistrate has failed to give an opportunity of hearing and to consider the Probation Officer's (for short 'PO') report and the facts which were brought to her notice by him and the victim and most importantly the fact that the applicant is the close relative of the victim. So also, the Magistrate has not appreciated the facts of the matter properly and has wrongly passed the impugned order. The impugned order under appeal may be set-aside and the appeal may be allowed.

32. Per contra, the prosecution has strongly contended that the Magistrate has passed the impugned order after giving fullest opportunity to the applicant and the victim and considering entire evidence on record. The Magistrate has appreciated the facts of the matter properly and has rightly passed the impugned order. The impugned order under appeal may be confirmed and the appeal may be dismissed.

33. A perusal of the custody application, remand papers, the documents produced on record by the prosecution, PO report and the explanation submitted by the Magistrate vide letter outward No. 93/2020, dated 04/07/2020 clarifies as follows :-

- a) That according to the applicant he is a close relative of the victim i.e. to say real brother.
- b) That the accused was running a brothel in a house and has forced the victim to work there as a prostitute.

34. I have applied my mind to the contentions of the advocate for the applicant and of the A.P.P for the prosecution and have gone through the custody application, remand papers, the documents produced on record by the prosecution, PO report and the explanation submitted by the Magistrate vide letter outward No. 93/2020, dated 04/07/2020 and the impugned order. I am unable to persuade myself with the arguments advanced on behalf of the applicant that the appeal deserves to be allowed by handing over custody of the victim to him. The reasons are :-

- ◆ That during raid effected by the I.O. on 18/01/2020 at about 21.50 hours at Jawala Bazar in the area of '*Satara mal tekdi*', the accused was found running a brothel in a

house.

- ◆ That the accused has forced the victim to work in a brothel as a prostitute and he was living on the earnings of prostitution.
- ◆ That the I.O. rescued the victim and produced her before the Magistrate on 19/01/2020.
- ◆ That at the time of producing the victim before the Magistrate the I.O. filed report praying to pass an order for her safe custody.
- ◆ That the Magistrate by passing an order on 19/01/2020 directed to keep the victim in Mata Anusaya Rajgruha, Shashkiya Mahila Aadhargruha, Shivaji Nagar, Nanded till 27/01/2020.
- ◆ That the Magistrate by passing an order on 27/01/2020 extended the order dated 19/01/2020 till filing report by the PO viz. for two weeks.
- ◆ That the Magistrate by passing an order on 10/02/2020 again extended the order dated 19/01/2020 till 17/02/2020 and passed the impugned order, finally.
- ◆ That the Magistrate has failed to consider the mandatory provision that the victim can not be kept in safe custody while inquiry is pending for a period exceeding three weeks on the date on such order i.e. to say from the order dated 19/01/2020, embodied in Section 17(3) of the ITPA.
- ◆ That the Magistrate has not followed the procedure prescribed under Section 17(2) of the ITPA, correctly.

- ◆ That though the Magistrate has mentioned in the explanation submitted vide letter outward No. 93/2020, dated 04/07/2020 that the victim was heard orally, however, there is nothing in the impugned order from which it can be gathered that the Magistrate gave an opportunity to the victim of being heard.
- ◆ That the Magistrate has failed to give specific finding about victim's wish while passing impugned order, violating mandatory provision under Section 17 of the ITPA.
- ◆ That the Magistrate though has called report of the PO in respect of age, character and antecedents of the victim and also the suitability of the applicant claiming custody and the nature of the influence of the applicant or condition of his house will have on the victim rescued, has failed to give an opportunity of being heard to the victim.
- ◆ That the Magistrate has merely/formally mentioned in the impugned order that 'I have called victim' and nothing more was done to comply with the mandatory procedure laid down under Section 17(2) of the ITPA.
- ◆ That the impugned order nowhere speaks that the Magistrate has made an inquiry as to the correctness of the information received by the I.O. under Section 16 of the ITPA.
- ◆ That the Magistrate has not considered the various

factors like age, character and antecedents of the victim.

- ◆ That the Magistrate has failed to consider the suitability of the applicant for taking charge of the victim and the nature of the influence which the conditions in his home are likely to have on the victim if she is sent to home.
- ◆ That the Magistrate has failed to clarify as to how she concluded that the victim will again involve herself in prostitution.
- ◆ That the Magistrate has not considered the aspect as to why the victim is in need of care and protection.
- ◆ That there is nothing in the impugned order from which it can be gathered that the Magistrate gave an opportunity to the victim of being heard.
- ◆ That the Magistrate has overlooked the fact that the procedure prescribed under Section 17(2) of the ITPA is mandatory and the Magistrate has no authority to depart from it.
- ◆ That the Magistrate has failed to give reasoning as to how she decided the question of welfare of the victim.
- ◆ That the Magistrate has overlooked the report of the PO and has not considered anything from his report while passing the impugned order.
- ◆ That the Magistrate while passing the impugned order has failed to consider antecedents of the victim and applicant as well as of the accused.
- ◆ That the Magistrate has failed to pass reasoned order as contemplated under Section 17 of the ITPA.

- ◆ That the impugned order is cryptic.
- ◆ That after going through the impugned order it is not possible to know on what basis the Magistrate rejected the custody application.
- ◆ That the impugned order clearly showed non-application of mind.
- ◆ That it seems that the Magistrate has considered inquiry under Section 17 of the ITPA as a formality.
- ◆ That the Magistrate has not considered the effect of same advocate appearing for the accused and the victim and has failed to follow the direction issued by the Hon'ble Bombay High Court in the case of Prerana Vs. the State of Maharashtra and Others, 2003 (2) Mh.L.J. 105 viz. (G) an advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the ITPA.
- ◆ That the offences with which the accused are charged and in which the victim is involved are increasing day by day. These offences disrupt the society as well as the victims and their family. The time has come when it is necessary to bear in mind by the Magistrate this aspect while considering the question of liberty of the victim. In view of this, sufficient opportunity was required to be given to the victim to put forward her grievance as contemplated under Section 17 of the ITPA.

35. Thus, after going through the impugned order it is crystal clear that the Magistrate has not followed the procedure prescribed

under Section 17 of the ITPA viz. an inquiry as to the correctness of the information received by the I.O. under Section 16 of the ITPA and why the victim is in need of care and protection, consideration of the various factors like age, character and antecedents of the victim and the suitability of the applicant for taking charge of the victim and the nature of the influence which the conditions in his home are likely to have on the victim if she is sent to home. The Magistrate as has not given an opportunity to the victim of being heard by following the mandatory procedure prescribed under Section 17(2) of the ITPA, I am of the firm view that a just and fair opportunity of hearing to explain the circumstances appearing against the applicant and pointedly against the victim was not provided by the Magistrate. Therefore, it is in the interest of justice to remand the custody application to the Magistrate with a direction that she shall decide the custody application afresh on its own merit after giving an opportunity of hearing to the applicant, to the victim and the prosecution keeping in mind Sections 15, 16, 17 and 17-A of the ITPA and the observations made in this order that too after giving due reasons, without being prejudiced even in the least by any of the observations and thereafter proceed in accordance with law to conclude the hearing and pronounce the order. For this view, I am buttressed by the ruling viz. Ramsingh @ Raisaheb Chananiya Guddawat V/s. The State of Maharashtra & Other, 2018 SCC OnLine Bom. 71, wherein the Hon'ble Bombay High Court has observed :-

"The procedure prescribed in Section 17(2) of the Immoral Traffic (Prevention) Act, 1956 is mandatory and no departure from it can be made. The reason being that the Court being in the position of parens patriae, can decide the question of well being and welfare of the victim only after giving sufficient opportunity

of prior hearing to the victim herself and then the Court can appropriately decide about further course of enquiry to be made by it. If the Court does not give such an opportunity first and foremost to the victim, the Court would never know as to what more is required to be enquired into, in addition to what is stipulated in sub-Section (2) of Section 17 of the Immoral Traffic (Prevention) Act, 1956.

Prior hearing of the victim before an enquiry as contemplated under this provision of law is not an empty formality. This has not been done in the present case and there is no dispute about it. Therefore, the impugned order cannot be sustained in the eye of law. A fresh enquiry strictly in accordance with the procedure prescribed under Section 17 of the Immoral Traffic (Prevention) Act, 1956 is necessary and for this purpose the matter deserves to be remanded back to the Court below."

36. The victim was produced before the Magistrate on 19/01/2020. The impugned order is dated 12/02/2020. Means as on today more than 06 months time has lapsed. Under such circumstances it is expected that after remand the Magistrate should make every possible endeavour to dispose of the custody application as early as possible, that too giving priority and for a that purpose the applicant is required to be directed to appear before the Magistrate on 20/07/2020.

37. In a nutshell, real and substantial injustice has been done due to passing of the impugned order. The Magistrate has failed to follow the mandatory procedure prescribed under Section 17 of the ITPA. This certainly has caused unfairness denying justice to the applicant as well as to the victim.

38. Consequently, I hold that the prosecution has failed to prove that the Magistrate has given an opportunity of being heard to the victim before conducting an inquiry and has not made an inquiry as prescribed under Section 17 of ITPA.

39. Accordingly, I answer point Nos. 1 and 2 in the negative.

Reasons as to Point Nos. 3 and 4.

40. In view of answer on point Nos. 1 and 2 now it is clear that the Magistrate will be required to decide the custody application afresh under Section 17 of the ITPA and thereafter to conclude the hearing and pronounce order, afresh. Therefore, it is not in the interest of justice to deal with these points, on merit.

41. Accordingly, I answer point Nos. 3 and 4 as redundant.

Reasons as to Point No. 5 and 6.

42. To sum up, the Magistrate has failed to follow the procedure prescribed under Section 17 of the ITPA by giving opportunity of hearing to the victim and has not considered the various factors like age, character and antecedents of the victim and the suitability of the applicant for taking charge of the victim and the nature of the influence which the conditions in his home are likely to have on the victim if she is sent to home. This certainly has caused prejudice to the applicant as well as to the victim, causing miscarriage of justice. The Magistrate has committed grave error while deciding custody application. The impugned order is not legal, proper and correct and requires interference.

43. Now, the victim is in the Protection Home and is in safe custody. Even though the impugned order is liable to be set aside keeping in mind the object of the ITPA i.e. to say it is a **Social Welfare**

legislation to abolish the commercial sex activity carried on by the brothel keepers by using innocent and illiterate women and also to remove the social evil for the good of the society and also the larger interest of the society, in the interest of social economic good of the society to achieve constitutional goal the individual fundamental right has to yield to the larger interest of the society, it is not in the interest and welfare of the victim to release her or to give her custody to the applicant pending fresh hearing of the custody application before the Magistrate. Therefore, it is in evident advantage to the victim to continue her detention in a Protection Home as per the impugned order passed by the Magistrate, till passing of final order on the custody application, afresh.

44. Consequently, I hold that the impugned order is not legal, proper and correct and is required to interfere with, partly.

45. Accordingly, I answer point No. 5 in the negative and point No. 6 in the affirmative, partly, as per final order.

Reasons as to Point 7.

45. In short, in view of what is discussed while answering point Nos. 1 and 2, the appeal deserves to be allowed, partly.

46. It is made clear that the observations made in this order are made for the limited purpose of this appeal only and shall not have any effect on the merits of the custody application to be decided by the Magistrate, afresh and all parties are at liberty to agitate their respective cases at the time of inquiry in the custody application on merit without being prejudiced even in the least by any of the observations made in this order.

47. Consequently, I hold that the appeal deserves to be allowed, partly.

48. Accordingly, I answer point No. 7 as appeal is allowed, partly as per final order.

49. In the result, I pass the following order :-

ORDER

1)	The appeal is allowed, partly.
2)	The order dated 12/02/2020 passed by the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II), on the custody application filed by the applicant, in the Crime Register No. 23/2020, is set aside, partly.
3)	The custody application filed by the applicant, in the Crime Register No. 23/2020 is remanded to the Court of the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II), with a direction to register it as a Criminal Miscellaneous Application and to make a fresh inquiry in accordance with Section 17 of the Immoral Traffic (Prevention) Act, 1956 and thereafter proceed in accordance with law to decide the issue of custody of the victim and pronounce the order, as early as possible, on priority basis.
4)	The victim's detention in a Protection Home as per order passed by the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II) on 12/02/2020, be continued till passing of final order on the custody application filed by the applicant, in the Crime Register No. 23/2020.
5)	The applicant is directed to appear before the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II) on 20/07/2020, failing which the order dated 12/02/2020 passed by the Judicial Magistrate, First Class, Aundha (Nagnath) (Court No. II), on the custody application filed by the applicant, in the Crime Register No. 23/2020, shall stand.

(Pronounced in open court)

Dated :- 09/07/2020.

(M.B. Lambe)
Additional Sessions Judge,
Basmathnagar.