

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.3104 OF 2009

Kanchhaman Tamang & Ors. Petitioners

Vs.

The State of Maharashtra & Ors. Respondents

Mr. M.V. Holmagi for the petitioners.

Ms. P.H. Kantharia, A.P.P. for the State.

**CORAM: MRS. RANJANA DESAI &
MRS. MRIDULA BHATKAR, JJ.**

DATED : 10TH FEBRUARY, 2010.

P.C.:-

1. The petitioners claim to be close relatives of five girls, who were rescued by the police. The petitioners have, inter alia, prayed that the respondents be directed to produce the said girls before this court so that they can be interviewed by this court. The petitioners have also

prayed that the said girls may be allowed to meet the petitioners. The petitioners have also prayed that the said girls be set free and all pending proceedings concerning the said girls be quashed.

2. At the outset, it must be stated that the petitioners 1 to 3 had preferred Criminal Writ Petition No.242 of 2009 at the Aurangabad Bench of this court. The Aurangabad Bench had directed the Child Welfare Committee (for convenience, "the CWC") to dispose of applications filed by petitioners 1 to 3 claiming custody of the said girls after hearing them if they remain present before the CWC by passing a brief reasoned order.

3. On 1/12/2009, this petition was moved before the Division Bench presided over by Justice J.N. Patel. The Division Bench directed the petitioners to place on record material to show that they are parents of the said girls. The Division Bench directed the Social Service Branch to verify the credentials of the petitioners and submit report

to this court. On 15/12/2009, affidavit filed by the Probation Officer – Rashmi Sarfare dated 15/12/2009 was taken on record. The report regarding the credentials of the petitioners was placed on record as directed by the Division Bench by learned A.P.P. The Division Bench observed that a copy of the said report cannot be handed over to learned counsel for the petitioners as it will not be in the interest of the said girls, who came to be rescued from the brothel. The Division Bench treated Report dated 4/12/2009 as confidential and directed that it may be kept in a sealed cover in the custody of the Registrar (Judicial). The Division Bench directed that if during the investigation, the culprits responsible for trafficking these girls are traced, action can be taken against them under the Prevention of Immoral Trafficking Act, 1956 (for short, "the PITA") and other penal laws. Report dated 4/12/2009 has been perused by us.

4. Mr. Holmagi made a statement that at present, he is not pressing the case of petitioners 1 to 3 as they are not

present in the court. Since petitioners 4 and 5 are present in the court, he has argued their case. Before we deal with Mr. Holmagi's contentions, we must note that on 25/1/2010, we had directed that Nikita and Salma, who are daughters of petitioners 4 and 5 respectively be produced in our court on 27/1/2010. Accordingly, they were produced. We interviewed them in our chamber. Mr. Holmagi has filed affidavit of petitioners 4 and 5 in support of his submission that the respondents are incapable of looking after the said girls because in the Home where the said girls are lodged, illegal activities go on. According to Mr. Holmagi, in the said Home, the girls are ill-treated. We shall deal with this submission at the appropriate stage.

5. Mr. Holmagi submitted that the respondents ought to have given a copy of the report to him to enable him to effectively meet the respondents' case. Mr. Holmagi submitted that the girls are major and, hence, cannot be detained by the respondents. He submitted that

petitioners 4 and 5 are father and mother of Nikita and Salma respectively; they are entitled to the custody of their major daughters; they would do everything in the best interest of the girls and they cannot be deprived of custody of their major daughters. He showed us birth certificates which according to him indicate that the girls are major. Mr. Holmagi also produced a ration card to make out a case that Nikita is shown there as an 18 year old girl and is, therefore, a major. He submitted that in the circumstances, custody be handed over to petitioners 4 and 5.

6. Before we deal with the submissions of Mr. Holmagi, it is necessary to state that the orders passed by the CWC and the medical report of the girls are served on Mr. Holmagi. So far as report dated 4/12/2009 submitted by the respondents as regards the credentials of the petitioners is concerned, we have already stated that it has been treated as confidential and it cannot be handed over to Mr. Holmagi. We have carefully perused the

record of the CWC and copies of the Home Study Reports handed over to us. The Home Study Reports inspire confidence. We have no reason to disbelieve them. The respondents have no reason to concoct them and illegally detain the girls. We are also not inclined to hand over copies of the reports to Mr. Holmagi. That, in our opinion, will not be in the interest of the girls.

7. So far as the affidavit of petitioners 4 and 5 is concerned, that does not help the petitioners to make out a case that any illegal activities are carried out in the Home where the girls are kept because the allegations made therein pertain to Children's Home at Mankhurd whereas the girls are directed to be kept in Advait Foundation, which is an after-care centre.

8. Ms. Rashmi Sarfare - the Probation Officer, Special Home at Deonar, Mumbai has stated in her affidavit that Nikita was rescued on 31/1/2008 by Ghatkopar Police Station from Hotel Airways. L.A.C. No.154/08 under the

provisions of the PITA was registered at Ghatkopar Police Station. As per the record of the Nair Hospital as on 4/2/2008, her age was 14-15 years. She was sent to Special Home for Girls, Deonar as per the order passed by the CWC on 6/2/2008. Ms. Sarfare has further stated that Salma was rescued on 16/11/2006 from the Fonseka Beach Resort at Gorai Beach, Borivali (West) by the Social Service Branch in C.R. No.00/06 under Sections 4, 5, 7(1) (b) of the PITA.

9. We have carefully read the confidential Report dated 4/12/2009 submitted to this court by the Senior Inspector of Police, Social Service Branch, Crime Branch, CID, Mumbai as directed by this court. The Home Study Reports of the girls depict a sorry state of affairs. It is not possible for us to give all the minute details as that will not be in the interest of Nikita and Salma. But, suffice it to say that Nikita comes from a poor family in Madhya Pradesh. She has been brought to Mumbai by her aunt and has been dragged in flesh trade. The Home Study

Reports reveal that her parents have no plans for her future. They appear to be incapable of taking care of her. It appears that they are dependent on her for money. If she is allowed to go back to them, she is likely to be re-trafficked. Her age as on 4/2/2008 as per the examination conducted at Nair Hospital is 14-15 years. Therefore, as of today, she is a minor.

10. Mr. Holmagi has produced a ration card where the age of Nikita is shown as 18 years. We are not inclined to accept this submission. It is a duplicate copy of a ration card. The date of issuance is not mentioned. There is nothing to indicate that this is a true copy of the original. Nikita's mother's age is shown as 31 years and Nikita's age is shown as 18 years on this ration card. The family has not drawn any ration. In the circumstances, it is not possible for us to accept this ration card as a truthful document.

11. The CWC by its order dated 30/11/2009 directed that

Nikita may be restored to Advait Foundation under Section 39(3)(f) of the Juvenile Justice (Care & Protection of Children) Act, 2000 (for short, "the said Act"). Advait Foundation has been recognized by the Government of Maharashtra under the said Act as an institution which can take care of juveniles or the children after they leave special homes, children homes and for the purpose of enabling them to lead an honest, industrious and useful life. Section 39 of the said Act provides for restoration of children. Section 39(1) states that the restoration of and protection to a child shall be the prime objective of any children's home or the shelter home. Sub-section (2) thereof states that the children's home or a shelter home, as the case may be, shall take such steps as are considered necessary for the restoration of and protection to a child deprived of his family environment temporarily or permanently where such child is under the care and protection of a children's home or a shelter home, as the case may be. Sub-section (3) thereof states that the CWC shall have the powers to restore any child in need of

care and protection to his parent, guardian, fit person or fit institution as the case may be, and give them suitable directions. Explanation thereof states that for the purposes of this section, "restoration of and protection of a child" means restoration to (a) parents; (b) adopted parents; (c) foster parents; (d) guardian; (e) fit person; or (f) fit institution.

12. In this case, the CWC has thought it fit to restore Nikita to a fit institution i.e. Advait Foundation. We are unable to find any fault with the order of the CWC. We are of the considered opinion that at this stage, restoring the custody of Nikita to her parents would be risky.

13. Mr. Holmagi submitted that Nikita and Salma be kept in a Shelter Home or an Aftercare Home in Gwalior so that their parents can meet them. Ms. Kantharia after making necessary inquiry from the concerned officers informed us that as of today, there is a Short Stay Home in Gwalior which is run by the State. But it is not exclusively for

trafficking victims. In the past, some girls have run away from this place and, therefore, it is risky to keep these girls in that Home. She submitted that they can be kept at Delhi which has two good Homes because the parents can reach Delhi in about 3 hours. In view of this statement, we asked Nikita whether she wants to go to Delhi. She stated that she does not want to go to Delhi but would like to continue to stay in Advait Foundation. We are informed that in Advait Foundation, efforts are made to give vocational training to the inmates which would help Nikita to stand on her own feet. That would prevent her from being re-trafficked. The prayer of respondent 4 that Nikita be restored to him, therefore, needs to be rejected. Nikita must continue to stay in Advait Foundation.

14. So far as Salma is concerned, the CWC in its order dated 15/5/2007 stated that the Home Inquiry was conducted in Mumbai by the Probation Officer, which indicated that the place where the family of Salma stayed

in Mumbai looked like a brothel. The Home Inquiry was conducted at Gwalior in which it transpired that Salma's family is staying in Badnapura, which is a red light area. There is a major instate and out of state trafficking happening at Gwalior and the girls are being sent to Mumbai and Nagpur in hordes for sexual exploitation. The statement of Salma showed that she was brought to Mumbai by her sister, who is also a commercial sex worker. Salma was brought to Mumbai for the purposes of prostitution. The CWC has observed that Salma is therefore a child in need of care and protection who will be in danger of sexual exploitation if her custody is granted to her parents. The CWC has directed that Salma be transferred to Advait Foundation till she attains the majority or attains the age of 20 years as per Section 44 of the said Act.

15. Section 44 of the said Act provides for after-care organization. It states that the State Government may, by rules made under this Act, provide for establishment and

recognition of after-care organizations. Second proviso to section 44 states that a juvenile or child over seventeen years of age but less than eighteen years of age would stay in the after-care organization till he attains the age of twenty years.

16. Salma was rescued on 16/11/2006. She was examined at the J.J. Hospital on 17/11/2006. Her age as on 17/11/2006 was 16-17 years. The CWC passed order on 15/5/2007. Therefore, as on the date when the CWC passed the order, Salma's age was below 18 years. Therefore, as per the second proviso to Section 44 and in the circumstances of the case, the CWC has ordered that Salma be sent to Advait Foundation and be kept there till she attains 20 years of age. Having perused the Home Study Report and the Confidential Report dated 4/12/2009, we cannot fault the order of the CWC. We are of the opinion that it will not be proper to hand over Salma to her parents. We asked Salma whether she would like to stay in Prays Special Home for Women in Delhi because

that would be closer to Gwalior. She answered in the affirmative. We, therefore, direct that Salma be sent to Prayas Special Home for Women situated at 59, Tughlakabad Institutional Area, New Delhi. Salma has been given vocational training which may help her to stand on her own feet. That may also prevent her from being re-trafficked. The prayer of petitioner 5 is, therefore, rejected.

17. While rejecting the prayers of petitioners 4 and 5, we have taken into consideration the fact that they never lodged any missing complaint in respect of their daughters. The fact that Nikita was rescued from Hotel Airways and Salma was rescued from the Fonseka Beach Resort at Gorai Beach, Borivli speaks volumes. The medical examination conducted in Mumbai needs to be given more weightage than the claims made by the petitioners about the girls' ages on the basis of documents which do not inspire confidence. After interviewing the girls, we felt that they are naive. They do not know the

ways of the world. They must be looked after, educated and counselled. We are, therefore, not inclined to hand over custody of the girls to the parents. We only direct that as per the rules, the parents be allowed to see the girls.

18. Mr. Holmagi has stated that he is not pressing the petition as regards petitioners 1, 2 and 3 because they are not present in the court today. So far as petitioners 1, 2 and 3 are concerned, we adjourn this petition to 10/3/2010. On the adjourned date, appropriate orders could be passed as regards prayer made by them.

[MRS. RANJANA DESAI, J.]

[MRS. MRIDULA BHATKAR, J.]

