

MUMBAI STUDY CIRCLE ON AHT

DISCUSSION ON BOMBAY HIGH COURT JUDGMENT ON REHABILITATION OF VICTIMS OF SEX TRAFFICKING

A discussion to analyse and interpret the judgement by J.Mridula Bhatkar which set aside the Order placing women in protective Homes for Rehabilitation, along with its impact - by organisations working in the anti trafficking sector.



CRIMINAL WRIT PETITION NO. 3951 AND 3952 OF 2018
CORAM: Mrs. Mridula Bhatkar, J.
DATED: 23rd January, 2019

Date: 21st February 2019

Time: 3:00 -5:00 PM

Venue: Save the Children India office, Bandra

Number of organizations: 07

Number of participants: 16

The writ petitions were filed by two women rescued by D.B. Marg Police Station during a raid from Grant Road, Mumbai, on 23rd May 2018. The victims were placed in a protective home - Navjeevan Mahila Vastigruha, Deonar, Mumbai. The offence was registered under Section 370(3) read with Section 34 of Indian Penal Code, 1872 and under Sections 3, 4, 5, and 6 of Immoral Traffic (Prevention) Act, 1956.

The victims were placed in the rehabilitation home on 24th May 2018 after production before the Magistrate and an Order was passed on 9th August 2018 directing them to be placed in the rehabilitation home for a period of one year. The issue in contention was that this Order was illegal since it was passed in contravention of Section 17(3) second proviso which prohibits the stay of women in intermediate custody for more than three weeks.

J. Mridula Bhatkar, while allowing the writs stated that the Order for rehabilitation should have been passed on or before 14th June 2018 (21 days since first production) and since the same wasn't complied with, the Order was set aside and the victims were slated to be 'released' on the condition that they shall furnish their correct addresses and whereabouts to the Sessions Court and Investigating officer.

The need to discuss the said judgment with other organisations working in this field was echoed in various anti-trafficking groups and forums. Thus, Prerana and Save the Children India facilitated a discussion to understand the text of the judgment, its implication on rehabilitation along with the ways and means to realize the objective of rehabilitation. It was also pertinent to understand the period mandated under law to pass the Order, the period of inquiry, etc. to help work on the cases in the future.

The document is split into two parts. The first part focuses on the issues raised by the participating organizations, and the responses that resulted from analysing, interpreting and understanding the judgment. The discussion also helped in the creation of a flowchart depicting the process followed in cases of persons rescued from sex trafficking. The second part covers some other concerns raised during the course of discussion and subsequent points to address the same.

The report is a synthesis of the discussion and does not attribute the statements to any persons who expressed them.

Section 1

1. **Issue:** Who is an “Appropriate Magistrate” in cases of the Immoral Traffic (Prevention) Act 1956 (86) (hereinafter referred to as “ITPA”)?

Response: The term “Appropriate Magistrate in any given case is the judicial body that is adjudicating/presiding over the case, having the jurisdiction in terms of territory and competency (whether the power to hear such a case is vested in them). Thus, in cases of women rescued from commercial sexual exploitation, the “Appropriate Magistrate” as mentioned in Section 15(5) will be the Metropolitan Magistrate in a metropolitan area and the Judicial Magistrate of the first class in a non-metropolitan area as stated in the Schedule of the Act.

The Schedule

Section 15(5) - Magistrate competent to exercise the powers is the Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or Sub- Divisional Magistrate depending on the metropolitan area or the district, as applicable.

2. **Issue:** Who conducts the inquiry laid down under Section 17(2) of ITPA?

Response: Response: In this sub-section, the ‘cause an inquiry to be made’ puts the onus of inquiry on the Magistrate. The Magistrate is obligated to conduct the inquiry, and s/he may direct the probation officer to inquire into the same. The word MAY while stating the provision to call for report of the Probation Officer, thereby, shows that it is not mandatory to do so. The report of the Probation Officer is often called for to assess the socio-economic background of the person, and to also ascertain the safety and security of the person, if s/he is restored to the family

Section 17(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 his 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 (20 of 1958), to inquire into the above circumstances and into the personality of the person and the prospects of his rehabilitation.

An argument made in *Sanam Vimla Joshi v/s State of Maharashtra* before the Bombay High Court was quoted with reference to the obligation and onus of responsibility to conduct the enquiry. The case law in question was interpreted to understand that the Magistrate cannot entirely put the burden of inquiry on any other person, be it the victim or the probation officer.

“...it was for the Magistrate to hold an enquiry and he committed mistake in placing the burden of proof upon the petitioners to satisfy their bonafides and antecedents of family.”

3. **Issue:** Is there a stipulated period provided under the law to complete the inquiry?

Response: The law inasmuch does not directly state a particular duration for completion of an inquiry. But the proviso laid down in Section 17(3) of ITPA prohibits the stay of a person in a protective institution beyond the period of three weeks, regardless of the stage of inquiry.

Thus, the Magistrate ought to conduct and complete the inquiry within three weeks and pass a decisive Order for rehabilitation on or before the 21st day; and even if the inquiry is not complete, the continued stay of a person will be ultra vires and beyond the scope of the law. This could be interpreted as the custody of such a person would be in violation of law beyond three weeks and an Order should be passed within the time frame.

One best practice that could be followed to ensure that such cases are brought to the notice of the Court in time- is that the protective institution could keep maintain a record of all the admissions, and keep track of the date of admission so that cases are presented before the Magistrate in timely manner.

Section 17(3) Proviso 2 :

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. **Issue:** What happens to the person (victim) pending inquiry and post inquiry?

Response: Pending inquiry, the rescued person may be placed in safe custody of a protective institution as prescribed under Section 17(2). The Proviso to Section 17(3) as mentioned above. Since it states that no person shall be kept in custody beyond three weeks, and this fact formed the basis of the present case where delay in passing the Order became the ground for release of the persons. As civil society organizations and protective institutions, we are raising a concern towards this grey area in the law- and the solution to this needs to be addressed.

Post inquiry, if the Magistrate declares the person in need of care and protection under Section 17(4)(b) and direct the person to be placed in an institution for a period of 1-3 years.

Section 17(4) :

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

- that the information received is correct; and

- that he 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 years, 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.

5. **Issue:** Thus, what is the period of stay in a protective institution for a person rescued from the sex trade?

Response: Pending inquiry, it is three weeks. Thus, the intermediate custody cannot be for more than three weeks! Post inquiry, if found to be a person in need of care and protection, it can be for a period of 1-3 years after an Order for rehabilitation is passed for the same. ²

6. **Issue:** Thus, what is the period of stay in a protective institution for a person rescued from the sex trade?

Response: Pending inquiry, it is three weeks. Thus, the intermediate custody cannot be for more than three weeks. Post inquiry, if found to be a person in need of care and protection, it can be for a period of 1-3 years after an Order for rehabilitation is passed for the same.

7. **Issue:** Is there a time period for Probation Officer to submit their report?

Response: No. But it is interpreted that the probation officer has to submit the report to the Magistrate as an aid to inquiry, and thus it has to be submitted to the Magistrate in order to help him/her with the inquiry i.e. before the expiry of three weeks. It also cannot be submitted on the 21st day as the Magistrate also requires sufficient time to peruse the report and pass the order.

1 Section 17(3) Proviso 2

2 Section 17(4)

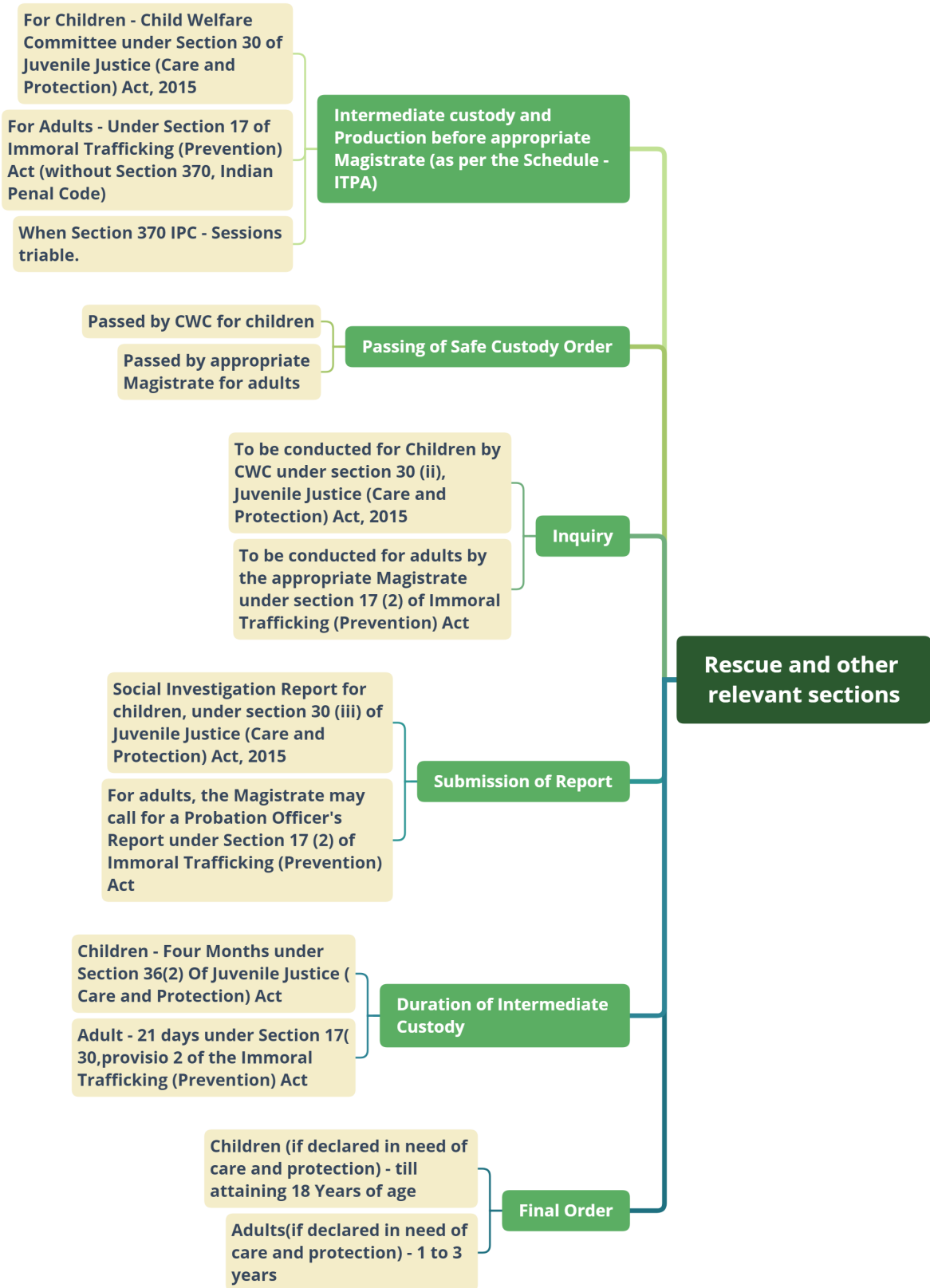
Section 17(2) :

...Magistrate may direct a probation officer appointed under the Probation of Offenders Act, 1958 (20 of 1958), to inquire into the above circumstances and into the personality of the person and the prospects of his rehabilitation.

8. **Issue:** What is the underlying issue of the Order by J. Bhatkar?

Response: The underlying issue was the delay in passing the Order for rehabilitation by the Magistrate. The conclusion was that no person can be placed in a protective institution beyond a period of three weeks, unless an Order has been passed declaring the person to be in need of care and protection after due enquiry by the Magistrate.

The following flowchart depicts the process observed after a person is rescued from commercial sexual exploitation.



Section 2

Other issues discussed :

1. The mention of 'Designated Judge under Protection of Children from Sexual Offences Act, 2012' inasmuch the issue in question was of two adult women
 - Often observed, there are cases where women are rescued from commercial sexual exploitation along with child victims, and all the victims are together produced before the Sessions Court, as minor victims of sex trafficking attract Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSOA") sections. The Sessions Court then directs the children to be presented before the Child Welfare Committee and the women to be produced before the Appropriate Magistrate. Thus, the judgment must have used the term in this context.
2. The need to ensure that even if victims rescued from sex trafficking are together presented before the Sessions Court at first, they should be presented before the appropriate judicial body as per the relevant law.
 - When adults rescued from sex trafficking are presented before the Sessions Court, it is important to inform the Special ITPA Court and follow the practice of getting a transfer of jurisdiction Order from the Sessions Court for the persons to be presented in the Special ITPA Court; instead of directly 'freeing' the persons.
 - It is also important to present children thus rescued before the Child Welfare Committee for a decision as to declaring the child to be a child in need of care and protection.
3. Reason for reduction of cases being presented before the Special ITPA Court
 - Since the addition of Section 370 of Indian Penal Code (hereinafter referred to as "IPC"), the cases become Sessions triable for bail applications, for the trial, etc. It has drastically reduced the cases that come before the Special ITPA Court, as it then only deals with Remand Orders or tries older cases where Section 370 has not been added.
4. Possible suggestions to address the above issue
 - One possible solution could be changing and increasing the cadre of the Special Court from Magisterial Court to that of Sessions Court by way of an amendment in the law.
5. When a Sessions Court reverses the judgment of Special ITPA Court declaring a person to be in need of care and protection under Section 17(4)(b) of ITPA:
 - The Magistrates presiding over Special ITPA Court receive regular trainings to identify and declare persons to be in need of care and protection after a thorough inquiry.
 - This Order is often challenged in the Sessions Court.

- Thus, there is a need to prepare Individual Care Plans on the basis of Rule 18(J) of the Maharashtra Immoral Traffic (Prevention) Rules, 2009. If the same is submitted to the Court as updates on progress of rehabilitation, it will give Session Courts some basis for upholding the Special ITPA Court Order, in case the rehabilitation plan is concrete.
 - This document to be taken to the Principal District Judge of Sessions Court and/or Registrar General of Bombay High Court to help them understand issues derived from on- ground experience.
6. The issue of challenging the decision of the specially created body is also observed in cases of minor victims rescued from commercial sexual exploitation, wherein an Order by the Child Welfare Committee to place a child in an institution after the child is declared to be a child in need of care and protection as per Section 2(14) of JJA is challenged in the Sessions Court. In these cases, the say of the CWC is also not sought to justify the decision.
- The Courts should be made aware of Support Person appointed in the case, and the police should always submit the appointment of Support Person Order to the Court, as mandated by Rule 4(9) of POCSO Rules.
 - Cases of child sexual abuse and minor victims of commercial sexual exploitation should also include sections of Juvenile Justice (Care and Protection) Act, 2015, (hereinafter referred to as “JJA”) in the FIR; as then provisions of Social Investigation and Individual Care Plan, etc., become applicable under law by default.
7. There are chances that this judgment will be cited as an example to file a similar petition challenging the placement of children in child care institutions by the Child Welfare Committee.
- To ensure that such judgments are not passed in cases of minor victims of commercial sexual exploitation as well, it was decided that the organizations present would meet in the next 4-6 weeks for the second session of the study circle, with 5 cases which fulfilled the following criteria:
 - i) Case was referred to an organization through the CWC- valid Order based on the sections filed in the case.
 - ii) Social Investigation conducted and report submitted, Individual Care Plan prepared and submitted (both of which recommended the child to be not restored to the family)
 - iii) Order of the CWC directing the child to not be restored to the family
 - iv) Appeal was made in the Sessions Court for custody and the child was restored to the family- and whether the CWC was asked for a say in the matter.

