

Budhadev Karmaskar vs The State Of West Bengal on 19 May, 2022

Bench: L. Nageswara Rao, B.R. Gavai, A.S. Bopanna

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ITEM NO.20

COURT NO.5

SECTION II-B

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal

No(s).135/2010

BUDHADEV KARMASKAR

Appellant(s)

VERSUS

THE STATE OF WEST BENGAL & ORS.

Respondent(s)

(I.A NO. 80140/2020 APPROPRIATE ORDERS/DIRECTIONS TO BE LISTED)

Date : 19-05-2022 This appeal was called on for hearing today.

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HON'BLE MR. JUSTICE A.S. BOPANNA

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UPON hearing the counsel the Court made the following
O R D E R

Human rights jurisprudence in India has acquired a constitutional status and sweep, owing to the full potential breathed by this Court into Articles 14, 19 and 21 of the Constitution of India since *Maneka Gandhi v. Union of India*¹. The constitutional regard for human decency and dignity has been explicitly incorporated into Article 21 by this Court. While expounding on the scope of the right to life under Article 21, this Court in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*² extended the meaning of the right to life beyond the protection of limb or faculty to include the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and also the right to carry on such functions and

activities as constitute the bare minimum expression 1 (1978) 1 SCC 248 2 (1981) 1 SCC 608 of the human-self. Needless to say, this basic protection of human decency and dignity extends to sex workers and their children, who, bearing the brunt of social stigma attached to their work, are removed to the fringes of the society, deprived of their right to live with dignity and opportunities to provide the same to their children.

Pursuant to an order passed by this Court on 19.07.2011, a Panel was constituted with Mr. Pradip Ghosh as the Chairman of the Panel, Mr. Jayant Bhushan, Senior counsel, Usha Multipurpose Co-operative Society through its President/Secretary, Durbar Mahila Samanwaya Committee through its President/Secretary, and Roshni through Ms. Saima Hasan.

The terms of reference made to the panel are:

- (1) Prevention of trafficking, (2) Rehabilitation of sex workers who wish to leave sex work, and (3) Conditions conducive for sex workers who wish to continue working as sex workers with dignity.

By an order dt. 26.07.2012, this Court modified the third term of reference to conditions conducive to sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution of India.

After conducting a detailed discussion with all the concerned stakeholders, the Panel submitted a comprehensive report on the terms of reference. When the matter was listed in the year 2016, this Court was informed that the recommendations made by the panel were considered by the Government of India and a draft legislation was published incorporating the recommendations made by the panel. Thereafter, periodically adjournments were taken by the Union of India on the ground that the Bill is on the anvil. As the legislation has not been made till date even though the recommendations were made by the Panel in the year 2016 and the said recommendations have to be implemented, we are exercising our powers conferred under Article 142 of the Constitution of India, to issue the following directions which will hold the field till a legislation is made by the Union of India. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.

The directions that are issued today relate only to the rehabilitation measures in respect of sex workers and other connected issues. The panel has recommended in respect of the third term of reference in the following terms:

- (i) Sex workers are entitled to equal protection of the law. Criminal law must apply equally in all cases, on the basis of 'age' and 'consent'. When it is clear that the sex worker is an adult and is participating with consent, the police must refrain from interfering or taking any criminal action.

There have been concerns that police view sex workers differently from others. When a sex worker makes a complaint of criminal/sexual/any other type of offence, the police must take it seriously

and act in accordance with law.

ii) Any sex worker who is a victim of sexual assault should be provided with all facilities available to a survivor of sexual assault, including immediate medical assistance, in accordance with Section 357C of the Code of Criminal Procedure, 1973 read with “Guidelines and Protocols: Medico-legal care for survivor/victims of sexual violence”, Ministry of Health and Family Welfare (March, 2014).

iii) Whenever there is a raid on any brothel, since voluntary sex work is not illegal and only running the brothel is unlawful, the sex workers concerned should not be arrested or penalised or harassed or victimised.

iv) The State Governments may be directed to do a survey of all ITPA Protective Homes so that cases of adult women, who are detained against their will can be reviewed and processed for release in a time-bound manner.

v) It has been noticed that the attitude of the police to sex workers is often brutal and violent. It is as if they are a class whose rights are not recognised. The police and other law enforcement agencies should be sensitised to the rights of sex workers who also enjoy all basic human rights and other rights guaranteed in the Constitution to all citizens. Police should treat all sex workers with dignity and should not abuse them, both verbally and physically, subject them to violence or coerce them into any sexual activity.

vi) The Press Council of India should be urged to issue appropriate guidelines for the media to take utmost care not to reveal the identities of sex workers, during arrest, raid and rescue operations, whether as victims or accused and not to publish or telecast any photos that would result in disclosure of such identities. Besides, the newly introduced Section 354C, IPC which makes voyeurism a criminal offence, should be strictly enforced against electronic media, in order to prohibit telecasting photos of sex workers with their clients in the garb of capturing the rescue operation.

Vii) Measures that sex workers employ for their health and safety (e.g., use of condoms, etc.) must neither be construed as offences nor seen as evidence of commission of an offence.

Viii) The Central Government and the State Governments must involve the sex workers and/or their representatives in all decision-making processes, including planning, designing and implementing any policy or programme for the sex workers or formulating any change/reform in the laws relating to sex work. This can be done, either by including them in the decision-making authorities/panel and/or by taking their views on any decision affecting them.

ix) The Central Government and the State Governments, through National Legal Services Authority, State Legal Services Authority and District Legal Services Authority, should carry out workshops for educating the sex workers about their rights vis-a-vis the legality of sex work, rights and obligations of the police and what is permitted/prohibited under the law. Sex workers can also be informed as to how they can get access to the judicial system to enforce their rights and prevent unnecessary

harassment at the hands of traffickers or police.

x) As already recommended in the 6th interim Report dated 22.03.2012, no child of a sex worker should be separated from the mother merely on the ground that she is in the sex trade. Further, if a minor is found living in a brothel or with sex workers, it should not be presumed that he/she has been trafficked. In case the sex worker claims that he/she is her son/daughter, tests can be done to determine if the claim is correct and if so, the minor should not be forcibly separated.” We have heard Mr. Jayant Sud, learned ASG who submitted that the Government of India has certain reservations in respect of the recommendations that are made by the panel except those in paras 2,4,5,6,7 and 9. The State Governments/ UTs are directed to act in strict compliance of the recommendations made in paras 2,4,5,6,7,9, in addition to the implementation of the recommendations made by the panel as mentioned above, the competent authorities under the Immoral Traffic (Prevention) Act, 1956 are directed to comply with the provisions of the Act. It need not be gainsaid that notwithstanding the profession, every individual in this country has a right to a dignified life under Article 21 of the Constitution of India. The Constitutional protection that is given to all individuals in this country shall be kept in mind by the authorities who have a duty under Immoral Traffic (Prevention) Act, 1956. The other recommendations that are made by the panel shall be taken up after summer vacation.

List this matter on 27.07.2022.

In the meanwhile, the Union of India is directed to file its response to the recommendations made by the panel within a period of six weeks from today.

Mr. Anand Grover, learned senior counsel, brought to the notice of this Court that Aadhar Cards are not being issued to sex workers as they were unable to produce proof of their residence. We had issued notice to UIDAI and sought its suggestions in respect of waiving the requirement of proof of residence for the sex workers, to enable them to get an identity by the issuance of Aadhar cards. In the affidavit filed by the UIDAI, it was proposed that sex workers who are on NACO's list and who apply for Aadhar card but cannot submit proof of residence, can be issued Aadhar Cards provided a 'proforma certificate' is submitted by a Gazetted Officer at NACO or the State Health Department certifying the particulars of the applicant. The organisations representing sex workers have made the following suggestions for the procedure to be followed by UIDAI:

3.1 The Gazetted Officer of the State Health Department, who is authorized to submit the proforma certificate for a sex worker who applies for an Aadhar Card but is unable to furnish proof of residence should be specifically designated as:- “The Project Director of the State AIDS Control Society, or her/his nominee.” 3.2 The name and designation of the Gazette Officers who will be authorised to submit the 'proforma certificate' for sex workers desirous of applying for an Aadhar Card on behalf of NACO must be publicized on its website.

3.3 NACO and the State AIDS Control Societies should publicize the procedure for sex workers who wish to apply for an Aadhar Card but who cannot furnish proof of

residence through their websites as well as through outreach under the Targetted Intervention Programmes that they implement.

3.4 The sample 'proforma certificate' submitted by UIDAI in its Additional affidavit dated 09.02.2022 in terms of the order dated 10.01.2022 as "Annexure R-1" on pages 5 and 6 of the said affidavit may be made readily available on the websites of UIDAI, NACO and State Aids Control Societies.

3.5. There should be no breach of confidentiality in the process, including assignment of any code in the Aadhar enrolment numbers that identify the applicant/holder of the card as a sex worker. 3.6 The procedure proposed by the UIDAI in its Additional affidavit dated 09.02.2011 may not be restricted to sex workers on the NACO list but also extended to those who are identified by CBOs after verification by the State Legal Services Authority or the State AIDS control Society.

This is in line with the Hon'ble Court's directions to State Governments to extend dry ration support and access to ration cards and voter ID cards to sex workers who are not on NACO's list, vide orders dated 10.01.2022 and 28.02.2022.

UIDAI has examined the suggestions and accepted that the procedure as proposed, can be followed.

In view of the aforementioned, Aadhar Cards shall be issued to sex workers on the basis of a proforma certificate which is issued by UIDAI and submitted by the Gazetted Officer at NACO or the Project Director of the State Aids Control Society, along with Aadhar enrolment form/application. There shall be no breach of confidentiality in the process, including assignment of any code in the Aadhar enrolment numbers that identify the card holder as a sex worker.

We appreciate the cooperation of Mr. Zoheb Hossain, learned counsel appearing for the UIDAI, in providing relief to sex workers who will have some identity in the society.

(B.Parvathi)
Court Master

(Anand Prakash)
Assistant Registrar