

**Brothel Customer Can Be Prosecuted U/S 7 Of Immoral Traffic (Prevention) Act:
Kerala High Court**

2022 LiveLaw (Ker) 639

**IN THE HIGH COURT OF KERALA AT ERNAKULAM
BECHU KURIAN THOMAS, J.**

Crl.M.C. No.1398 of 2013; 7 December, 2022

MATHEW versus STATE OF KERALA

Petitioner / 3rd Accused by Adv R. Santhosh Babu

Respondent / Complainant by Noushad K.A., Public Prosecutor

ORDER

Can a 'customer' in a brothel be proceeded against criminally under the Immoral Traffic (Prevention) Act, 1956 (for short, 'the Act')? The above question requires to be answered in this petition filed by the alleged customer, invoking the inherent jurisdiction of this Court under section 482 of the Code of Criminal Procedure, 1973.

2. Petitioner faces an indictment as the third accused in C.C No. 1778 of 2007, on the files of the Chief Judicial Magistrate's Court, Ernakulam. The prosecution alleges that the first accused had taken a building situated 175 metres away from the Ravipuram Temple at Ernakulam, to conduct an Ayurvedic Hospital and under the cover of the ayurvedic hospital permitted the conduct of prostitution by appointing the second accused as the supervisor and accused Nos.4 and 5 for carrying on the prostitution. It was further alleged that on 15.12.2004 at 2.45 p.m., the Investigating Officer found the third accused engaged in a sexual act with accused Nos.4 and 5 after paying Rs.500/-and thus the accused committed the offences under sections 3, 4 and 7 of the Act.

3. Petitioner alleged that he had approached the Ayurvedic Hospital for treatment of his back pain and the doctor on duty had prescribed oil massage for a period of thirty days. According to the petitioner, while he was undergoing treatment, the police officers came to the hospital and arrested him and accused Nos.4 and 5, who were the nurses employed at the hospital.

4. The statement collected by the police during investigation reveals that when the police reached the building, petitioner was found in the company of two women, who are accused 4 and 5, without any dress and engaged in a sexual act. According to the petitioner, even if, for argument's sake, the allegations are assumed to be true, still, he, being only a 'customer', cannot be proceeded against, as the statute does not contemplate prosecuting a 'customer'.

5. It is relevant to mention in this context that, after cognizance was taken, accused Nos.4 and 5 had pleaded guilty to the crime and were imposed with a fine, while, the second accused, who was alleged to be the supervisor, was discharged by the trial court. Thus the proceedings now pending before the trial court are only against the first accused and the petitioner. It is noticed from E-court's website that the first accused is absconding.

6. Sri.R.Santhosh Babu, learned counsel for the petitioner, contended that section 7 of the Act is the only section against which petitioner can be proceeded against, as sections 3 and 4 cannot apply to any person other than the owner or the person who conducts a brothel. According to the learned counsel, since petitioner's alleged conduct as a 'customer' is stated to be offensive, in the absence of the statute including a 'customer' within the scope of the Act, he cannot be roped in as an accused. The proceeding being an abuse of the process of court, the trauma of a criminal trial ought not

to hang over petitioner's head anymore, contended the learned Counsel. In support of his contention, he relied upon several decisions of various High Courts and that of this Court including the decisions in **Radhakrishnan v. State of Kerala** (2008 (2) KLT 521) and in **Vijayakumar and Others v. State of Kerala and Others** (2016 (1) KHC 698).

7. Sri.K.A.Noushad, learned Public Prosecutor, on the other hand, contended that though section 7 of the Act alone can apply to the petitioner, the provisions of the said section will apply, especially since he can be regarded as a person with whom the "prostitution was carried on". Learned Public Prosecutor further contended that in any event, the contentions raised can be decided only after taking evidence and hence interference under section 482 of the Cr.P.C is not warranted and thus sought for dismissal of this petition.

8. As mentioned at the beginning, the question raised for consideration is whether a customer in a brothel situated inside the specified area would fall within the purview of section 7 of the Act.

9. The Act was enacted pursuant to India becoming a signatory to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Initially, the Act was titled 'The Suppression of Immoral Traffic in Women and Children Act, 1956. Later in 1986, the title was changed to Immoral Traffic (Prevention) Act, 1956. One of the salient features of the Act is that prostitution *per se* is criminalized. The Act has criminalized only certain activities connected with prostitution as well as prostitution in certain specific areas.

10. In order to appreciate the above features and the rival contentions raised in this case, it is essential to extract the definition of the term 'prostitution' as defined in section 2(f) as well as section 7 of the Act, which reads as follows:

"2(f) **"prostitution"** means the sexual exploitation or abuse of persons for commercial purpose, and the expression "prostitute" shall be construed accordingly."

"7. Prostitution in or in the vicinity of public places.—(1) Any person, who carries on prostitution and the person with whom such prostitution is carried on, in any premises,—

(a) which are within the area or areas, notified under sub-section (3), or (b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.

(1A) Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.]

(2) Any person who—

(a) being the keeper of any public place knowingly permits prostitutes for purposes of their trade to resort to or remain in such place; or

(b) being the tenant, lessee, occupier or person in charge of any premises referred to in sub-section (1) knowingly permits the same or any part thereof to be used for prostitution; or

(c) being the owner, lessor or landlord, of any premises referred to in subsection (1), or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof may be used for prostitution, or is wilfully a party to such use, shall

be punishable on first conviction with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both, and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine which may extend to two hundred rupees, and if the public place or premises happen to be a hotel, the licence for carrying on the business of such hotel under any law for the time being in force shall also be liable to be suspended for a period of not less than three months but which may extend to one year:

Provided that if an offence committed under this sub-section is in respect of a child or minor in a hotel, such licence shall also be liable to be cancelled.

Explanation.—For the purposes of this sub-section, “hotel” shall have the meaning as in clause (6) of section 2 of the Hotel Receipts Tax Act, 1980 (54 of 1980).

(3) The State Government may, having regard to the kinds of persons frequenting any area or areas in the State, the nature and the density of population therein and other relevant considerations, by notification in the Official Gazette, direct that prostitution shall not be carried on in such area or areas as may be specified in the notification.

(4) Where a notification is issued under sub-section (3) in respect of any area or areas, the State Government shall define the limits of such area or areas in the notification with reasonable certainty.

(5) No such notification shall be issued so as to have effect from a date earlier than the expiry of a period of ninety days after the date on which it is issued.”

11. A glance at the various provisions of the Act reveals that section 3 applies to a person who maintains a brothel and also applies to a prostitute, while section 4 applies to a person who lives on the earnings of prostitution, and section 5 deals with procurement or inducement for the sake of prostitution. Section 6 deals with detaining a person in the premises where prostitution is carried out. The said four sections have no restriction in terms of the area where prostitution is carried on. However, Section 7 of the Act makes prostitution in certain specific areas punishable. Three different areas are contemplated under section 7 of the Act. They are (i) areas notified by the State Government under section 7(3), (ii) areas that are within a distance of two hundred metres from places of public religious worship, educational institutions, hostel, hospital, or nursing home, and (iii) public place of any kind which are notified by the Commissioner of Police or Magistrate in the manner prescribed.

12. Further, section 7(1) of the Act penalises two types of persons for indulging in prostitution within the areas specified. Those persons are (i) the person who carries on prostitution and (ii) the person with whom such prostitution is carried on. Admittedly under sections 3 and 4 of the Act, a 'customer' is not included and only a brothel owner and a person who lives on the earnings of prostitution are included. Also, the words 'the person with whom such prostitution is carried on' does not appear in any other provision of the Act other than section 7. Obviously, it indicates a different category of persons as coming within the sweep of the said provision.

13. Till the year 1987, the words used in the first part of section 7(1) were “women or girl who carries on prostitution.....”. The words 'women or girl' were replaced with the word 'person' with effect from 26-01-1987, indicating that even a man can carry on prostitution. Thus the words 'person who carries on prostitution' in section 7(1) of the Act includes the prostitute also.

14. The meaning to be ascribed to the words the “person with whom such prostitution is carried on” is significant for this case. Those words will have to be read in conjunction with the definition of the word prostitution. The term prostitution is defined as sexual

exploitation or abuse of persons for commercial purposes. Sexual exploitation cannot be done singularly. The person engaged in the act of exploitation is also a person who falls within the term 'persons with whom such prostitution is carried on'. In other words, the person who exploits or abuses the prostitute is the person with whom the prostitute carries on prostitution. Thus the act of immoral traffic cannot be perpetrated or carried on without a 'customer'. By using the words 'person with whom the prostitution is carried on' in section 7(1) of the Act, I am of the considered view that the legislature has intended the customer also to be brought within the purview of the penal provisions.

15. In this context, the purpose of the statute cannot be ignored. The Act is intended to be a deterrent against and prevent immoral traffic. In the absence of the customer falling within the penal umbrella of the statute, the objects of the enactment can never be achieved. Thus, in my considered opinion, the words 'person with whom such prostitution is carried on' as appearing in section 7(1) of the Act will include a 'customer'.

16. In order to buttress his contention that a customer is not included under the provisions of the Act, the learned counsel for the petitioner invited the attention of the court to several decisions. However, none of those decisions has dealt with the issue specifically. In the decision in **Goenka Sajan Kumar v. The State of A.P.** (MANU/AP/1052/2014), the High Court did not consider the question with regard to section 7 of the Act, while in **Korada Subrahmanyam v. The State of Andhra Pradesh** (Criminal Petition No.6182 of 2022) the Hon'ble Court merely followed **Goenka Sajan Kumar's** case to hold that a customer does not come within the purview of the Act. In the decisions in **Suseela v. State (1982 Cri.L.J. 702)**, **Babu S. v. State** (Criminal Petition No.2119 of 2022) and **Sri.Sanulla v. State of Karnataka** (Writ Petition No.54250 of 2017), the High Court of Karnataka did not specifically refer to the words used in section 7 of the Act and merely followed few of the unreported decisions of the said Court itself. Further, and more significantly, section 7 of the Act was not referred to or even charged against the petitioners therein.

17. In the decision in **Suresh Babu @ Arakkal Arjunan v. State of West Bengal & Another** (C.R.R. No.2363 of 2019), though the Calcutta High Court was dealing with the case of a customer in a brothel, the Court did not specifically consider the question except for a passing observation, that too on the basis of the case diary entries in that case that a customer cannot be convicted with the help of the materials in the CD. With respect to the learned Judges in the above decisions, I am unable to subscribe to the proposition laid down therein that a customer is not punishable under the Act.

18. However, in the decision in **Vijayakumar and Others v. State of Kerala and Others** (2016 (1) KHC 698), this Court had held that engaging in sexual activity even in a brothel is not made an offence and quashed the proceedings against a customer. As mentioned earlier, section 7 operates only within certain specified areas. Prostitution within those specified areas alone is made punishable under the said section. There is nothing to suggest that the decision in **Vijayakumar's case** related to a notified area, and therefore that decision cannot apply to the present set of facts.

19. In view of the above discussion, I am of the firm view that a 'customer' in a brothel can be proceeded against criminally under the provisions of section 7 of the Act if the other conditions of the section are satisfied.

Hence there is no merit in this petition, and it is dismissed.