

(2017) 01 AHC CK 0159

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 17687 of 2016

Asma

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 03-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 302

Citation : (2017) 98 ACrC 743 : (2017) 1 AllCrIRulings 729

Hon'ble Judges : Ramesh Sinha and Krishna Pratap Singh, JJ.

Bench : Division Bench

Advocate : Manish Tiwary, Irshad Husain and Saiyad Imran Ibrahim, Advocates, for the Petitioner; G.A., Sudhir Mehrotra, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Ramesh Sinha and Krishna Pratap Singh, JJ.—An affidavit of compliance has been filed by learned AGA on behalf of the S.S.P., Ghaziabad, today in Court, which is taken on record.

2. Heard Sri Saiyad Imran Ibrahim holding brief of Sri Manish Tiwary, learned counsel for the petitioner and Sri Ashish Pandey, learned AGA for the State and perused the record.

3. Brief facts of the case are that an FIR was lodged by respondent no.3, namely, Moin Malik against the five accused persons for the murder of his real brother, namely, Arshi Malik by making indiscriminate firing on him at 23.30 hours on 11.3.2016 which was registered as Case Crime No.426 of 2016, under Sections 147, 148, 149, 302 I.P.C., Police Station-Indrapuram, District Ghaziabad on 12.3.2016 at 00.25 hours.

4. The petitioner is not named in the FIR and she is a victim of gang rape case in which the deceased along with two accused, namely, Iqbal Malik and Arif were

involved, for which her mother had lodged an FIR against them as Case Crime No.657 of 2015, under Sections 363, 376D I.P.C. and 3/4 POCSO Act, Police Station-Dalanwala, District-2 Dehradun on 4.5.2015 at 10.40 hours with respect to an incident which had taken place on 2.5.2015 at 7 a.m.

5. The name of petitioner figured in statement under Section 161 Cr.P.C. of Smt. Shamim, wife of Akram Malik who is mother of the deceased in which allegation was made against the petitioner that she along with other accused named in the FIR has murdered her son (deceased).

6. The impugned FIR has been challenged by the petitioner in the present writ petition which came up before this Court on 4.8.2016 and this Court passed the following order on 4.8.2016, which is quoted here-in-below:

" Heard Sri Manish Tiwary, learned counsel for the petitioner and Sri A.K. Sand, learned A.G.A. for the State and perused the record.

This petition has been filed by the petitioner with a prayer to quash the F.I.R. dated 12.3.2016, registered as case crime no.426 of 2016, u/s 147, 148, 149, 302 IPC, P.S. Indrapuram, district Ghaziabad.

It has been contended by the learned counsel for the petitioner that the petitioner was gang raped by three accused persons including the deceased of the present case for which she lodged an FIR on 4.5.2015 which was registered as Case Crime No.657 of 2015, u/s 363, 376 Gha IPC and 3/4 POCSO Act, P.S. Dalanwala, district Dehradun against the accused and deceased also. Thereafter investigation was transferred to district Ghaziabad under the orders of S.S.P. Dehradun as both the prosecutrix and Co-accused persons are residing in district Ghaziabad. After investigation, final report was submitted in the said case which was challenged by the petitioner before the Apex Court under Article 32 of the Constitution of India by filing S.L.P No.154 of 2015 in which orders were passed on 26.10.2015 and 14.12.2015 respectively issuing notices to the accused persons of the said case and further protection was also granted to the petitioner who was minor girl, copy of the said order is annexed on page 96 to 100 of the present petition. Thereafter it appears that one of the accused who was an accused in the case u/s 376 IPC lodged by the petitioner was murdered for which present FIR has been lodged against five persons and the petitioner is not named in the said FIR. Her name has come in the statement of the mother of the deceased recorded u/s 161 Cr.P.C. showing the involvement of the petitioner in the crime in question. The petitioner who was the victim of rape for which she initiated proceeding against the accused persons after final report was submitted having name deliberately figured in the statement u/s 161 Cr.P.C. of the mother of the deceased just to harass the petitioner.

Notice on behalf of opp. party No.1 and 2 has been accepted by the learned AGA.

Issue notice to opp. party No.3 returnable within four weeks at the address given in the petition.

Opp. party No.3 may file counter affidavit within four weeks. Learned A.G.A. may also file counter affidavit within the same period. Rejoinder affidavit may thereafter be filed within two weeks.

List immediately after expiry of the aforesaid period.

Till the next date of listing, further proceedings of the aforesaid criminal case against the petitioner shall remain stayed.

The case of the petitioner is distinguishable from the accused persons named in the FIR. The order granting interim relief to the petitioner shall not be treated as parity by the other Co-accused persons."

7. On 7.11.2016, a supplementary affidavit was filed on behalf of the petitioner stating therein that in spite of the interim order passed in favour of petitioner on 4.8.2016 staying her arrest and proceedings in pursuance of the impugned FIR against her, she was arrested by the police and produced for remand on 15.10.2016 before the C.J.M., Ghaziabad and she was sent to judicial custody.

8. On 26.8.2016, an application along with the copy of the order dated 4.8.2016 passed by this Court was sent through registered post to the S.S.P., Ghaziabad addressed to the Station Officer of Police Station Indrapuram, District Ghaziabad, a copy of which has been annexed as Annexure-SA 1 to the supplementary affidavit.

9. Taking serious note about the said fact that in spite of the interim order dated 4.8.2016 passed by this Court, petitioner was arrested and produced by the police for remand on 15.10.2016 before the C.J.M., Ghaziabad, this Court on 7.11.2016 passed the following order which is quoted here-in-below:-

" Supplementary affidavit filed learned counsel for the petitioner today in Court, is taken on record.

Heard Sri Praveen Singh, Advocate holding brief of Sri Manish Tiwary, learned counsel for the petitioner and Sri Ashish Pandey, learned A.G.A. appearing for the State....

It is stated by learned counsel for the petitioner that in spite of order of this Court passed on 4.8.2016 staying the arrest of the petitioner in the present case, the petitioner was arrested by the police and was produced for remand on 15.10.2016 before C.J.M., Ghaziabad. He further states that an application was moved by the petitioner on 26.8.2016 at the concerned police station informing the order of this Court staying her arrest annexing the copy of the same and also a copy of the same was sent by speed post to the S.S.P., Ghaziabad, but no receiving of the order of this Court was given by the concerned police station. It has been further submitted that the order of this Court was shown to the C.J.M., Ghaziabad while the petitioner was produced for remand but that too was not considered. There is no material on record to verify the contention of the learned counsel for the petitioner.

The matter appears to be serious in nature as in spite of order of this Court the petitioner was arrested and sent to jail.

We call upon the C.J.M., Ghaziabad on the next date to inform this Court whether any order of this Court dated 4.8.2016 staying the arrest of the petitioner was produced by petitioner or by her counsel at the time of remand or not and further what steps were taken by S.S.P., Gautam Budh Nagar on the application dated 26.8.2016 sent through speed post by the petitioner.

Let the matter be listed again on 17.11.2016.

The S.S.P., Ghaziabad shall also file his personal affidavit in this regard by the next date and also about the averments made in supplementary affidavit sworn on 6.11.2016, which is on record.

A Copy of this order may also be given to learned AGA.

The Registrar General is directed to send certified copy of this order to District Judge, Ghaziabad for its compliance."

10. On 17.11.2016, an affidavit of compliance was filed by the learned AGA of S.P., Ghaziabad who was holding the charge of S.S.P., Ghaziabad as the S.S.P., Ghaziabad was stated to be on casual leave.

11. Sri Sudhir Mehrotra, learned Special Counsel appearing for the High Court as well as for C.J.M., Ghaziabad filed an affidavit on behalf of the C.J.M., Ghaziabad and this Court on 17.11.2016 passed the following order, which is quoted here-in-below:-

"Affidavit of compliance filed today by learned AGA is taken on record.

Heard Sri Irshad Husain, learned counsel for the petitioner, Sri Sudhir Mehrotra, Special Counsel for the High Court and appearing on behalf of C.J.M. Ghaziabad and Sri Ashish Pandey, learned AGA for the State.

Learned AGA states that the application along with order dated 4.8.2016 passed by this Court sent by the petitioner on 26.8.2016 through speed post which was received in the office of the S.S.P. Ghaziabad and the Constable Anil Kumar who has received the said order has sent the same to police station Sahibabad in place of Indrapuram. The said constable has been suspended from his service on 15.11.2016 by the S.S.P. Ghaziabad as there was serious lapse on his part, the said order is annexed on page 5 of the affidavit of compliance. In the said suspension order the S.S.P., Ghaziabad has ordered for inquiry which is to be concluded within seven days. Learned AGA states that he will inform the result of inquiry to this Court on the next date, hence some time may be granted to him.

Sri Sudhir Mehrotra, Special Counsel appearing on behalf of C.J.M. Ghaziabad states that the C.J.M. Ghaziabad has received the copy of the order dated 7.11.2016 yesterday i.e. 16.11.2016 in the evening through FAX from the office of District Judge, Ghaziabad. He prays that he may also be allowed a week's

time to file the explanation on behalf of C.J.M. Ghaziabad.

List the matter again on 29.11.2016.

The presence of C.J.M. Ghaziabad is hereby dispensed with unless otherwise is directed by this Court."

12. When the matter came up before this Court on 29.11.2016, an affidavit was filed on behalf of S.S.P. Ghaziabad and also on behalf of the C.J.M., Ghaziabad. It was stated by the learned AGA appearing for the State that the Enquiry Officer has concluded the enquiry against the erring officials who were found to be guilty for defiance of this Court's order dated 4.8.2016, arresting the petitioner and producing her before the C.J.M., Ghaziabad for remand who sent her to judicial custody. He further stated that as the S.S.P., Ghaziabad was on leave, hence, proposed action which was to be taken against them is still awaited and as soon as the S.S.P., Ghaziabad takes over the charge, on the basis of enquiry conducted against the erring officials, he shall take appropriate action against them for laxity on their part. The order dated 29.11.2016 passed by this Court is quoted here-in-below:-

"An affidavit of compliance filed by the learned AGA is taken on record.

An affidavit has also been filed on behalf of CJM, Ghaziabad. The same is taken on record.

Heard Sri Sayeed Imran Ibrahim, learned counsel holding brief of Sri Manish Tiwari for the petitioner, Sri Sudhir Mehrotra, learned counsel appearing for the CJM, Ghaziabad and Sri Ashish Pandey, learned AGA for the State.

Learned AGA has filed today an affidavit of compliance on behalf of the SP, Ghaziabad who is stated to be holding the charge of SSP, Ghaziabad who is stated to be on leave till 27.11.2016. He further submitted that as the SSP, Gahziabad was on leave an enquiry which was ordered against the erring official has been concluded by the Enquiry Officer but the proposed action is to be taken by the SSP, Ghaziabad who is states to be on leave till 27.11.2016.

List the matter before this Bench again on 12.12.2016 on which date the SSP, Ghaziabad shall inform this Court about the action taken against the erring officials for defiance of this Court's order dated 4.8.2016.

Sri Sudhir Mehrotra, leaned counsel appearing for the High Court has pointed out that the petitioner has been released on interim bail till 30.11.2016 by the District Judge, Ghaziabad after coming to know about the facts of this case and the order passed by this Court on 4.8.2016.

The petitioner has been released on interim bail by the District Judge, Ghaziabad after coming to know the interim order dated 4.8.2016 passed by this Court in which the arrest was stayed by this Court, even then the petitioner was produced by police personnel for remand and she was sent to jail.

As per the office report dated 4.11.2016, notice issued to respondent no.3 is still awaited.

Learned counsel for the petitioner is directed to take fresh steps for service upon the respondent no.3.

As the petitioner has already been released on interim bail, she shall remain on interim bail until further orders of this Court.

A copy of this order be given to the learned counsel for the parties for its compliance."

13. On 13.12.2016, when the matter was taken up by this Court, this Court passed the following order which is quoted here-in-below:-

"Heard learned counsel for the parties and Sri Ashish Pandey, learned AGA for the State.

Sri Sudhir Mehrotra, learned counsel for the respondent is present.

Learned AGA for the State submits that ten days time be allowed to him in order to inform this Court what action has been taken against the informant by SSP, Ghaziabad.

List the matter on 20.12.2016, as prayed."

14. Today, when the matter is listed before this Court, an affidavit of compliance has been filed by S.S.P., Ghaziabad through learned AGA today in Court, which is taken on record.

15. In the affidavit it has been stated by the S.S.P., Ghaziabad that on the basis of the enquiry conducted by Assistant Superintendent of Police/Circle Officer, Sahibabad, District Ghaziabad an enquiry report has been submitted on 22.11.2016 and thereafter on 29.11.2016 a show cause notice was issued to the erring officials, namely, Constable 1149 Anil Kumar, Constable 1548 Uday Pal, Sub Inspector Ravindra Kumar Tathi and Sub Inspector Ganesh Singh Chauhan and after considering their explanation on 14.12.2016 and 16.12.2016 respectively, S.S.P., Ghaziabad has awarded adverse entries for the year 2016 and it was also directed that the same may be entered in their character role, a copy of which has been annexed as Annexure-1 to the affidavit of compliance.

16. It appears from the enquiry report of Assistant Superintendent of Police/Circle Officer, Sahibabad, District Ghaziabad dated 22.11.2016 and the order dated 16.12.2016 passed by the S.S.P., Ghaziabad giving adverse entries to the erring officials who were found to be guilty in the enquiry, prima facie it is apparent that the petitioner was arrested by the police personnel of the concerned police station in spite of the interim order dated 4.8.2016 passed by this Court in favour of the petitioner and produced her before the C.J.M., Ghaziabad who remanded her to judicial custody though the interim order dated 4.8.2016 passed by this Court in the present petition has been sent by the

petitioner on 26.8.2016 to the Police Station Indrapuram, District Ghaziabad addressed to the Station Officer of Police Station Indrapuram, District Ghaziabad to S.S.P. Ghaziabad through registered post, which has been admitted by the police officials, as is evident from the enquiry report of Assistant Superintendent of Police/Circle Officer, Sahibabad, District Ghaziabad.

17. An affidavit on behalf of C.J.M., Ghaziabad dated 17.11.2016 has also been filed, wherein he has stated that he made all efforts to call for reports from the reader functioning in the office of the C.J.M. as well as Court Moharrir and further through the counsel for the petitioner about order dated 4.8.2016 passed by this Court, but all of them have informed that they have not received copy of the order dated 4.8.2016 passed by this Court from any corner or by means of any communication. Moreover, on 24.10.2016, a bail application was also filed on behalf of the petitioner through her counsel and in that too also the order dated 4.8.2016 was neither annexed nor brought in the knowledge of the C.J.M., hence, he passed the remand order dated 15.10.2016 due to lack of knowledge of the Court's order dated 4.8.2016 passed in the present petition.

18. After considering the affidavit filed on behalf of the C.J.M., Ghaziabad, we are of the opinion that there appears to be no fault on the part of C.J.M., Ghaziabad in sending the petitioner to judicial custody and passing the remand order dated 15.10.2016, hence, notice issued to him is hereby discharged.

19. It is made clear that the C.J.M., Ghaziabad shall remain cautious in future and shall make all possible efforts to verify such instances which comes before him as the Court hopes and trust that he being head of the Magistracy in the District Judiciary has to see that no person is put to irreparable loss and injury which cannot be compensated in terms in terms of the money, as the personal liberty of a person cannot be curtailed except by the established proposition of law.

20. So far as the adverse entries given by the S.S.P., Ghaziabad to the four police officials are concerned, the same appears to be not enough which can compensate the petitioner who being a victim of rape case has been shown to be involved in the murder of the deceased who was one of the accused who committed rape on the petitioner in which the final report was submitted by the police at Dehradun, which was challenged by the mother of the petitioner before the Apex Court in Writ Petition (Criminal) No.154 of 2015 on the ground that the accused being influential person had tried to threaten their life and the Apex Court vide order dated 26.10.2015 issued notice to the accused persons of the rape case which was lodged by the petitioner and further granted protection to the them. The order dated 26.10.2015 passed by Hon"ble Apex Court is quoted-here-in-below:

"The learned counsel for the State of U.P. submits that Final Report in FIR No.657 of 2015 has been filed before the Chief Judicial Magistrate, Ghaziabad.

The learned counsel for the petitioner submits that the petitioner and her

daughter are not safe in their place on account of threat to their lives. The Ghaziabad Police shall ensure sufficient protection to the petitioner and her family for further pursuing the matter before the Chief Judicial Magistrate, Ghaziabad.

The petitioner shall be furnished with the copy of the final Report filed by the police.

The petitioner shall furnish her address to the standing counsel for the State of U.P. so that the police can be directed to provide the protection to the petitioner and her family.

Post the matter after six weeks."

21. Thereafter, the matter was listed before Hon''ble the Apex Court on 14.12.2015 and Hon''ble the Apex Court on 14.12.2015 passing the following order, which is quoted here-in-below:-

" The learned counsel for the petitioner undertakes to furnish the address and particulars of the petitioner to the standing counsel for the State of U.P. within four weeks from today.

The learned counsel for the State of Uttrakhand shall also file counter affidavit within four weeks.

List thereafter."

22. The matter appears to be pending before the Apex Court.

23. Prima facie, it is evident that there was serious laches on the part of the police machinery of the State that in spite of the order dated 4.8.2016 passed by this Court staying the arrest of the petitioner and also further proceedings against the petitioner, the petitioner was arrested by the police and produced for remand before the C.J.M., Ghaziabad who sent her to jail. The said act and conduct of the police of the State Government is very painful and disturbing as the petitioner who is alleged to be a victim of a rape case has been sent to jail who has knocked the doors of this Court for getting justice and she appears to have falsely been implicated in the present case only on the basis of bald and vague statement made by the mother of the deceased under Section 161 Cr.P.C. showing the involvement of the petitioner in the murder of her son with the named accused persons, which cannot at this stage be enough for initiation of any proceedings against the petitioner.

24. Moreover, it has been stated by the learned AGA that the Sessions Judge, Ghaziabad after coming to know about the Court's order dated 4.8.2016 has granted interim bail to the petitioner who has been released in pursuance of the same and her interim bail has also been extended by this Court until further orders of this Court vide order dated 29.11.2016.

25. The notice was issued to the informant of the case who is respondent no.3,

namely, Moin Khan by this Court on 4.8.2016 and further fresh steps were taken by the learned counsel for the petitioner to serve notice on him.

26. As per the office report dated on 9.12.2016, notice has been issued to respondent no.3 but service of notice is still awaited.

27. In view of the foregoing discussions, we think it proper and in the interest of justice to grant compensation of Rs.3 lacs to the petitioner for the serious laxity on the part of the police machinery of the State of U.P. in defying the Court's order dated 4.8.2016 and sending the petitioner in jail, which shall be paid by the State Government to her within a period of one month from today

28. The Chief Secretary of the State of U.P. is directed to ensure the payment of the said amount of Rs. 3 lacs to the petitioner. He is further directed to file affidavit of compliance in the matter by the next date.

29. List the matter on 6th February, 2017.