

(2012) 10 KL CK 0098

In the High Court Of Kerala

Case No : Criminal M.C. No. 2799 of 2012

Oseela Abdul Khader and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 01-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 482, 82, 83
Passports Act, 1967 — Section 12(1)(b), 12(1)(b)(2), 12(2), 15

Citation : (2012) 4 KLJ 592

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : K.P. Satheesan, M.R. Jayaprasad, P. Mohandas and Anoop V. Nair, for the Appellant; K.M. Sathianatha Menon and R. Ranjith, (PP), for the Respondent

Judgement

S.S. Satheesachandran, J.—Petitioners are the accused, two in number, in a pending case on the file of the Judicial First Class Magistrate Court-V, Kozhikode. They are being prosecuted on a police report imputing the offence punishable, as stated in such report, u/s 12(1)(b)(2) of the Passports Act, 1967, for short the "Act". They have filed the above petition to quash the criminal proceedings in the case contending that no previous sanction of the Central Government has been obtained to prosecute them of the offence imputed under the Act. Notice given, the additional 3rd respondent/de facto complainant has entered appearance, and filed a counter affidavit.

2. I heard the counsel on both sides and also the learned Public prosecutor.

3. The 1st petitioner in the case is a medical practitioner employed at Dubai, and the 2nd petitioner is her father. First petitioner is also the mother of a four year old child born out of her wedlock with the 3rd respondent. Matrimonial disputes between the spouses had led to severing of their marital relationship, with the custody of the child handed over to the mother. At a time while such disputes were prevailing, the 3rd respondent filed a complaint before the Police alleging that the petitioners have obtained a duplicate passport of the child suppressing

material facts and making false representation that previous passport issued in her name had been lost. Crime registered thereof has led to indictment of the petitioners for the offence stated supra under the Act.

4. After completion of the investigation in the crime, it is seen, report was filed before the Magistrate in the month of July, 2010. Annexure-I is a copy of the agreement entered into by the 1st petitioner and the 3rd respondent, spouses, for severing their matrimonial relationship. That agreement is seen dated 18.09.2010. So, whatever be the complaint raised by the husband/3rd respondent which led to registration of a crime and later filing of a report by the Police, thereafter, on mutual terms and conditions the spouses settled their disputes and severed their relationship as husband and wife. Annexures produced in the case would also show that after effecting publication in a newspaper over the loss of the passport of her daughter, she applied for getting a duplicate passport for the infant.

5. When the above petition was presented, learned counsel for the petitioners brought to my notice that the 1st petitioner, employed in a Gulf country as a doctor, on her return and surrender before the magistrate in the case had been remanded to jail. To examine the circumstances which warranted such a drastic step against her, to incarcerate her, records of the case were called for.

6. Perusal of the records, and also the diary extract of the case, reveals that the order passed by the magistrate to remand her to prison on her surrender was not justified and it was a case of abuse of judicial authority. What is seen from the diary extract is that when summons was issued to the 1st petitioner, it was reported that she had left India. Order then passed by the Magistrate, on 18.02.2012, reads thus:

A2 present. A1 left India. Issue 82 and 83 steps and NBW against A1 to 22.05.2012.

Till the above posting date, no warrant was issued against the 1st petitioner to secure her presence. When that be so, no steps under Sections 82 and 83 of the Code of Criminal Procedure, for short, the "Code" could have been proceeded against her on the ground that she has absconded. Abscondence of a person against whom previously a warrant has been issued or concealment by such person to avoid execution of warrant, is a mandatory requirement to take steps u/s 82 of the Code. Learned magistrate then proceeded with steps for trial of the accused (A2) who had appeared keeping alive the coercive steps ordered to secure the presence of the other accused (A1) issuing a non-bailable warrant against her. She surrendered before the Magistrate on 16.08.2012 and, then, the Magistrate remanded her to District Jail.

7. Records of the case would show that on surrender the 1st petitioner moved two applications before the magistrate, one numbered as C.M.P. No. 3683 of 2012 for bail and the other, numbered as C.M.P. No. 3684 of 2012, for recalling the warrant issued against her. In the affidavit sworn to in support of the

application for recalling warrant she has asserted that summons issued by the court could not be accepted by her since she was employed abroad. With the bail application she offered two solvent sureties also, with supporting documents, for her enlargement on bail. While allowing her application for recalling the warrant the magistrate adjourned hearing of the bail application to the next day and remanded her to prison. She was granted bail only the next day imposing some conditions.

8. When the 1st petitioner surrendered before the magistrate I fail to understand why a drastic order to incarcerate her was called for. The fact that a non-bailable warrant has been issued against her in the case whatever be the justification for such an order by itself is not at all a ground to incarcerate her. The offence imputed against her u/s 12(1)(b) of the Act contemplates punishment of imprisonment for a term which may extend to two years or with fine which may extend to Rs. 5,000/- or with both. As the offence falls under Clause II of the 1st Schedule to the Code with punishment for less than three years, it is bailable. The learned magistrate evidently has not taken note that where the offence is bailable the accused if he offers to give bail has to be released pending his trial, and there is no question of the police officer or court exercising any discretion in granting bail. Only choice is of demanding security with surety. An exception thereto can be made against an accused proceeded of bailable offence only in a situation covered by sub section (2) of Section 439 of the Code. The magistrate has issued a non-bailable warrant against such accused and proceeded with coercive steps under Sections 82 and 83 of the Code against such accused, is no ground to refuse bail when the offence imputed is bailable and she is entitled to be released on bail as of right.

9. The 1st petitioner was not in the country when the summons issued was sought to be served and a non-bailable warrant was thereupon issued against her, it seems, had prompted the magistrate to remand and incarcerate her. She is an educated lady, and more so, a professional, medical practitioner; the offence imputed against her was bailable, and it had arisen out of a matrimonial dispute with her husband over the obtaining of a passport for her child; and, even the prosecution against her for such offence without sanction from the competent authority is not permissible, all the above factors speak in volumes that orders passed remanding her to jail by the magistrate, to say the least, was not sanctioned by law. A non-bailable warrant has been previously issued against the accused for his/her appearance before the court, even assuming summons issued had been accepted but not responded, which is not the case here, cannot be the basis to pass an order for incarcerating such person on his/her surrender before the court. Detention in prison whether it be for one day or more will injure the psyche of an individual, and affect his reputation and respect before the Society. A medical practitioner is a professional who renders valuable service to the society. Service of such a professional has immense value, and that being taken note of the High Court has cautioned that when doctor is summoned as a witness in any case, preference should be given for his examination to see that

he is relieved from court without delay. A special provision is also provided under Rule 12 of the Criminal Rules of Practice in issuing of summons to medical witness. When such be the concern shown by the High Court while securing the attendance of the doctor as a witness in a case, the learned magistrate flouting the statutory mandate over granting of bail has passed the order for detaining the 1st petitioner, a lady doctor, on her surrender before the court. Authority or power vested, whether it be on a person or court, should be exercised with concern and respect not only to the issues involved but to the individual as well, more so, where it involves his liberty and freedom. Nothing more need be stated than pointing out that a day of incarceration whether it be by orders of the court or not will remain a blot over the individuality of a person and it may perhaps continue as nagging pain through out life. Wound so inflicted injuring the individuality of that person will be more where it is a case of judicial excess.

10. Now, on the facts presented in the case as well it is seen that the prosecution of the accused is without sanction from the competent authority. Learned magistrate has overlooked that aspect even when he proceed framing charge against one of the accused (A2). Even the offence imputed in the report of police and charge framed by court show non-application of mind by both of them. Offences u/s 12(1)(b) and 12(2) of the Act are different, the former commission of the offence specified as such and the latter abetting such offence by another person. Leaving that also, indisputably, prosecution has not obtained sanction from the authority concerned to prosecute the petitioners for the offence imputed under the Act. Section 15 of the Act reads thus:

15. Previous sanction of Central Government necessary:- No prosecution shall be instituted against any person in respect of any offence under this Act without the previous sanction of the Central Government or such officer or authority as may be authorised by that Government by order in writing in this behalf.

When there is statutory interdiction prohibiting the prosecution of a person for any offence under the Act without the previous sanction of the Central Government or such officer or authority as may be authorised by the Government by an order in writing, prosecution of the petitioners in the above case is totally unjustified, and liable to be quashed. So much so, the petition filed for quashing the criminal proceedings against the petitioners in the case has to be allowed invoking the inherent powers of this Court.

By the interim orders passed in the petition, release of the passport of the 1st petitioner had been ordered subject to conditions including one directing deposit of the sum fixed. Now that the criminal proceedings against the petitioners are found to be unsustainable, it is ordered that whatever amount deposited by the 1st petitioner whether to enlarge her on bail or for release of the passport shall be refunded without delay. Criminal proceedings against the petitioners, accused in C.C. No. 669 of 2010 are quashed u/s 482 of the Code of Criminal Procedure.

Crl.M.C. is allowed.