

(2024) 08 KL CK 0035

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 4759 Of 2024

Sayyid Imbichi Koya Thangal @ Bayar Thangal

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 09-08-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 375, 377, 498A
Bharatiya Nyaya Sanhita, 2023 — Section 63, 69

Citation : (2024) 08 KL CK 0035

Hon'ble Judges : A. Badharudeen, J

Bench : Single Bench

Advocate : Rameez Nooh, Ronit Zachariah, Badir Sadique, Fathima K.,
P.Rafthas, K.N.Muhammed Thanveer, K.M Sathyanatha Menon K.M, M.P.Prasanth

Final Decision : Partly Allowed

Judgement

1. This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure with the following prayer:

"Call for the records pertaining to Annexure A5 complaint on the files of the Judicial First Class Magistrate Court-I, Tirur and Annexure A6 order dated 06.12.2021 in CMP No.3445/2021 taking cognizance, now pending as C.C.No.1402/2021 on the files of the Hon'ble Judicial First Class Magistrate Court-I, Tirur and quash the same with all its consequential proceedings for the ends of justice."

2. Heard the learned counsel for the petitioner, the learned counsel for the complainant/2nd respondent and the learned Public Prosecutor in detail. Perused the relevant documents.

3. Coming to the genesis of the prosecution case, crime No.144/2021 of Kadampuzha Police Station was registered on 11.06.2021, on the allegation that the accused/petitioner herein committed offences punishable under Sections 377

and 498A of IPC. Annexure A1 is the copy of FIR. Annexure A1 was investigated and thereby Annexure A2 report filed, stating that the case was false. Aggrieved by Annexure A2 final report, the complainant lodged Annexure A5 protest complaint. While proceeding with the protest complaint, the learned Magistrate recorded the statements of the complainant as well as four other witnesses. Thereafter, the learned Magistrate passed Annexure A6 order dated 06.12.2021, whereby cognizance taken for the offences punishable under Sections 377 and 498A of IPC and numbered the case as C.C.No.1402/2022.

4. It is at this juncture, the present petition has moved to quash the entire proceedings by the accused. At the outset, the learned counsel for the petitioner submitted that offence under Section 377 of IPC alleged to be committed by the accused against the defacto complainant, who is none other than his wife, is not maintainable. Therefore, cognizance taken by the learned Magistrate, as per Annexure A6 order, for the said offence is illegal. In this connection, he has placed decision of this Court in Vinod Thankarajan and Another v. State of Kerala and Others reported in 2020(1) KHC 852, wherein this Court considered whether oral sex at the instance of the male accused on a female victim would come within the purview of Section 375 of IPC with effect from 03.02.2013 and held as under:

"6. A reading of Sec.375 as per the amended process would make it clear that forcible acts of oral sex that may be done by a male accused on a female victim would come now within the ambit of Sec.375 of the IPC with effect from 03-02-2013. Therefore, where the alleged acts of oral sex are said to have been committed by a male accused on a female victim if allegedly done on or after 03-02-2013, then it would come within the ambit of Sec.375 of the IPC and not within Sec.377 of the IPC. Exception No.2 of Sec.375 stipulates that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape. Of course, the Apex Court has declared and held in the celebrated decision in Independent Thought v. Union of India & another [2017(10) SCC 800]., that the said outer age limit of 15 contained in Exception No.2 of Sec.375 of the IPC will stand enhanced as 18 years of age in view of the provisions contained in the POCSO Act and the amended provisions of the IPC and that the said judgment will be applicable only on a prospective basis from the date of the said judgment. The abovesaid dictum laid down by this Court in State of Kerala v. Kundumkara Govindan (1968 KLJ 485) has been affirmed by the Constitution Bench of the Apex Court in the celebrated case in Navtej Singh Johar & others v. Union of India [(2018) 10 SCC 1]. The upshot of the above discussion is that as the act of oral sex which is said to have been forcibly done by the male accused on the female victim on or after 03-02-2013, it will come within the ambit of Sec.375 of the IPC and at the same time if the male accused is the husband of the female victim at the time of alleged acts, then it would also get the protection under Exception No.2 of Sec.375 of the IPC. Suffice to say that even the admitted allegations in the instant crime will not constitute an offence inasmuch as it is saved by Exception No.2 of IPC."

5. Secondly, it is argued by the learned counsel for the petitioner that none of the overt acts, which would attract offence under Section 498A of IPC, would attract in the facts of this case and no allegation averred in the complaint in this regard. He also would submit that the delay in lodging the FIR also is a reason to disbelieve the entire case. It is specifically pointed out that in order to take cognizance for an offence under Section 498A of IPC, there should be exact allegations pointing out specific overt acts, mentioning date and time of the said overt acts and general and sweeping allegations would not suffice the ingredients to bring home as offence under Section 498A of IPC. In this connection, he has placed decision of the Hon'ble Apex Court in *Achin Gupta v. State of Haryana* reported in 2024(3) KHC SN 24 SC, wherein in paragraph No.18, the Apex Court held as under:

"18. The plain reading of the FIR and the charge-sheet papers indicate that the allegations levelled by the First Information are quite vague, general and sweeping, specifying no instances of criminal conduct. It is also pertinent to note that in the FIR no specific date or time of the alleged offence/offences has been disclosed. Even the police thought fit to drop the proceedings against the other members of the Appellant's family. Thus, we are of the view that the FIR lodged by Respondent No.2 was nothing but a counter-blast to the divorce petition & also the domestic violence case."

6. He also placed the decision of the Apex Court in *State of Andhra Pradesh v. M.Madhusudhan Rao*, reported in 2008 KHC 6891 SC : 2008 (15) SCC 582, with reference to paragraph No.11 to define 'cruelty' dealt under Section 498A of IPC. The same is extracted hereunder:

"11. Thus providing a new dimension to the concept of 'cruelty', clause (a) of Explanation to S.498A IPC postulates that any wilful conduct which is of such a nature as is likely to drive a woman to commit suicide would constitute 'cruelty'. Such wilful conduct, which is likely to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman would also amount to 'cruelty'. Clause (b) of the Explanation provides that harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand, would also constitute 'cruelty' for the purpose of S.498A IPC. It is plain that as per clause (b) of the Explanation, which, according to learned counsel for the State is attracted in the instant case, every harassment does not amount to 'cruelty' within the meaning of S.498A IPC. The definition stipulates that the harassment has to be with a definite object of coercing the woman or any person related to her to meet an unlawful demand. In other words, for the purpose of S.498A IPC harassment simpliciter is not 'cruelty' and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to 'cruelty' punishable under S.498A of IPC."

7. The decision of this Court in *Shyamala Bhasker v. State of Kerala* reported in 2024 KHC OnLine 429 also has been placed to buttress the said point.

8. It is also pointed out that whenever an accused comes before the Court invoking either the inherent powers under Section 482 of Cr.P.C. or extraordinary jurisdiction under Article 226 of the Constitution of India to get FIR or the criminal proceedings quashed, essentially on the ground that such proceedings are manifesting, frivolous or vexatious or instituted with ulterior motives for wrecking vengeance, then in such circumstances, the Court also has a duty to look into the FIR with care and a little more closely. The facts of the case dealt and the findings are as under:

Facts of the case

"Petitioner/accused No.2 is alleged to have committed the offence punishable under S.498A of Penal Code, 1860. Present petition has been filed under S.482 of Code of Criminal Procedure, 1973 by accused seeking to quash the final report filed against her. Petitioner contended that, only allegation against her is that petitioner became a spectator while de-facto complainant was persecuted at the instance of 1st accused/husband and she did not interfere to stop the same. Accordingly, it is submitted that case against her is liable to be quashed. The issue arose for consideration was; whether the final report filed against the petitioner is liable to be quashed."

Finding of the Court

"Though it is argued by the learned counsel for the defacto complainant and the learned Public Prosecutor that the statements attributing abetment against the mother/2nd accused available from the prosecution records alone are sufficient to go for trial and this is not a case of quashment, it could be seen that only omnibus allegations raised against the mother to the effect that the mother also abetted crime, without narrating any specific overt acts, with certainty how the mother ill-treated or persecuted the defacto complainant. The statements of the mother and father of the defacto complainant are, in fact, hearsay, as already observed. In the instant case, as I have already pointed out, only general and sweeping allegations without bringing on record any specific instance of cruelty at the instance of the mother/2nd accused is the substratum on which the mother got arraigned as an accused. Therefore, in the facts of the instant case discussed, the quashment as sought by the petitioner is liable to be allowed."

9. Accordingly, the learned counsel for the petitioner pressed for quashment of the entire proceedings.

10. While resisting the contentions raised by the learned counsel for the petitioner, the learned counsel appearing for the complainant would submit that insofar as attraction of offence under Section 377 of IPC against the husband at the instance of wife is concerned, there are divergent judgments. But the learned counsel zealously argued that going by the allegations in its entirety, with

particular reference to paragraph No.7 of the complaint, herein, not only general, sweeping and omnibus allegations raised, but also specific instances of cruelty at the instance of the accused has been narrated in the complaint when the defacto complainant expressed dissatisfaction regarding the 2nd marriage of the accused with a minor girl who studied at his institution. Accordingly, the learned counsel for the complainant would submit that insofar as offence under Section 498A of IPC is concerned, there are sufficient materials prima facie and in such a case, the matter requires trial.

11. The learned Public Prosecutor also conceded the legal position that, it is not fair to hold that unnatural offences, if any, at the instance of the husband against the wife, would bring home offence under Section 377 of IPC. However, he also shared the argument of the learned counsel for the complainant while substantiating that the offence under Section 498A of IPC is made out, prima facie, warranting trial of this matter.

12. Coming to the first question, as to whether offence under Section 377 of IPC would attract in the facts of this particular case, it has to be held that going by the definition of rape under Section 377 of IPC, as held by this Court in Vinod Thankarajan's case (supra), oral sex, if any, committed by a male accused on a female victim, after the amendment came with effect from 03.02.2013 is offence of rape. Explanation (2) of Section 375 of IPC provides that sexual intercourse or sexual acts by a man with his own wife, and the wife not being under fifteen years of age, is not rape. Here the defacto complainant is a lady attained majority. Thus it has to be held that allegation of commission of offence punishable under Section 377 of IPC by the husband against the wife would not stand in the eye of law. It is relevant to note in the new criminal procedure law, viz., Bharatiya Nyaya Sanhita (hereinafter referred to 'BNS' for short), no pari materia provisions equivalent to Section 377 of IPC is incorporated. The rationale behind this omission is not stated in BNS. But it is perceivable that almost all forms of sexual overtures/assaults against minors aged below 18 years (both male and female) are covered by the provisions of the Protection of Children from Sexual Offences Act, apart from pari materia provisions equivalent to Section 375 of IPC incorporated in Sections 63 to 69 of the BNS. Holding so, cognizance taken by the learned Magistrate for the said offence found to be unsustainable.

13. Coming to the ingredients to attract the offence under Section 498A of IPC, the same are well settled. Providing a new dimension to the concept of 'cruelty', clause (a) of Explanation to S.498A IPC postulates that any wilful conduct which is of such a nature as is likely to drive a woman to commit suicide would constitute 'cruelty'. Such wilful conduct, which is likely to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman would also amount to 'cruelty'. Clause (b) of the Explanation provides that harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable

security or is on account of failure by her or any person related to her to meet such demand, would also constitute 'cruelty' for the purpose of S.498A IPC. It is plain that as per clause (b) of the Explanation, which, according to learned counsel for the State is attracted in the instant case, every harassment does not amount to 'cruelty' within the meaning of S.498A IPC. The definition stipulates that the harassment has to be with a definite object of coercing the woman or any person related to her to meet an unlawful demand. In other words, for the purpose of S.498A IPC harassment simpliciter is not 'cruelty' and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to 'cruelty' punishable under S.498A of IPC.

14. Now the question poses for consideration is, whether only general, sweeping and omnibus allegations raised in the private complaint and in the statements of the witnesses in the instant case inasmuch as offence under Sections 498 A is concerned.

15. As pointed out by the learned counsel for the complainant and the learned Public Prosecutor, in paragraph No.7 of Annexure A5 complaint, it has been stated that the accused married a sixteen year old girl during the subsistence of the marriage of the defacto complainant and when the defacto complainant questioned the same, on 09.11.2019, the accused informed her that he happened to marry the minor girl under a particular circumstance. But when the defacto complainant demanded divorce on the said ground, she was subjected to severe tortures and she was asked to get out of the house (shared household) along with the children. Further, there is specific allegation in paragraph No.7 that during 19.01.2021, the accused herein left the house along with his articles and he did not return so far and he neglected the defacto complainant and the children, even failed to maintain them.

16. It is true that the accused herein filed W.P.(C). No.17611/2021 (B) and obtained police protection on 02.09.2021, in view of the dispute arose between the defacto complainant and the accused. At the same time, the defacto complainant filed MC No.135/2021 under the Domestic Violence Act and obtained an interim residence order so as to continue residence at the shared household when the accused threatened her to evict.

17. On critical reading of the prosecution records, prima facie, the allegations to constitute commission of offence punishable under Section 498A of IPC is made out, and the allegations are not general, sweeping and omnibus allegations. Therefore, it is held that this petition seeking quashment of the entire proceedings could not succeed in full.

In the result, this petition stands allowed in part. Criminal proceedings as against the petitioner for the offence punishable under Section 377 of IPC is quashed, while allowing trial to continue for the offence punishable under Section 498A of IPC.