

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS
&
THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN
Wednesday, the 22nd day of June 2022 / 1st Ashadha, 1944
CONTEMPT CASE(C) NO. 427 OF 2022(S)

PETITIONERS:

1. GOPIKA JAYAN, AGED 22 YEARS, D/O. JAYAKUMAR, CHAITHRAM APARTMENT, NEAR CHANGAMPUZHA PARK, EDAPPALLY, ERNAKULAM DISTRICT - 682024.
2. SUDHEEKAMAL, AGED 24 YEARS, S/O. KAMALASANAN, ADIMURIYIL HOUSE, KUMBAZHA P.O, PATHANAMTHITTA - 689653.

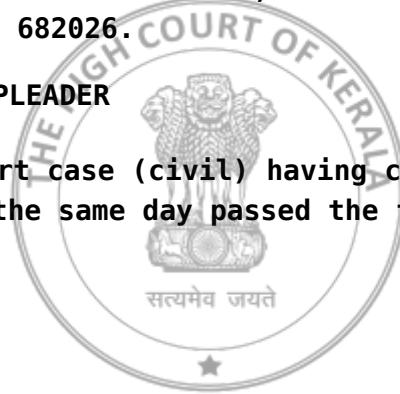
BY ADVS.M/S.U.JAYAKRISHNAN,C.C.ANOOP

RESPONDENT:

FAISAL M.A, SUB INSPECTOR OF POLICE,ELAMAKKARA POLICE STATION,
ERNAKULAM DISTRICT - 682026.

BY SENIOR GOVERNMENT PLEADER

This Contempt of court case (civil) having come up for orders on
22.06.2022, the court on the same day passed the following:



P.T.0

ALEXANDER THOMAS & SHOBA ANNAMMA EAPEN, JJ.

=====

Cont.Case No.427 of 2022

*[Arising out of violations of the guidelines in Arnesh Kumar Vs. State of Bihar
2014 (3) KLJ 330 of the Hon'ble Supreme Court]*

=====

Dated this the 22nd day of June, 2022**ORDER**

The afore captioned Contempt of Court case has been instituted alleging patent and flagrant violation of the directives and guidelines issued by the Apex Court in the Celebrated case **Arnesh Kumar Vs. State of Bihar** (2014(8) SCC 273)=2014 (3) KLJ 330.

2. The above contempt of Court case had come up for admission on 02.03.2022. Request for adjournment was made on behalf of the respondent. We did not issue notice at that stage. Request for adjournment was made on behalf of the respondent officer through the learned Senior Government Pleader for time to get instructions and to ensure that an affidavit is sworn to personally by the respondent Officer. Later the matter came up on 08.04.2022, on which day also, the plea for adjournment was made on behalf of the respondent officer stating that the case may be adjourned to enable him to personally swear to an affidavit. Still later, the matter came up after summer vacation on 30.05.2022, on which day also, the respondent officer has not even bothered to file any affidavit. On the

COC 427 of 2022

- : 2 :-

other hand, again he sought for adjournment. On that day, the Counsel for the 1st petitioner had submitted that IA No.1 of 2022 has been filed by him in the Contempt Petition producing therein, the additional documents as per Annexures 6 to 11 thereof. We had then directed that the respondent officer should also respond to the matters arising out of Annexures A6 to A11 in the affidavit to be sworn to him. The case has thereafter come up for consideration today. Even today, the respondent Officer who is the Sub-Inspector of Police, Elamakkara, Ernakulam, has not cared to file any affidavit.

3. The case of the first petitioner is that she is a 22 year old lady who is divorced and is having a ten month old baby. That she was residing with her mother, one Smt.Rekha and her mother (Smt.Rekha) is divorced from her first husband (viz, the first petitioner's father) and is now in a live in relationship with one Sri. Saji Varghese and that her mother has not legally married the said Saji Varghese. That since the first petitioner is divorced and is having a child, she was constrained to live with her mother and the abovesaid Sri.Saji Varghese in an apartment rented out by her mother. Further, Counsel for the 1st petitioner would point out that the abovesaid Saji

COC 427 of 2022

- : 3 :-

Varghese used to sexually harass the first petitioner. This was not stopped by the mother and this constrained the first petitioner to alert the Police authorities about the abovesaid unlawful conduct of Sri.Saji Varghese. Further, the first petitioner is working in a cleaning agency which is managed by the 2nd petitioner, and she sought his help to go to the Police authorities for complaining against Shri.Saji, on 21.1.2022. On being alerted that the first petitioner would give complaint against Shri Saji, the mother had immediately called the 1st petitioner by mobile and quarreled and asked her, not to come to the house. That the first petitioner had then gone over to the office of the Commissioner of Police along with the 2nd petitioner and had handed over a complaint to the Police Authorities there regarding the abovesaid harassment caused by Sri.Saji Varghese. No receipt was issued on the said complaint and it is not known whether the said complaint has been processed by the Police Authorities.

4. In view of these aspects, the first petitioner's mother was taking a highly antagonistic attitude. The first petitioner's mother was then aware that the petitioners would lodge complaint against Sri.Saji Varghese to the Police as above. Since her mother was having a

COC 427 of 2022

- : 4 :-

highly antagonistic attitude, and had asked the first petitioner, not to come to that house and in view of the harassment meted out by Shri Saji, the first petitioner was constrained to go along with the 2nd petitioner to his residence at Kollam. That thereafter, the mother gave the first information statement as per Annexure A11, only stating that the 1st petitioner, after going for work, has not returned back on 21.01.2022. No allegation was made that the 1st petitioner had deserted the child in the residence of the mother. Annexure A-11 FIS has been given by the mother on 21.01.2022 at 8 pm as can be seen from Annexure A-1 FIR. However, Annexure A-8(4), email would show clearly that the mother had sent email on the same day, ie, 21.01.2022 at 9.38 pm, addressed to the Child Welfare Committee alleging that the 1st petitioner had left her child in the residence of the mother and that the Child Welfare Committee should take action, etc. Even in Annexure A-8(4) email, no allegation has been made that the 1st petitioner had deliberately and intentionally deserted the child and such false allegations were made to silence the petitioner on the harassment issue. Later, it appears that presumably on the version given by the mother, the respondent Police

COC 427 of 2022

- : 5 :-

Officer has proceeded on the basis as if the first petitioner had intentionally deserted the child in the residence of the mother and had gone over to the residence of the 2nd petitioner and that the 2nd petitioner had abetted the first petitioner to do so etc. On this basis, false criminal proceedings were initiated by the respondent Police Officer, by later altering the offence covered by Annexure A1 FIR. That initially Annexure A1 FIR was registered under Section 57 of the Kerala Police Act, which deals with man missing report. Later, the respondent Police Officer has altered the offence as those under Section 75 read with Section 87 of the Juvenile Justice Act, in which the first petitioner and the 2nd petitioner has been arrayed as accused. The alteration of the offence was never informed to the petitioners. For the first time, the petitioners were called to the Police Station by the respondent Police Officer on 25.01.2022 and then they were arrested. They were called to the Police Station and they were not even informed of the offences involved and they were thus arrested on 25.01.2022 and later brought before the Jurisdictional Magistrate for remand. That before the Magistrate, the first petitioner has given a statement as per Annexure A6, wherein she has clearly stated that

COC 427 of 2022

- : 6 :-

she was facing series of harassment at the hands of her so called step father, Shri Saji, etc. That the Magistrate has also mechanically without any application of mind has remanded both the petitioners and they were under judicial custody for five days.

5. Section 75 of the Juvenile Justice Act deals with punishment for cruelty to child and the maximum punishment stipulated therein is for a term of imprisonment which may extend up to three years or fine of Rupees one lakh or with both. Further the proviso thereto, clearly mandates that in case it is found that such abandonment of a child by the biological parents is due to certain reasons beyond their control, it shall be presumed that such abandonment is not willful and the penal provisions of the Section shall not apply in such cases.

6. Section 87 of the Juvenile Justice Act deals with abetment and the punishment stipulates that the offender shall be punished with the punishment provided for that offence. So the maximum punishment for Section 87 of the JJ Act, read with Section 75 thereof would be as above. It is brought to our notice that going by the prescriptions in Sec.86(2) of the JJ Act, these offences under the JJ Act are cognizable.

COC 427 of 2022

- : 7 :-

However, going by the abovesaid prescriptions of the JJ Act, the abovesaid offences would come within the ambit of Section 41 A(1) of the Cr.PC. The Apex Court as per direction no.6 in paragraph 14 of the judgment rendered in **Arnesh Kumar's case (supra)** [(2014) 8 SCC 273 (SC)] has specifically directed that prior notice in terms of Section 41A of the CrPC shall be mandatorily served by the Police authorities on the accused within two weeks of the date of institution of the case which will be extended by the Superintendent of Police of the District for reasons to be recorded in writing, etc. Further it has been ordered in direction no.7 thereof that failure to comply with the directions aforesaid shall apart from rendering the Police Officer liable for departmental action, will also make him liable to face punishment for Contempt of Court to be instituted before the High Court concerned. Paragraph No.15 thereof further directs that the abovesaid directions in paragraph no.14 (supra) shall apply not only to cases under Section 498A of the IPC or Section 4 of the Dowry Prevention Act, but also in such cases, where the offence is punishable with imprisonment for a term which may extend to less than 7 years or which may extend to 7 years, with or without fine. So,

COC 427 of 2022

- : 8 :-

in the instant case, issuance of Section 41A notice was mandatory, not only as per the prescriptions of the Cr.P.C., but also in view of the abovesaid directions issued by the Apex Court in **Arnesh Kumar's case (supra)** [(2014) 8 SCC 273]. The Counsel for the petitioners would submit that at no point of time, prior to the arrest of the petitioners, has the respondent Police Officer issued the mandatory Section 41A notice to the petitioners and that the said conduct on the part of the respondent officer would amount to contumacious violation of the abovesaid guidelines, making him liable for punishment for contempt of Court. Further that they have not even stated the proper reasons for arrest of the petitioners as can be seen from Annexures A9 and A2 remand report. Further, it has also been mandatorily directed as per direction no.3 of paragraph 14 of **Arnesh Kumar's case (supra)** that all Police Officers shall forward the checklist duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding and producing the accused before the Magistrate for further detention. That, in the instant case, it is reliably learnt that no such checklist has been furnished by the respondent Police Officer. Further it is stated that in view of 1st

COC 427 of 2022

- : 9 :-

proviso to Section 75 of the JJ Act, the respondent Police Officer was bound to satisfy himself as to whether the alleged abandonment or desertion of the child was with deliberate premeditation and intention or whether it was out of reasons beyond the control of the accused. The case papers produced in this contempt petition do not show any application of mind. On the other hand, Annexure A1 FIR and Annexure A8 FIS were registered on 21.01.2022 at 8 pm on the premise of a mere man missing report in regard to the first petitioner. No allegation of deliberate abandonment or desertion of the child has been made even in Annexure A8 email. It was later that false allegations were raised that the first petitioner had deliberately abandoned the child and the respondent Police Officer has without any application of mind and without satisfying himself on the basis of any objective enquiry has sought for the arrest and remand of the petitioners. When the petitioners were called to the Police Station, they were on the bonafide belief that the FIR was registered only as a man missing report under Section 57 of the Kerala Police Act. The respondent Police Officer had never properly apprised the petitioners that the offence has been duly altered and the records do not show

COC 427 of 2022

- : 10 :-

as to how the respondent Police Officer was satisfied that the case involves deliberate and premeditated abandoning of the child in the facts and circumstances of this case. Further, neither the mother of the first petitioner, nor the Police authorities have any case that the 1st petitioner has at any prior point of time abandoned the child on any previous occasion. From the abovesaid aspects apprised to us by the learned Counsel for the petitioners, we see that a 22 year old young working lady and her colleague have been arrested and remanded at the instance of the respondent Officer. Prima facie, we would also observe in the same breadth that though, the first petitioner had given a statement before the learned Magistrate in terms of Annexure A6, the learned Magistrate has not taken into consideration those aspects regarding the harassment said to have been meted out to her by her so called step father and has not cared to make any proper satisfaction as to whether the case of deliberate and premeditated abandonment of the child is made out. This we say so in view of the first proviso to Section 75 of the JJ Act. Direction no.8 in Paragraph 14 of **Arnesh Kumar's case** (supra) would also concede that authorizing detention without recording proper reasons as aforesaid

COC 427 of 2022

- : 11 :-

by the Judicial Magistrate concerned shall also be liable for Departmental action by the appropriate High Court etc. It is by now, well established as an elementary proposition of criminal jurisprudence as can be seen from a reading of Arnesh Kumar's case (supra), **D.K.Basu Vs. State of West Bengal**, [AIR 1997 SC 610], as well as **Jogindar Kumar V. State of UP & Ors.** [(1994) 4 SCC 260], that no arrest can be made merely because it is lawful for the Police Officer to do so and the existence of the power to arrest is one thing and justification of the exercise of it is quite another and no arrest shall be made without reasonable satisfaction reached after some investigation about the genuineness and bonafides of a complaint and a reasonable belief that both as per the person's complicity and even as to the necessity to arrest that person and denial of liberty is a serious matter, etc. These aspects of the matter have also been referred to in the celebrated decisions of the Apex Court in **D.K. Basu's case** [AIR 1997 SC 610] and **Joginder Kumar Vs. State of UP** [AIR 1994 SC 1349].

7. In the instant case, the respondent Officer has not cared to respond to this case by filing his personal affidavit. We have given

COC 427 of 2022

- : 12 :-

him more than sufficient time. The learned Counsel appearing for the petitioner through afore submissions has made out a very strong prima facie case in this matter. We cannot be oblivious to the fact that most of these directions of the Apex Court in cases as in **Arnesh Kumar's case (supra)**, **D.K.Basu's case (supra)**, **Joginder's case (supra)** etc., have been more observed by the Police Authorities in the breach than its adherence. We are now concerned with the specific case of contempt instituted by a young lady aged 22 years, who has suffered arrest and remand for five days, as above. The matter cannot brook any further delay.

8. Accordingly, it is ordered that the Contempt of Court case will stand admitted. Issue notice to the respondent Officer, which shall be served on him through the Commissioner of Police, Kochi City. In case the respondent Officer is not available in the abovesaid address, then notice process shall be duly completed by affixture, in the presence of witnesses and report in that regard shall be duly given to this Court within three days.

9. The Registrar General will forthwith call for a report from the learned Judicial First Class Magistrate, who has rendered

COC 427 of 2022

- : 13 :-

Annexure A7 remand order dated 03.02.2022 on Crime No.44/2022 of Elamakkara Police Station, Ernakulam, as to how he could reach reasonable satisfaction, based on the parameters laid down by the Apex Court in the aforesaid decisions and the applicable legal principles and as to why the arrest and remand of both these accused persons was highly imperative. So also, it shall be explained as to how he has ordered that A1 (1st petitioner) is remanded to the District Jail, Kakkanad and A2 (2nd petitioner) is remanded to the Judicial custody to Borstal School, Kakkanad.

10. The Registrar General will forward a copy of the memorandum of this Contempt Petition with all the Annexures thereto as well as the additional documents to the learned Magistrate, who shall submit his explanation within two weeks from the date of receipt of a communication in that regard by the Registrar General.

11. We will not issue any further directions to the respondent officer to file any affidavit, as he has not cared to file any affidavit so far.

12. The Commissioner of Police will ascertain and apprise this Court as to whether the mother of the first petitioner is lawfully

COC 427 of 2022

- : 14 :-

divorced from her first husband and whether she is legally wedded to the above said Saji Varghese and if so, under which enactment and to furnish a copy of the marriage registration certificate. So also, the Commissioner of Police will explain to this Court as to why the first petitioner has been described as the daughter of Sri.Saji Varghese in internal page No.3 of Anx. A-1 FIR 44/2022 of Elamakkara Police Station, if as a matter of fact, he is not the legally wedded husband of the first petitioner's mother.

List the case on 07.07.2022.

Handover to both sides.



Sd/-

ALEXANDER THOMAS, JUDGE

Sd/-

SHOBA ANNAMMA EAPEN, JUDGE

Nsd
sdk+

APPENDIX OF CON.CASE(C) 427/2022

- Annexure A1** CERTIFIED COPY OF THE FIRST INFORMATION REPORT IN CRIME NO. 44/2022 OF ELAMAKKARA POLICE STATION.
- Annexure A2** CERTIFIED COPY OF THE REMAND REPORT SUBMITTED BY THE 1ST RESPONDENT BEFORE THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE -1, ALUVA.
- Annexure A6** CERTIFIED COPY OF THE STATEMENT OF GOPIKA JAYAN RECORDED BY THE HONOURABLE JUDICIAL I CLASS MAGISTRATE II ALUVA IN CRIME NO 44/2022 OF ELAMAKKARA POLICE STATION UNDATED.
- Annexure A7** CERTIFIED COPY OF THE REMAND ORDER BY THE HONOURABLE JUDICIAL FIRST CLASS MAGISTRATE-II ALUVA DATED 25.01.2022.
- Annexure A8** CERTIFIED COPIES OF THE E-MAIL COMMUNICATIONS BETWEEN THE DEFACTO COMPLAINANT TO THE CHILD WELFARE COMMITTEE ERNAKULAM DATED 23/01/2022 AND THE EMAIL FORWARDED TO THE DISTRICT CRIME BRANCH BY THE CHILD WELFARE COMMITTEE ERNAKULAM DATED 23/01/2022.
- Annexure A8(4)** CERTIFIED COPY OF THE E-MAIL COMMUNICATION BETWEEN THE DEFACTO COMPLAINANT TO THE CHILD WELFARE COMMITTEE ERNAKULAM DATED 21/01/2022.
- Annexure A9** CERTIFIED COPY OF THE ARREST MEMO OF THE 2ND PETITIONER/2ND ACCUSED
- Annexure A10** A TRUE COPY OF THE REPORT FILED BY THE RESPONDENT BEFORE THE JFCM II,ALUVA IN Cr.44/2022U./S 57 OF THE KP ACT DATED 25.01.2022.
- Annexure A11** CERTIFIED COPY OF THE FIS IN Cr.No.44/22 dated 21/1/2022.

