

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 3RD DAY OF FEBRUARY 2015/14TH MAGHA, 1936

Crl.Rev.Pet.No. 1029 of 2014 ()

**AGAINST THE COMMON ORDER DATED 10-3-2014 IN RC NO. 7/2013 &
CRL.M.P. NO. 1559/2013 OF ADDL. CHIEF JUDICIAL MAGISTRATE COURT (EO),
ERNAKULAM
CRIME NO. 1731/2012 OF ERNAKULAM TOWN NORTH POLICE STATION, ERNAKULAM**

PETITIONER/DE- FACTO COMPLAINANT :

**AMITHA RAZZAK,
70/1841 (68/1406), A.C.S. ROAD,
KALOOR P.O., ERNAKULAM -682 017.**

**BY SENIOR ADVOCATE SRI.M.K.DAMODARAN
BY ADVS.SRI.ALAN PAPALI
SRI.GILBERT GEORGE CORREYA
SRI.NISHIL.P.S.
SRI.J.VIMAL**

RESPONDENT/STATE :

**STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM, KOCHI- 682 031.**

***ADDL. R2 & R3 IMPEADED**

***ADDL.R2. KAMARUDEEN MUHAMMED SHAFI
THEKKEDATHU VEEDU, PALACKAL
THEVALAKKARA VILLAGE
THEVALAKKARA P.O., PIN – 690 524
KOLLAM DISTRICT
E-mail>muhammed.shafi@hp.com<**

...2/-

***ADDL.R3. K. SABEENA BEEVI
W/O. A.S. NAUSHAD
A.M.C. NO. 17/1178, ATTINGAL P.O.,
PIN – 695 101
THIRUANANTHAPURAM DIST.**

***ARE IMPEADED AS ADDITIONAL R2 AND ADDITIONAL R3 AS PER ORDER
DATED 20.8.14 IN CRL.M.A. NO. 4649/2014 IN CRL.R.P. NO. 1029/2014**

**R1 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS
R2 & R3 BY ADVS. SRI.GEO PAUL
SRI.SANU MATHEW
SRI.C.R.PRAMOD
SRI.S.ASHOK KUMAR.**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 03-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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...3/-

APPENDIX

PETITIONERS' ANNEXURES :

- ANNEXURE I : COPY OF THE ORDER DATED 3.9.2013 IN CRL.R.P. NO. 1157 OF 2013 OF THIS HON'BLE COURT.**
- ANNEXURE II COPY OF THE OBJECTIONS DATED 23.11.2013 FILED BY THE PETITIONER BEFORE THE ADDITIONAL CHIEF JUDICIAL MAGISTRATE (EO) COURT, ERNAKULAM.**
- ANNEXURE III COPY OF THE PROCEEDINGS OF THE ADDITIONAL CHIEF JUDICIAL MAGISTRATE COURT (EO), ERNAKULAM IN C.M.P NO. 1559/2013 IN R.C. NO. 7/2013 FROM 6.6.2013 TO 4.3.2014.**
- ANNEXURE IV COPY OF THE RELEVANT PAGES OF THE PASSPORT OF KAMARUDEEN MOHAMMED SHAFI DATED 21.3.2006.**

RESPONDENT'S ANNEXURES : NIL

//TRUE COPY//

P.S. TO JUDGE

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[CR]

B. KEMAL PASHA, J.

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Crl.R.P. No.1029 of 2014
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Dated this the 3rd day of February, 2015

ORDER

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Dissatisfied with the acceptance of a final report filed by the investigating officer whereby the investigating officer has chosen to refer the case against the husband and sister-in-law of the petitioner, the petitioner has come up in revision.

2. Crime No.1731/2012 of Ernakulam Town North Police Station was registered against the husband of the petitioner and his sister alleging an offence punishable under Section 498A read with Section 34 IPC. The allegations in short is that the petitioner was given in marriage to her husband and thereafter, she was subjected

to severe cruelty and torture by her husband and his sister. It is alleged that cruelty was exercised on her by the sister-in-law by taking away all her gold ornaments and money, which were given by her parents at the time of her marriage. It is specifically alleged that thereafter, the petitioner was taken to London by her husband, where also she was subjected to severe cruelty at the instigation of the sister of her husband. It is alleged that there were specific instances of cruelty as he has not cared to take the food prepared by the petitioner and he was not at all considering the petitioner as his wife. She was neglected to the core. On account of such tortures and harassment, it is alleged that she has become mentally depressed, for which she had to undergo medical treatment. She had to approach two doctors under whom she had taken medical care. It is alleged that her husband had not cared to provide necessary medical care to the petitioner even though she was suffering from severe mental depression on account of

the willful conduct of her husband.

3. It seems that a so-called investigation was conducted by the investigating officer and at the first instance, a refer report was readily filed, which was accepted by the court below. Aggrieved by the same, she approached this Court in revision through Crl.R.P. No.1157/2013. This Court set aside the acceptance of the refer report by the learned Magistrate and remitted the same to the court below for fresh consideration in accordance with law, after hearing the petitioner. It seems that once again, the learned Magistrate has chosen to accept the refer report in the matter through the impugned order. Aggrieved by the same, the petitioner has come up in revision.

4. Heard. The learned Senior Counsel Sri.M.K. Damodaran for the petitioner has pointed out that the learned Magistrate has grossly erred in relying on the statement allegedly recorded by the investigating officer from the husband of the petitioner. The learned counsel for

the 2nd and 3rd respondents, Sri. Geo Paul, vehemently canvased an argument that there is absolutely nothing to interfere with the impugned order passed by the court below and that the learned Magistrate has passed an order on merits only because of the fact that the court below was invited to make such observations and findings through a written objection filed on behalf of the petitioner. A further argument has also been canvased that the only remedy available to the defacto complainant is to file a protest complaint, if she is not satisfied with the refer report filed by the police.

5. According to the learned Senior Counsel, in fact, it seems that no such statement of the husband could have been recorded at all. There is no case that the investigating officer has visited London as the husband of the petitioner was in London during the period in question. It seems that the learned Magistrate has referred the certificates issued by the two doctors, which evidently make it clear that the

mental depression suffered by the petitioner is as a result of the harassment from the part of her husband. The learned Magistrate has simply brushed aside those certificates issued by the doctors by stating that those are only opinion evidence. I do not find any better evidence in the matter on the side of the husband of the petitioner in order to discard the opinion evidence expressed by the medical experts in the matter. It was not the stage for entering such findings.

6. Over and above it, the learned Magistrate has taken the view that the father of the petitioner is a practising lawyer and, therefore, the complaint might have been prepared by the father of the petitioner and even then, there is no specific allegations to bring out 'cruelty' within the meaning of Section 498A IPC in the complaint. Those observations are quite unfounded. On going through the definition of 'cruelty' within the meaning of Section 498A IPC, it can be seen that if there is any allegation of willful conduct so as to direct the woman to commit suicide or to

result in danger or injury to her life or health including mental health, it can constitute 'cruelty'. The court below has found that there is no specific allegation of cruelty. It is specifically alleged that the willful conduct of the husband of the petitioner had caused mental depression to the petitioner. Evidently, it seems that there is concrete allegation of cruelty within the meaning of Section 498A IPC.

7. Over and above it, on the part of the sister-in-law of the petitioner, specific allegation of cruelty is there as she had allegedly demanded the petitioner to sell out her rubber estate and to handover the consideration to the sister-in-law. It is specifically alleged that as the petitioner was not ready and willing to part with her property and give money as demanded by the sister-in-law, she entertained enmity towards her and she was canvassing harassment and torture from the husband of the petitioner. Matters being so, there are concrete allegations of cruelty in the matter.

8. It seems that the investigating officer has simply

brushed aside the findings entered by the doctors and also the statements furnished by the father and relatives of the petitioner in the matter. It seems that all the findings entered by the investigating officer for referring the matter and the impugned order by which the court below has chosen to accept the refer report are erroneous.

9. Whatever it is, it seems that the learned Magistrate has gone beyond the jurisdiction conferred on him only when he was expected to consider whether there were materials for making out a *prima facie* case or not. It seems that he has gone beyond the contours of the criminal jurisprudence when he had acted just as sitting to decide on a question of conviction or acquittal, which was not expected from the court below at that point of time. It seems that most of the matters were considered on merits by the court below on the basis of the available records. Such a decision could not have been entered on merits, especially when the parties were not called upon to enter on their

evidence.

10. Regarding the next argument that the only remedy available to the petitioner is to prefer a protest complaint, I am of the view that it is also one of the courses open to the defacto complainant, and it is not the only remedy available to her. It cannot be said that the defacto complainant cannot point out the mistakes crept into the investigation conducted by the police. Therefore, such a course also is open to the defacto complainant.

11. In fact, the accused should not have been called upon for a hearing at all in the matter. The accused has no right to be heard at that stage. It is trite that at the stage of invoking the power under Section 173(8) Cr.P.C, the accused has no right to be heard in the matter. Here, the position is worse than that.

12. It seems that the court below has considered the matter as if the court below was weighing the evidence for considering whether it is a fit case for acquittal. Gross

illegality, irregularity and impropriety have been crept in the impugned order. Matters being so, the impugned order is liable to be set aside.

In the result, this Crl.R.P. is allowed and the impugned order is set aside. The matter is remitted to the court below for fresh disposal in accordance with law. The court below shall hear the petitioner and peruse the evidence collected by the investigating officer, if any. If it is found that there is lack of proper investigation, the learned Magistrate shall direct the investigating officer to conduct further investigation under Section 173(8) Cr.P.C. in the matter. The petitioner shall appear before the court below on 19.02.2015.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/03/02

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PA to Judge