$~7 & 8 *(common order)*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 26th February, 2019

\+ **CRL. M.C. 658/2016 & Crl.M.A. 2728/2016, 8038/2017**

NITIN JAIN ..... Petitioner

Through: Mr. Randhir Jain, Adv.

versus

GOVT. FO NCT DELHI & ANR. ..... Respondents

Through: Mr. Sanjeev Sabharwal, APP for the State with SI Bikramjeet, PS Dabri.

\+ **CRL. M.C. 1968/2017**

ANIL KUMAR JAIN ..... Petitioner

Through: Mr. Randhir Jain, Adv.

versus

GOVT. FO NCT DELHI & ANR. ..... Respondents

Through: Mr. Sanjeev Sabharwal, APP for the State with SI Bikramjeet, PS Dabri.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

<u>ORDER (ORAL)</u>

1. Both these petitions filed under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C) arise out of a criminal case relating to first information report (FIR) no. 55/2011 of police station Dabri, registered at the instance of the second respondent. Since they relate to facts which are substantially common and have been pressed through the same advocate for each of these petitioners, his

submissions being overlapping, they have been heard together and are being decided through this common order.

2. It may be mentioned at the outset that second respondent Vandana Jain was married to Nitin Jain, petitioner in Crl.M.C. 658/2016 he, in turn, being the son of Anil Kumar Jain, petitioner in Crl.M.C. 1968/2017, the marriage having been solemnised at Delhi on 03.03.2009, the said couple having lived here for some time before moving to Nigeria. There is some material available to show that the couple had returned to India in August, 2009 and that, on or about 15.09.2009, petitioner Nitin Jain took second respondent Vandana Jain (complainant) to her parental home in Janak Puri, Delhi leaving her there, he himself returning to Nigeria. It appears that, on 30.11.2009, Nitin Jain served a legal notice on Vandana Jain through his counsel in Nigeria calling her upon to join his company, accusing her, *inter alia*, of having abandoned the matrimonial home, she sending reply, through her counsel, on 15.01.2010, refuting the allegation of desertion, and instead accusing Nitin Jain and his family of various acts of commission or omission, including desertion and of having subjected her to cruelty (physical and mental).

3. Vandana Jain made a complaint to crime against women cell (CAW) on 19.01.2010, which after inquiry was converted into FIR no. 55/2011 on 12.02.2011, the investigation taken up into acts of commission or omission constituting offences punishable under Sections 498A/406/34 of Indian Penal Code, 1860 (IPC). It culminated in report (charge-sheet) under section 173 Cr.P.C. being submitted through the Assistant Commissioner of Police (ACP) on

06.05.2013 by which prosecution was sought against Nitin Jain for offences under Sections 498A/406 IPC, the names of others, including his parents (Anil Kumar Jain & Shasi Jain) having been shown in column no.12 (persons not sent up for prosecution). The Metropolitan Magistrate before whom the charge-sheet was presented took cognizance, by order dated 13.09.2013, of offences under Sections 498A/406/34 IPC observing that specific allegations had been also made against Anil Kumar Jain and Shasi Jain, summoning both of them along with Nitin Jain as accused.

4. Earlier, during the course of investigation Anil Kumar Jain, Shasi Jain and one Neha Jain (who was not summoned) had moved this Court for anticipatory bail by application (no. 923/2011). The said application came up before a learned single judge of this court on 08.07.2011 when the submissions of both sides were noted with directions given as under:-

> *"1.After hearing submissions, the complainant Ms. Vandana Jain, who is present in Court along with her counsel, has pointed out that she is prepared to settle all the matrimonial disputes and part company from the petitioner no.1 in case an amount of Rs. 15 lacs is paid to her towards full and final settlement of her entire claim of permanent alimony, stridhan etc., as was agreed before the learned Mediator in District Court, Dwarka.*
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> *2. The learned counsel for the petitioner has very fairly stated that he has no reservation about accepting the aforesaid proposal.*
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> *3. In view of the statement made by the complainant and her counsel as well as by the learned counsel for the petitioner, list the matter on 14.7.2011.*

> *4. The petitioner is directed to bring the drafts for a sum of Rs. 15 lacs in the name of the complainant on the next date."*

5. The application, in which petitioner Anil Kumar Jain was one of the petitioners, seeking release on bail came up for hearing on 14.07.2011. The submissions made by both sides were noted by the court with directions to the following effect:-

> *1. The learned counsel for the petitioners has shown the Court three drafts for a sum of Rs.5 lacs each in the name of the complainant for the purpose of final settlement as was agreed between the parties on the last date of hearing. The complainant who is appearing in person has stated that she has spoken to her husband who has no objection in reconciling with her, so as to avoid break down of the matrimonial home.*
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> *2. It has been stated by the complainant that her husband has stated that he will not be able to come to India unless and until he is asked by his parents to do so and therefore, a direction be given to Mr.Nitin Jain, husband to come to India to sort out the matter once and for all, as to whether he would like to reconcile or part company from the complainant.*
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> *3. The learned counsel for the petitioners has contested the claim of the complainant that the husband is under the influence of his parents and therefore, does not want to come to India. It has been stated by him on instructions that if the husband wants to reconcile with the complainant, they have absolutely no objection but they certainly cannot exercise an influence over the husband to come to India.*
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> *4. In view of the aforesaid facts and circumstances of the case, I feel that an opportunity be given to the parties to have a relook on the entire matter and make sincere efforts to save the matrimonial home.*
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> *5. In the meantime, the petitioners shall deposit the aforesaid amount of Rs.15 lacs with the Registrar General*

of this Court within a week, which shall be kept in a fixed deposit for a period of one year and shall be subject to the orders passed in this petition or alternatively by the Trial Court in the charge sheet which may ultimately be filed in respect of the FIR in question.

6. The petitioners may not be arrested in the meantime, however, they shall join the investigation as and when required by the IO.

7. List on 22.9.2011".

6. It is clear from the submissions at the hearing, as indeed the observations recorded in the above quoted two orders, as also the subsequent orders on bail application no. 923/2011, that Nitin Jain failed to return from Nigeria even though he was fully aware of the ongoing investigation into the above-mentioned FIR, this being re-inforced by his communication dated 17.02.2010 from Nigeria addressed to Inspector CAW Cell, a copy whereof has been filed as Annexure 'D' (page 158 of the paper book of the first captioned petition).

7. The bail application no. 923/2011 was disposed of by this Court on 22.09.2011, the order reading thus:-

"1. This is an application for grant of anticipatory bail filed by the parent-in-laws and sister-in-law of the complainant in respect of FIR no. 55/2011 under Section 498/406/34 IPC registered with P.S. Dabri in respect of which investigation is still inconclusive.

2. The case of the petitioners is that the husband of the complainant is staying in Nigeria and they have no control over him. So far as the present petitioners are concerned, to show their bonafide they have deposited a sum of Rs. 15 lacs without admitting their liability to pay any amount and without prejudice to their rights and contentions.

> *3. I have heard the learned APP as well as the complainant, who is present in Court. Having regard to the facts of the case, I feel that anticipatory bail may be granted to the petitioners. Accordingly, the petitioners shall, in the event of their arrest, be enlarged on anticipatory bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of IO/SHO.*
> *4. The petitioners shall not leave the country without the permission of the trial court and they shall surrender their passport to the Investigating Officer. The petitioners shall not change their address without informing the Court and the IO shall not tamper with the evidence. The amount which has been deposited by the petitioners shall be released to the complainant on her furnishing an undertaking before the Registrar of this Court that she will be bound by such terms and conditions which ultimately trial court may pass in respect of the said account.*
> *5. The complainant has stated that her original passport is with the petitioners. The learned counsel for the petitioners has denied that the original passport of the complainant is with them. The petitioners shall file their affidavit in the Court stating that the passport of the complainant is not with them, within a period of ten days from today.*
> *6. On the affidavit being filed, the complainant shall be at liberty to apply for a duplicate/fresh passport to the competent authority.*
> *7. With these directions, the petition is allowed.*
> *8. Dasti."*

8. An undertaking in terms of the above-mentioned order was submitted by the complainant.

9. Subsequently the complainant approached this Court by Crl.M.A. 2816/2012 in the context of bail application no. 923/2011, her grievance being with respect to non-release of the interest that was accruing on the fixed deposit receipt of Rs.15 lakhs. The said

application was resisted by the petitioner Anil Kumar Jain. The Court, however, found no substance in the opposition and by order dated 25.04.2012 allowed the interest amount to be released to the complainant observing thus:-

> *"1. This is an application filed by the complainant for release of the interest amount. On the last date of hearing, notice was issued to the non applicant through counsel. The non applicant has not filed any reply to the application. However, a request for release of the interest amount by the complainant has been contested.*
> *2. It is contended by the learned counsel that the principal amount of Rs. 15 lacs had already been released to the complainant but the interest amount may not be released to her inasmuch as, the Court had only directed to deposit the amount of Rs.15 lacs with the Registrar General of this Court and the said amount only was to be released to the complainant. Accordingly, it is prayed that the interest amount may not be released to the applicant. It is further prayed that the said amount be released to the non applicant.*
> *3. This has been contested by the complainant who is present in person.*
> *4. I have heard the learned counsel for the petitioners as well as the complainant.*
> *5. Having regard to the fact that the amount of Rs. 15 lacs was deposited in order to compensate the complainant for dowry articles as well as to maintain herself and her minor son. I am not inclined to stop the release of the interest amount in her favour.*
> *6. Let the interest amount be also released to the complainant on the same terms and conditions on which the principal amount has been released.*
> *7. With these directions, the application is disposed of".*

10. It may be noted that in the undertaking that was furnished by the complainant on 07.09.2012 pursuant to the above order, she had

undertaken to "restitute the interest amount" on the released amount in case of the petitioners succeeding in the case.

11. After the Metropolitan Magistrate had taken cognizance and issued process by order dated 13.09.2013, endeavour was made to secure the presence of the persons who had been summoned as accused. While the petitioner Anil Kumar Jain and his wife (Shashi Jain) appeared, the presence of petitioner Nitin Jain could not be secured. The Metropolitan Magistrate issued duress processes eventually leading to proclamation under Section 82 Cr.P.C. being issued and published on which basis he was declared an absconder/ proclaimed offender by order dated 09.01.2015. On the same date, the Metropolitan Magistrate considered the question of charge. She found no case made out for charge under Section 406 IPC to be framed though holding that a *prima facie* case was made out to put Nitin Jain, Anil Kumar Jain and Shasi Jain on trial for offence under Section 498A IPC. It may be observed here that the said order cannot be said to be binding against petitioner Nitin Jain inasmuch as at that stage he was an absconder having failed to appear even pursuant to the proclamation under Section 82 Cr.P.C. Be that as it may, petitioner Anil Kumar Jain and his wife Shasi Jain challenged the order framing charge before this Court by Crl.Rev. 66/2015. One of the contentions urged before this Court was that the order taking cognizance was bad in law on account of it having been passed after expiry of period of limitation under Section 468 Cr.P.C. in relation to the offence under Section 498A IPC, its gravamen showing acts of commission relating

to period prior to 15.09.2009 (whereafter the couple had not lived together).

12. The learned single judge while deciding the revision petition, by order dated 09.12.2015, rejected the plea of limitation with reference to the law laid down in *Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director and Ors. (2014) 2 SCC 62,* holding that the date of filing of complaint, or the date of institution of prosecution, was the relevant date and not the date on which the impugned order taking cognizance had been passed by the Metropolitan Magistrate. On merits, however, the contentions of the petitioner Anil Kumar Jain, and his wife Shasi Jain, were accepted and the order directing charge to be framed against them was set aside. At the same time, note was taken of the submissions of petitioner Anil Kumar Jain respecting payment of Rs. 15 lakhs to the complainant, this being reflected in the following observations:-

> "*9. The charge sheet which was filed by the police clearly discloses that the husband of the complainant was residing in Nigeria and he could not be traced. The charge sheet also took note of the fact that during the course of investigation, when the petitioners had prayed for bail, the dispute was settled between them and the complainant on deposit of Rs.15 lakhs by the order of the High Court. The complainant had accepted such amount towards settlement of her matrimonial disputes. Initially an amount of Rs.15 lakhs was deposited with the Registrar General of Delhi High Court but on the request of the complainant, the same was released in her favour. The complainant who is present in person admits of her having received the aforesaid amount".*
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> *xxx*

29.Apart from this, admittedly, the complainant accepted Rs.15lakhs towards settlement of her matrimonial dues. The husband of the complainant who is the son of the petitioners is untraceable".

13. After petitioner Anil Kumar Jain had been discharged by order dated 09.12.2015 passed in Crl. Rev. 66/2015, he moved an application before the Metropolitan Magistrate, seeking restoration of the amount of Rs. 15 lakhs which had been deposited by him in terms of the directions in the application for anticipatory bail. His request to that effect was rejected by the Metropolitan Magistrate, by order dated 29.03.2017, it reading thus:-

> *"The application filed at this stage is not only without merits but has been filed with an intention not only to befool the complainant but also to obtain illegal orders from this court as the non applicant/complainant had entered into a full and final settlement for alimony and istidhan/dowry articles and there was no mention of the FIR or its outcome at the time of entering into settlement. It is but clear that applicant is intentionally trying to harass the complainant by first entering into full and final settlement, settling all his claim and then seeking back the amount given by him in lieu of istridhan/dowry articles. Hence, the application of the applicant stands dismissed with cost of Rs. 50,000/- upon applicant to be deposited with DLSA for filing this application which not only lacks merits but it has been filed for harassing the non applicant/complainant and misguiding the court."*

14. The first captioned petition (Crl.M.C. 658/2016) has been preferred by Nitin Jain challenging the summoning order passed on 13.09.2013 pressing the petition only on the ground of limitation under Section 468 Cr.P.C., though some submissions were made to the

effect that the procedure adopted in the later proceedings to declare him a proclaimed offender were improper, the prayer in the petition is for the order dated 13.09.2013 to be quashed on the plea that the case is time-barred. This plea cannot be accepted in view of the declaration of law on the subject in *Sarah Mathew* (supra) referring to which similar plea by his father Anil Kumar Jain was repelled by a co-ordinate bench of this Court in order dated 09.12.2015 in Crl. Rev. 66/2015.

15. The petitioner Nitin Jain being a fugitive, aware all along of the proceedings pending against him before Metropolitan Magistrate, has the liberty to appear before the concerned criminal court and raise all contentions on merits of the accusations leveled against him. His petition Crl.M.C. 658/2016 does not call for any further directions.

16. Petitioner Anil Kumar Jain insists that he is entitled to restitution of the amount of Rs. 15 lakhs which was released to the complainant pursuant to the above-noted proceedings. It may be that the criminal case insofar as the said petitioner is concerned has come to an end. After all, he and his wife have been discharged, by order dated 09.12.2015. But, as is noted by the Metropolitan Magistrate in the impugned order dated 29.03.2017, the amount of Rs. 15 lakhs had been tendered, in absence of the petitioner's son from India, on his behalf *"towards full and final settlement"* of the "*entire claim of permanent alimony, srtidhan. etc. of the complainant*". This was a proposal which was initially mooted through the mediation process in district court, Dwarka, it being mentioned before the learned single judge at the time of hearing on the bail application no. 923/2011 on

08.07.2011, the petitioner through counsel having conceded that he had "*no reservation about accepting the said proposal*". The subsequent orders passed on bail application no. 923/20911 make it absolutely clear that payment was tendered by petitioner Anil Kumar Jain on behalf of his son, and received by the complainant, towards settlement of her claim for permanent alimony, *stridhan* etc., this position having been reiterated, as already noted, in the order dated 25.04.2012, treating the payment to be in the nature of compensation for dowry articles and right to maintenance. At any rate, Nitin Jain, son of Anil Kumar Jain, has continued to elude the legal process in India. It is clear from the above-noted developments that he had tendered the amount of money for and on behalf of his son. The case against the son Nitin Jain is still pending and has not reached conclusion. In these circumstances, no question arises of the complainant being called upon to return the money.

17. The view taken by the Metropolitan Magistrate in the impugned order, thus, is not found to be suffering from any error or infirmity. The petition Crl.M.C. 1968/2017 is devoid of merits and the contentions raised therein are liable to be rejected.

18. Both the petitions are, thus, dismissed.

R.K.GAUBA, J.

FEBRUARY 26, 2019
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