

**IN THE HIGH COURT AT CALCUTTA**  
**CRIMINAL APPELLATE JURISDICTION**  
**APPELLATE SIDE**

**Present :**

**The Hon'ble JUSTICE BIVAS PATTANAYAK**

**CRR. 487 of 2013**

**Abdus Salam Mondal**

**Vs.**

**State of West Bengal and Anr.**

**For the Petitioner:**

**Mr.Ayan Basu, Adv.**

**Mr. R.L Chakraborty, Adv.**

**Mr. Debapratim Guha, Adv.**

**Mr. Sumit Routh, Adv.**

**For the State :**

**Mr.Saswata Gopal Mukherjee,Ld. P.P.**

**Mr. Arijit Ganguly, Adv.**

**Ms. Debjani Sahu,Adv.**

**Heard on:**

**27.06.2022.**

**Judgment on:**

**23.08.2022.**

**BIVAS PATTANAYAK, J. : -**

1.The present revisional application has been filed by the petitioner under Section 482 of the Code of Criminal Procedure for quashing of proceeding being Sessions Sl. No. 127 of 2009 pending before the Learned Additional Sessions Judge, 3<sup>rd</sup> Fast Track Court, Berhampore, Murshidabad (arising out of Hariharpara P.S Case no.39 of 1999 dated 15<sup>th</sup> April, 1999).

**2.**The factual matrix of the case is that the opposite party no.2-complainant filed an application under Section 156(3) of the Code of Criminal Procedure on 4<sup>th</sup> February,1999 before the Sub-divisional Judicial Magistrate, Berhampore with the following contentions:-

(i) The petitioner married the elder sister of opposite party no.2-complainant and after the demise of her elder sister, the petitioner married one Selina Bibi.

(ii)During subsistence of such marriage with Selina Bibi an affair grew up between the petitioner and the opposite party no.2-complainant which ultimately resulted in marriage between them on 07.04.1997.

(iii) Soon thereafter they started to reside as husband and wife in the house of the petitioner, however, she was inflicted with torture both physically and mentally and ultimately on 24.01.1999 she was driven out from the matrimonial home by the petitioner.

(iv)On the aforesaid allegation the petition of complaint was sent to Hariharpara Police Station for causing investigation and the FIR being no. 39 of 1999 came to be registered against the petitioner.

(v)Upon completion of investigation the Investigating Agency submitted charge sheet against the petitioner under Sections 498A/417/376/312 of the Indian Penal Code and under Section 498A against other accused persons.

(vi) Thereafter the case was committed to the court of Learned Sessions Judge which transferred the same to the court of Learned Additional Sessions Judge, Fast Track, 3rd Court, Berhampore for trial and disposal.

(vii) The learned trial court framed charges against the petitioner under Sections 498A/417/376/312 of the Indian Penal Code and under Section 498A of the Indian Penal Code against the rest accused persons facing trial.

**3.** Being aggrieved by and dissatisfied with the aforesaid proceeding the petitioner has preferred the present revisional application.

**4.** Mr. Ayan Basu, learned advocate appearing on behalf of the petitioner, *firstly*, submitted that as per FIR the alleged date of torture is on 24.01.1999, however on such date there was no existence of legal and valid marriage between the petitioner and opposite party no.2-complainant as '*talaq*' was already pronounced on 14.01.1999. The petitioner, after registration of the FIR, filed a Civil suit before the Learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Berhampore, Murshidabad being Title Suit No. 113 of 1999 praying for declaration that no marital tie existed between the petitioner and opposite party no.2-complainant since 14.01.1999 when '*talaq*' was pronounced and learned Civil Judge (Junior Division) while disposing of the injunction petition observed that *prima facie* there was no legal valid marriage between the parties since 14.01.1999 which is relevant in terms of Section 41 of the Evidence Act.

Therefore in the absence of legal and valid marriage no case under Section 498A of the Indian Penal Code can be made out and in support of his contention he relied on the decisions of the Hon'ble Supreme Court passed in ***Shivcharan Lal Verma and Another versus State of Madhya Pradesh***<sup>1</sup>. Further relying on the decision of the Hon'ble Supreme Court passed in ***Bhaskar Lal Sharma and another versus Monica***<sup>2</sup>, he submitted the allegation made in the FIR does not enable one to arrive at an opinion that the petitioner has primarily committed such an offence under Section 498A of IPC. The statement of other independent witnesses also does not disclose of any torture.

*Secondly*, he submitted that the FIR does not disclose any allegation of rape on promise of marriage or of any abortion of foetus conceived by alleged sexual act. Although the opposite party no.2-complainant stated of rape upon her on promise of marriage and subsequent abortions in her statement under Section 164 of the Code of Criminal Procedure yet that is a total departure from her earlier statement made in the FIR. If at all any sexual act has taken place in between the petitioner and the opposite party no.2 –complainant it is fall out of a consensual relationship between two major persons which act cannot be termed as “rape”.. Further the opposite party no.2-complainant has already married one Humayan Kabir Biswas on 18.12.2009 and is leading her conjugal life. The petitioner has filed one supplementary affidavit disclosing such facts

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<sup>1</sup> (2007) 15 SCC 369

<sup>2</sup> (2009) 10 SCC 604

annexing document of marriage between the opposite party no.2-complainant and said Humayun Kabir Biswas and as such the allegations are baseless and frivolous. In the light of his above submissions he prayed that the proceeding should be quashed in the interest of justice.

**5.**In reply to the contention raised on behalf of the petitioner, Mrs. Debjani Sahu learned advocate for the State submitted that prior to marriage the opposite party no.2-complainant conceived twice due to forcible sexual act committed upon her by the petitioner and in both the occasions the child in the womb had to be aborted on 26.01.1992 and 08.03.1995 respectively, which is revealed from the statement of the victim under Section 164 as well as under Section 161 of the CrPC. The petitioner being a married person by act of deception got involved in sexual activity with the opposite party no.2-complainant resulting in pregnancy of the victim, followed by forceful abortion. Further, she submitted that the statement of the witnesses also indicate of torture upon the opposite party no.2-complainant by the petitioner after she was married to him. Furthermore, she submitted that on the basis of *prima facie* materials charge sheet has been submitted against the petitioner and others and charges have been framed before the trial court. In the aforesaid backdrop, she prayed for dismissal of the revisional application.

**6.**None appeared on behalf of opposite party no.2-complainant in spite of service of notice.

**7.**At the outset it is placed on record that in CRR 2644 of 1999, though not preferred by the petitioner there was direction to continue proceeding against the husband. The petitioner subsequent thereto along with two others filed an application under Section 482 of the Code for quashing of the proceeding as well as order issuing warrant of arrest being CRR no. 530 of 2007 but the same was dismissed. However, at a different stage of proceeding upon framing charges against him by learned trial court, the petitioner has filed the instant application for quashing of the proceeding including orders. Be that as it may, having heard the rival contentions of the both the sides, I now proceed to decide the prayer of the petitioner made in the present application on the touchstone of available materials.

**7.1.** The statement of the victim (opposite party no.2-complainant) recorded under Section 164 and Section 161 of Criminal Procedure Code reveals that the petitioner was earlier married to the elder sister of the victim and after the demise of her elder sister he married one Selina Bibi. In the meantime a love affair developed between the petitioner and the complainant (victim). There are allegations that the petitioner made physical relationship with the complainant (victim) which led to pregnancy of the victim twice and on both the occasions the child in her womb had to be aborted on 26.01.1992 and 08.03.1995 respectively at the instance of the petitioner. Ultimately on 07.04.1997 the petitioner married the complainant. On 22.10.1998 the petitioner conveyed a piece of land measuring 1½ sataks with house in favour of the victim and since then she started to reside therein. There are also allegations that since such

conveyance there were infliction of torture and assault upon her and on 24.01.1999 she was driven out from the matrimonial home. The statement of the witnesses recorded under Section 161 of CrPC also reveals of torture. The statement of doctor, who treated the victim, shows that he found mark of injury in the body of the victim. Further it is found from the materials on record that upon completion of investigation charge sheet has been submitted against the petitioner under Sections 498A/417/376/312 of the Indian Penal Code and under Section 498A of the Indian Penal Code against the rest accused persons by the Investigating Agency on the basis of primary materials collected during the course of investigation. The trial Judge basing on such primary materials framed charges against the petitioner under Sections 498A/417/376/312 of IPC and under Section 498A of IPC against the rest accused persons facing trial.

**7.2.** Learned advocate has vociferously argued on behalf of the petitioner relying on the decision of the Hon'ble Supreme Court passed in ***Shivcharan Lal Verma (supra)*** that as on alleged date of torture there was no subsistence of valid marriage due to pronouncement of 'talaq' on 14.01.1999, hence no offence of Section 498A of IPC is made out. The aforesaid argument does not hold good in view of the fact that offence under Section 498A of the Indian Penal Code is a continuing one and as per the statement of the victim she was tortured in the matrimonial home since after transfer of land in the year 1998 and ultimately on 24.01.1999 she was driven out from the matrimonial home. The marriage admittedly took place on 07.04.1997. As per the FIR there are

allegations of torture since the last part of 1998. Thus primarily it is found that since the year 1998 till she was driven out from the matrimonial home in the year 1999 there are allegations of torture. Relying on the observation of learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Berhampore made in Title Suit no.113 of 1999 that there was no subsistence of valid marriage since 14.01.1999 between the parties, learned advocate tried to impress upon the court that the offence under section 498A of the IPC is not attracted on the alleged date of occurrence on 24.01.1999 and pressed for acceptance of such observation of the Civil Judge in terms of Section 41 of the Evidence Act. Although it appears from order annexed to the petition that the learned Civil Judge (Junior Division), 2<sup>nd</sup> Court, Berhampore while disposing of the application for temporary injunction in Title Suit no.113 of 1999 observed, on the basis of *prima facie* materials, that there was no marital tie between the petitioner and opposite party no.2-complainant since 14.01.1999 yet that is a tentative opinion and not a final one. Section 41 of the Evidence Act provides for relevancy of certain judgments where such judgment is a final judgment or order or decree of a competent court passed in exercise of probate, matrimonial, admiralty or insolvency jurisdiction. Accordingly, the argument advanced on behalf of the petitioner in this regard fall short of merit.

**7.3.**With regard to the decision of the Hon'ble Supreme Court passed in ***Bhaskar Lal Sharma (supra)*** cited on behalf of the petitioner it is found that after analyzing the facts the Hon'ble Court observed that *ex facie* no case has been made out under Section 498A of IPC. However, in the case in hand there

are allegations of torture inflicted upon the opposite party no.2-complainant by the petitioner and others and as such the facts of the cited decision are quite distinguishable from the case in hand.

**7.4.** Learned advocate for the petitioner by filing supplementary affidavit contented that the opposite party no.2-complainant has already married one Humayan Kabir Biswas on 18.12.2009 and as such the entire case is baseless. Be that as it may, such aspect has hardly any consequence as far as the alleged offence is concerned which has its root much prior in time to the aforesaid marriage.

**8.**It is a trite law that while exercising power under Section 482 the Court should not usurp the jurisdiction of the trial court. The Court can quash a prosecution which amounts to abuse of process of the court, but that power cannot be exercised to hold a parallel trial, only on the basis of the statements and documents collected during investigation or enquiry, for the purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial court is allowed to proceed. **(See Radhey Shyam Khemka and Another versus State of Bihar<sup>3</sup>**. It is settled principle of law that at the stage of quashing FIR or complaint it is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein unless they are so absurd and inherently improbable that no prudent man can ever reach to just conclusion. **(See Rupan Deol Bajaj (Mrs) and Another**

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<sup>3</sup> (1993) 3 SCC 54.

***versus Kanwar Pal Singh Gill and Another***<sup>4</sup>. It is placed on record that there is neither any absurd or inherent improbability noted in the facts of the present case nor the facts alleged in the complaint on its face value fails to disclose an offence with which the accused is charged. As it is already found that there are primary materials to proceed, hence invoking inherent power will lead to stifling of a legitimate litigation. The questions whether the marriage between the petitioner and the opposite party no.2-complainant was subsisting at the time of alleged torture or whether sexual act was consensual or whether such sexual act was on promise of marriage or whether there was any abortion of foetus conceived by alleged sexual act at the instance of the petitioner or not are purely questions of fact which needs to be assessed after taking evidence.

**9.**In the aforesaid backdrop I do not find any reason to interfere with the proceeding before the trial court. However, it is made clear that the observations made hereinabove shall not have any bearing on the rights and contentions of the parties before the trial court.

**10.**Accordingly, the present revisional application being **CRR no. 487 of 2013** stands dismissed.

**11.**All connected applications, if any, stand disposed of.

**12.**Interim orders, if any, stand vacated.

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<sup>4</sup> (1995) 6 SCC 194

**13.**Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

**14.**Let a copy of this order be sent to learned trial court for information.

**(Bivas Pattanayak, J.)**