

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO. 4598 OF 2018****WITH****INTERIM APPLICATION NO.2500 OF 2024**

Mr. Nilesch Balkrishna Rode
Age 37 Years,
Indian Inhabitant, Occ. Nil
(Presently Unemployed)
Residing at
402, Sankalp Siddhi Apt,
Near Highway, Shreyas Colony,
Goregaon (East),
Mumbai-400 063

... Petitioner/Applicant

V/s.

1. Suvarna Nilesch Rode
(Original Complainant)
Age 32 years, occ. Doctor (Surgeon)
Attached to Bhatt Hospital Goregaon (West)
Residing at : 2/20, Jayas CHS
Opp. Pahadi School,
Jay Prakash Nagar,
Goregaon (East), Mumbai-400 063

2. State of Maharashtra
(Through BKC Police Station)

... Respondents

Mr. Mohan Pillai for Petitioner.
Ms. Seema Chopda for Respondent No.1.
Mr. Vinod Chate, A.P.P. for Respondent No.2-State.

**CORAM : A. S. GADKARI AND
DR. NEELA GOKHALE, JJ.**

DATE : 12th July 2024.

JUDGMENT (Per : A. S. GADKARI, J.) :-

- 1) By the present Petition under Article 226 of the Constitution of India, the Petitioner, an accused in POCSO Spl. Case No.288 of 2019 pending on the file of Additional Sessions Judge, Mumbai, arising out of C.R.No.168 of 2018, registered with BKC Police Station, Bandra, Mumbai, dated 13th June 2018 under Sections 354 and 323 of Indian Penal Code ('IPC') and under Sections 8, 10 and 12 of The Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), is seeking for quashing of the said crime.
- 2) Heard Mr. Pillai, learned Advocate appearing for Petitioner, Ms. Chopda, learned Advocate appearing for Respondent No.1 and Mr. Chate, learned A.P.P. for Respondent No.2-State. Perused record produced before us.
- 3) Record indicates that, by an Order dated 22nd November 2019, Rule was granted and by way of interim relief, proceedings before the trial Court were stayed.
- 4) At the outset, it is important to note here that, the Petitioner is husband of Respondent No.1 and the alleged victim herein is the daughter of the Petitioner and Respondent No.1, begotten from their wedlock. There is a matrimonial discord between the Petitioner and Respondent No.1 and on the date of lodgment of the crime, various proceedings were/are adopted by either of the parties, exercising their rights/remedies under the prevailing matrimonial laws.

5) Respondent No.1 has lodged present crime.

It is the prosecution case that, in pursuance of the Order passed by the Family Court, Bandra, Mumbai, Respondent No.1 on 2nd June 2018 at about 3.00 p.m. took their daughter Ms. 'A' to the Children's Complex, Family Court, BKC, Bandra, Mumbai. After sometime, the Petitioner came there and took their daughter in the Children's Complex. Respondent No.1 was standing outside in the lobby. At about 05.00 p.m., Petitioner handed over custody of their daughter to Respondent No.1 and thereafter Respondent No.1 came to her house. After coming to the house, Respondent No.1 noticed that, their daughter was having itching to her chest. Respondent No.1 thought that, it was due to the heat and therefore she applied powder to her affected areas and as the said child was having allergy of dust, she gave her medicine for it. That, on 5th June 2018, when Respondent No.1 told their daughter about visit to the Petitioner, at that time Ms. 'A' resisted it and informed Respondent No.1 that, on 2nd June 2018, when she had been to Children's Complex, the Petitioner initially rubbed sand on her hand and subsequently rubbed the sand on her chest. The said act was repeated by the Petitioner 9 to 10 times. In this brief premise, present crime is registered on 13th June 2018.

6) It be noted here that, after lodgment of present crime on 13th June 2018, the Petitioner herein filed an Application below Exhibit 18 in Petition No.A-302 of 2018, before the Family Court at Bandra, Mumbai, for

grant of regular access, custody and half of the vacations of the school during festivals i.e. Ganpati, Diwali, Christmas and Summer Vacation and overnight custody of their daughter, Ms. 'A'. Respondent No.1 resisted the said Application by filing her reply at Exhibit-21. The Respondent No.1 filed an Application below Exhibit 22 for permanent discontinuation of access granted to the Petitioner. The said Application was filed in the premise that, the crime under Section 9(n) of the POCSO Act and under Section 354 of IPC, is lodged against the Petitioner. It was also alleged that, during the access period, the Petitioner inappropriately touched the private parts of the child 8 to 9 times, while she was playing sand game due to which the child was traumatized.

7) To ascertain the allegations made against the Petitioner, learned Principal Judge, Family Court, Bandra Mumbai, in presence of both the Advocates, Respondent No.1 and the Petitioner, personally saw the CCTV footage of 2nd June 2018. In the CCTV footage, no such incident as alleged, was seen. It was the contention of the learned Advocate for Respondent No.1 that, the alleged incident occurred outside the Children's Complex room behind the cupboard. The said spot was also seen/visited by the learned Principal Judge, Family Court, in the presence of both the Advocates. The learned Principal Judge, in its Order dated 7th September 2018, has observed that, at the time of access with the child by the Petitioner, one Marriage Counsellor and one social worker, namely, Ms. Gayatri from

Muskan were also present and therefore the spot where the alleged incident took place, was not an isolated area. It is observed by the learned Principal Judge, Family Court, that on the same day, no such incident was reported by Respondent No.1 to the Marriage Counsellor.

8) We have no reason to have a contrary view or opinion than one expressed by the learned Principal Judge, Family Court, Bandra, Mumbai in its Order dated 7th September 2018 passed below Exhibit 18 and Exhibit 22.

9) Perusal of the F.I.R. indicates that, the allegations made against the Petitioner regarding application of sand to her chest, appears to be improbable and as observed by the learned Principal Judge, Family Court, Mumbai, the spot of the incident was a public place and one Marriage Counsellor and one social worker, namely, Ms. Gayatri from Muskan, were also present there. If such an incident infact would have occurred, the said two persons would have definitely prevented the Petitioner from doing so, or at least reported the said fact to the concerned Court immediately. It is necessary to note here that, the alleged incident was reported by the daughter Ms. 'A' on 5th June 2018 to the Respondent No.1 and the crime in question is lodged on 13th June 2018. No explanation at all is offered by the Respondent No.1, for lodgment of crime belatedly. It appears to us that, the Respondent No.1 with a view to wreak vengeance on the Petitioner, with malafide intention has lodged present crime.

10) The Hon'ble Supreme Court in the case of *State of Haryana Vs.*

Bhajanlal, reported in 1992 Supp (1) SCC 335 , while enumerating the powers under Section 482 of the Indian Penal Code and Article 226 of the Constitution of India, in para No.102 has observed as under :-

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2)

(3)

(4)

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of

which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6)

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.."

11) According to us, the case in hand squarely falls within the aforenoted categories enumerated by the Hon'ble Supreme Court in the case of *State of Haryana Vs. Bhajanlal* (supra).

12) In view thereof, according to us, continuation of the said proceedings will be a sheer abuse of process of law and deserves to be quashed.

12.1) Petition is allowed in terms of prayer clause (bb).

13) Rule is accordingly made absolute.

15) In view of disposal of Writ Petition, Interim Application No.2500 of 2024, does not survive and is disposed off.

(DR. NEELA GOKHALE, J.)

(A.S. GADKARI, J.)

RAJESH
VASANT
CHITTEWAN

Digitally signed by
RAJESH VASANT
CHITTEWAN
Date: 2024.07.30
19:20:58 +0530