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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ TR.P.(CRL.) 6/2023 & CRL.M.A. 1007/2023
MS. M PROSECUTRIX Petitioner

Through: Appearance not given.

versus

STATE OF NCT OF DELHI & ORS. Respondents

Through: Mr. Ritesh Kumar Bahri, APP for the
State.

Mr. Gurpreet Singh, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

ORDER

% **05.04.2023**

1. Pursuant to the previous orders of this Court where the learned counsel for the petitioner had adverted to Section 26 Clause A (III) of Cr.P.C. and second proviso to sub-Section 327(2) of Cr.P.C. as well as the directions of the Hon'ble Supreme Court in *Re: Assessment of the Criminal Justice System in Response to Sexual Offences*, SMW (CrI) No. 04/2019, the Ld. APP has filed a status report in that regard.

2. As per the status report, facts of complaint have been stated which are essentially allegations of misuse of complainant's photographs on a porn site. It is stated that pursuant to the FIR the accused was arrested on 11th November, 2020 and the laptop of the accused was seized already in a previous matter. The matter is now before the Ld. Trial Court and listed for arguments on charge and other proceedings. The petitioner has contended that the proceedings should be presided over by a female Judge and not a male Judge in light of the above provisions and judgment.

3. A perusal of the said provisions would show that there is no inflexible mandate as regards the trial of matters under Section 376 IPC to be dealt

with by a Court presided over by a woman judge. Section 26 (a)(iii) *proviso* categorically provides that offences mentioned in the said *proviso* (*inter alia* section 376 IPC) shall be tried “*as far as practicable*” by a Court presided over by a woman. The Hon’ble Supreme Court in the decision referred to above, has adverted to this provision in para 17 of the said order as also to the second *proviso* to sub-section 327 (2) Cr.P.C. (which provides that *in camera* trial shall be conducted as far as far as practicable by a Court presided over by a woman judge or magistrate) and observed that “*insertion of the above proviso has a very important object and the rider of ‘as far as practicable’ cannot be used to overcome the mandate in an ordinary manner.*”

4. Learned counsel for the petitioner has relied on this observation of the Hon’ble Supreme Court to state that the trial pursuant to the complaint (in SC No.53/2021 under sections 376, 354A, 387 IPC and sections 66 E and 67 A of the Information Technology Act) may be transferred to a newly created court of the ASJ (POCSO) which are presided over by a lady judge. As per the averments in the petition, in support of this plea, it is stated that the prosecutrix does not feel comfortable while appearing before the Court and the Ld. Presiding Officer has been insensitive.

5. Further reliance has been placed on the decision of the Hon’ble Supreme Court in *Nipun Saxena & Anr. V. UOI* to contend that fast track (POCSO) courts have been created for trial of cases under the POCSO Act and these courts may not only be used for trying cases under POCSO Act but also for trying cases against women. As per the petitioner, these submissions were made before the Ld. Presiding Officer who was not only reluctant but adamant not to hear these submissions in this regard.

6. Be that as it may, mere apprehension of the petitioner (which can be subjective) cannot become a ground for transfer of cases to POCSO courts even though the offence does not involve provisions of POCSO Act. This would create a precedent which would open floodgates where all cases being tried for offences under section 376 IPC would be required to be transferred to special courts dealing with POCSO and/or presided by a woman judge. Even though this may be ideally desirable in the overall administration of justice (as stated by the Hon'ble Supreme Court), at this stage when no such directions have been passed on the administrative or judicial side for a *carte blanche* mandate, a transfer may potentially create difficulties in administration of justice, allocation and preservation of jurisdictions. Besides, as contended by the Ld. APP, the grounds stated by the petitioner do not come within the purview of the conditions for transfer under section 407 Cr. PC.

7. It is of course expected that the Ld. Presiding Officer, be it male or female, are expected to handle such cases in a sensitive manner having due regard to directions passed by the Hon'ble Supreme Court and this Court *inter alia* while dealing with cases involving women and / or children and/or sexual offences. In this context, it may be appropriate to remind ourselves of the famous aphorism : “*Justice must not only be done, but must also be seen to be done*”.

8. The petition is disposed of with these observations.

9. Order be uploaded on the website of this Court.

ANISH DAYAL, J

APRIL 5, 2023/MK/sm