

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS
&
THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN
Monday, the 25th day of July 2022 / 3rd Sravana, 1944
CONTEMPT CASE(C) NO. 427 OF 2022(S)

PETITIONERS:

1. GOPIKA JAYAN, AGED 22 YEARS, D/O. JAYAKUMAR, CHAITHRAM APARTMENT, NEAR CHANGAMPUZHA PARK, EDAPPALLY, ERNAKULAM DISTRICT, 682024.
2. SUDHEEKAMAL, AGED 24 YEARS, S/O. KAMALASANAN, ADIMURIYIL HOUSE, KUMBAZHA P.O, PATHANAMTHITTA,689653.

BY ADVS.M/S.U.JAYAKRISHNAN,C.C.ANOOP,

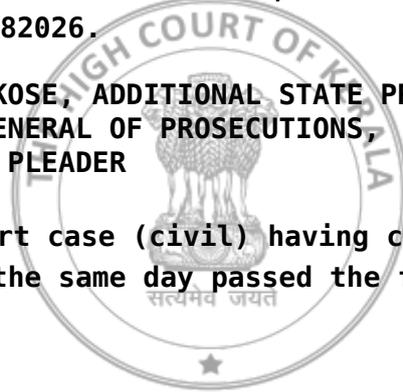
RESPONDENT:

FAISAL M.A., SUB INSPECTOR OF POLICE, ELAMAKKARA POLICE STATION, ERNAKULAM DISTRICT 682026.

BY SRI.GRACIOUS KURIAKOSE, ADDITIONAL STATE PROSECUTOR & ADDITIONAL DIRECTOR GENERAL OF PROSECUTIONS, AND SENIOR GOVERNMENT PLEADER

This Contempt of court case (civil) having come up for orders on 25.07.2022, the court on the same day passed the following:

P.T.0



ALEXANDER THOMAS & SHOBA ANNAMMA EAPEN, JJ.

Contempt of Court Case (Civil) No.427 of 2022
[arising out of violations of the guidelines in *Arnesh Kumar Vs. State of Bihar*
2014 (3) KLJ 330 of the Hon'ble Supreme Court]

Dated this the 25th day of July, 2022

ORDER

Earlier, we have passed a detailed order on 22.06.2022.

2. It appears that the respondent/alleged contemnor has filed affidavit dated 06.07.2022, wherein there are averments that he has produced therewith copies of various documents, as Anxs.R1(a), R1(b), R1(c) & R1(d), etc., as can be seen from a reading of para Nos.3 to 10, on internal pages 2 to 4, of the said affidavit. However, on a perusal of the case records, it is seen that the said affidavit alone is placed on record and the accompanying documents stated to have been produced as Anxs.R1(a) to R1(d) are not seen produced along with the said affidavit.

3. The main issue in this case is as to whether the alleged contemnor has issued Sec.41A notice to the accused, in compliance with the directions issued by the Apex Court in the celebrated ***Arnesh Kumar's*** case [(2014) 8 SCC 273]. From a reading of the said affidavit

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there is not even a whisper, anywhere in the said affidavit, filed by the alleged contemnor, as to whether he has or has not issued Sec.41A Cr.P.C. notice to the petitioners/accused herein. We are really surprised at the cavalier manner in which the respondent/alleged contemnor has sworn in to an affidavit and that too in a case in which notice in contempt proceedings has been issued against him.

4. Before we proceed further, we feel that a reasonable opportunity should be given to the respondent/alleged contemnor to explain these aspects and also to file an additional affidavit, if he so desires, not only to produce the documents mentioned hereinabove but also on the abovesaid crucial aspects.

5. Further, the Commissioner of Police, Kochi City, is not a party in this contempt proceedings and as per the order dated 22.06.2022, we have only directed him to file a statement on the limited factual points mentioned therein, that is as to how the 1st petitioner's mother (who is the defacto complainant) and one Sri.Saji Varghese are related and as to whether their marriage has been solemnised, etc. This, we said so, as it is stated in the FIR as if the 1st

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petitioner is the daughter of the abovesaid Sri.Saji Varghese. So, the task of the Commissioner of Police, Kochi City, was only to give the limited information stated in the said order dated 22.06.2022. On the other hand, he has filed a statement dated 02.07.2022, stating many things beyond his brief and even making certain allegations against the petitioners. Those allegations have also been made by the respondent/alleged contemnor in his affidavit.

6. But, it was not the look out of the Commissioner of Police to say those aspects in the statement filed by him in this contempt proceedings. Further, on the other hand, it is also interesting to note that, in the penultimate paragraph of the said statement, the Commissioner of Police had stated that the alleged contemnor was unaware of the law declared by the Apex Court in Arnesh Kumar's case (supra).

7. Sri.Gracious Kuriakose, learned Additional State Prosecutor & Additional Director General of Prosecutions, would submit that leave may be granted to the Commissioner of Police to withdraw the abovesaid statement and to file a fresh statement only on the matters which he should have dealt with, going by the orders

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passed by this Court on 22.06.2022.

8. Sri.U.Jayakrishhan, learned counsel appearing for the petitioners, would submit that the admission made by the Commissioner of Police, Kochi City, in the penultimate paragraph of the statement dated 02.07.2022, filed by him in this case, should be permitted to be used by his parties in this contempt proceedings. We do not say anything except that all options open to the parties could be resorted to by them, in accordance with law.

9. The case is treated as partly-heard.

10. The Parliament has amended various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'JJ Act' for short), including Sec.86 thereof, and the said amended provisions have been published in the Gazette of India dated 09.08.2021. Sec.26 of the Amendment Act, deals with amendment to Sec.86 of the Principal Act (JJ Act) whereby, in Subsection 2 thereof, it has been mandated that, where an offence under the Act (JJ Act) is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be non-cognizable, etc. So, the declared

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legislative policy of the Parliament is that, the abovesaid offences, in terms of Sec.75 of the Juvenile Justice Act, are to be treated not as cognizable but non-cognizable. But, it appears that the provisions contained in the Juvenile Justice (Care And Protection Of Children) Amendment Act, 2021 (Act 23 of 2021), published in the Gazette of India dated 09.08.2021, make a provision that, as per Section 1(2) thereof, the said amended provisions shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

11. It appears that no notification has been issued by the Government of India, bringing into force the provisions contained in the Juvenile Justice (Care And Protection Of Children) Amendment Act, 2021 (Act 23 of 2021), so far.

12. Further, the Apex Court has recently rendered a judgment on 11.07.2022 in the case in **Satender Kumar Antil vs. Central Bureau Of Investigation** [2022 (4) KHC 570 (SC)], wherein it has been *interalia* declared that the law declared by the Apex Court in **Armesh Kumar's** case (supra), should be strictly and scrupulously followed by all concerned. The necessity to have

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mandatory compliance with Sec.41 of the Cr.P.C. has been reiterated in para Nos.28 & 29 of the said judgment in **Satender Kumar Antil's** case (supra). In para No.30 thereof, their Lordships of the Apex Court has held that the courts should come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A of the Cr.P.C. and that the Investigating Agencies should keep in mind that the law laid down in **Arnesh Kumar's** case (supra), discretion shall be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41 of the Cr.P.C, since arrest is not mandatory. Further, it is emphatically declared, in para 23 thereof, that the consequences of non-compliance with Section 41 of the Cr.P.C. shall certainly inure to the benefit of the person suspected of the offense and resultantly, while considering the application for enlargement on bail, the criminal courts will have to satisfy themselves on the due compliance of this provision and any non-compliance would entitle the accused to a grant of bail. The said position has been again reiterated in para No.73 of the said judgment, especially in Clause (c) thereof, that the courts will have to satisfy themselves on the compliance of Section 41

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and 41A of the Cr.P.C. and any non-compliance would entitle the accused for grant of bail.

13. We have also gone through the explanation given by the learned Judicial Magistrate concerned. Though it has been recited in the said explanation, made by the Judicial officer concerned, that all the guidelines of the Apex Court has been duly complied with, at the time of arrest and remand, there is no whisper anywhere in the said explanation as to whether the learned Magistrate has ascertained from the investigating agency as to whether or not Sec.41A Cr.P.C. notice was, in fact, issued to the petitioners/accused.

14. Even the affidavit filed by the alleged contemnor, has mechanically stated that all the guidelines of the Apex Court, including that in **Arnesh Kumar's** case, has been scrupulously followed but then there are no averments anywhere therein as to whether or not Sec.41A notice has, in fact, been issued to the petitioners in this case. We fail to understand as to how the learned Magistrate has made such submissions, without stating as to whether or not he has verified the issuance of Sec.41A notice. Though there is a reference to the remand request issued in the man missing FIR,

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copies of none of the documents, referred to in the explanation given by the learned Magistrate, has been produced along with the said explanation. Hence, we feel that an opportunity should be given to the learned Magistrate to give a detailed explanation, touching on all these aspects. We make it clear that, if this opportunity is not availed, then no further time will be granted and we may proceed to decide the matter on the basis of existing pleadings and materials on record.

15. Hence, the Registry may apprise the jurisdictional Magistrate concerned to give an additional explanation in the matter, producing all the necessary documents, including the remand request and also stating the necessary factual aspects.

16. Further, from the materials, we see that Anx.A10 report dated 25.01.2022, submitted by the respondent/alleged contemnor, appears to be the finalisation of Anx.A1 man missing FIR. On the same day, the respondent officer has also prepared and submitted Anx.A2 report dated 25.01.2022, which also appears to be a finalistaion of the very same FIR, but altering the offences, as one under Sec.75 read with Sec.87 of the Juvenile Justice Act. A reading

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of Anx.A2 would make it clear that patently factually wrong assertions have been made therein, inasmuch as the date and time of arrest is shown as 22.01.2022 at 12 noon, whereas, in fact, the date of arrest is 25.01.2022. So also, the date of appearance of the petitioners before the Police Station in this case is stated to be 21.01.2022 in para No.2 of Anx.A2. It appears to be common ground that, for the first time, the petitioners were summoned to the Police Station only on 25.01.2022. So, it appears, from a reading of Anxs.A10 & A2, that two separate reports have been given for finalisation of the very same FIR. A reading of Anx.A10 would, *prima facie*, show that the respondent officer was fully satisfied about the explanation of the petitioners, regarding the circumstances of her missing and had even ordered that the Police Constable concerned will accompany the first petitioner to the jurisdictional Magistrate Court concerned, presumably, for closure of the man missing FIR.

17. The learned Magistrate should also apprise this Court as to whether copies of the documents, like Anx.A10, Anx.A2, etc., were also made available to him at the time of remand request, etc., if the

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respondent officer does not give any version in his explanation regarding the matters discernible from Anxs.A10 & A2, then this Court may proceed further in accordance with the available materials.

18. We have given very many opportunities, which has not been utilised properly, by the respondent. However, we would still feel that the respondent officer could be given one more opportunity to explain these aspects, if he chooses to do so.

19. At the request of the learned Additional Director General of Prosecutions, the Commissioner of Police is given permission to file a fresh report in the matter, dealing only with the limited points on which his assistance has been elicited.

List on 16.08.2022.

Hand Over a copy of this order to both sides.

Sd/-

**ALEXANDER THOMAS,
JUDGE**

Sd/-

**SHOBA ANNAMMA EAPEN,
JUDGE**

Skk

APPENDIX OF CON.CASE(C) 427/2022

Annexure A1	CERTIFIED COPY OF THE FIRST INFORMATION REPORT IN CRIME NO. 44/2022 OF ELAMAKKARA POLICE STATION.
Annexure A2	CERTIFIED COPY OF THE REMAND REPORT SUBMITTED BY THE 1ST RESPONDENT BEFORE THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE -1, ALUVA.
Annexure A10	A TRUE COPY OF THE REPORT FILED BY THE RESPONDENT BEFORE THE JFCM II,ALUVA IN Cr.44/2022U./S 57 OF THE KP ACT DATED 25.01.2022.
Annexure R1(a)	COPY OF THE EMAIL RECEIVED FROM CWC, ERNAKULAM
Annexure R1(b)	COPY OF THE DETAILS OF CRIME CASES AGAINST 2ND PETITIONER
Annexure R1(c)	COPY OF THE EMAIL TO SPPKERALA@GMAIL.COM
Annexure R1(d)	COPY OF THE ORDER OF CHILD WELFARE COMMITTEE, ERNAKULAM

