IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 03RD DAY OF AUGUST 2020 / 12TH SRAVANA, 1942

Bail Appl..No.9163 OF 2019

CRIME NO.1303/2019 OF Fort Kochi Police Station , Ernakulam

PETITIONER:

NAHAS
AGED 30 YEARS
S/O.ABDUL SHUKKOOR, MADATHILPARAMBIL HOUSE, SAHRIDAYA NAGAR, SANTHIGIRI, NAD, ALUVA, ERNAKULAM DISTRICT.

BY ADVS.
SRI.P.S.NANDANAN
SRI.P.N.ANOOP

RESPONDENTS:

1 THE STATE OF KERALA,
REPRESENTED BY SUB INSPECTOR OF POLICE FORT KOCHI POLICE STATION, THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682 031.

2 ADDL.R2 RISFANA,
AGED 24 YEARS, D/O SIYAD, 2/175,
KALVATHY, FORTKOCHI, FORT COCHIN,
ERNAKULAM DISTRICT, PIN-682001.

IS IMPLEADED AS PER ORDER DATED 27/2/2020 IN CRL.MA 2/2020 IN BA-9163/2019.

SRI.AJITH MURALI, PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 03.08.2020, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

' C.R.'

O R D E R

Dated this the 3rd day of August 2020

The above Bail Application is filed by the accused in Crime No.1303 of 2019 of Fort Kochi Police Station under Section 438 of the Code of Criminal Procedure (Cr.P.C.). This case is registered against the petitioner alleging offence punishable under Section 4 of the Muslim Women (Protection of Rights on Marriage) Act, 2019 (For short, the Act, 2019).

2. The prosecution case is that the defacto complainant married the petitioner on 3.5.2015 as per religious rituals, and they were living as husband and wife. Subsequently, the petitioner with an intention to end the marital relationship with the defacto complainant sent a registered letter on 4.11.2019, pronouncing triple talaq to the complainant. Hence it is alleged that the petitioner committed the offence under Section 4 of the Act, 2019.

3. When this Bail Application came up for consideration, through Video Conference, this court informed

the counsel for the petitioner that, when there is a specific provision regarding grant of bail in the Act 2019, it is always better for the petitioner to approach the Magistrate Court concerned under Section 7 (c) of the Act, 2019 before filing an application under Section 438 Cr.P.C. But, the counsel submitted that if the petitioner files a Bail Application before the Magistrate Court under Section 7(c), there is every chance to remand the petitioner by the learned Magistrate because the learned Magistrate can consider the Bail Application only after issuing notice to the defacto complainant. Therefore, the counsel submitted that the petitioner would be in remand till Bail Application is considered by the learned Magistrate under Section 7(c) of the Act, 2019. The counsel also submitted that it would be an injustice to the petitioner, if he is remanded by the learned Magistrate before considering the Bail Application on merit under Section 7(c) of the Act, 2019. Therefore, the counsel submitted that an application under Section 438 Cr.P.C. is the only remedy to the petitioner.

4. The learned Public Prosecutor submitted that the

petitioner could approach the Magistrate under Section 7(c) of the Act, 2019, and this court need not exercise the extraordinary jurisdiction under Section 438 Cr.P.C.

5. Therefore, the question to be decided is whether an accused involved in an offence under the Act, 2019 can file a petition under Section 438 Cr.P.C. without filing a Bail Application under Section 7(c) of the Act, 2019 before the Magistrate court concerned.

6. The Act, 2019 received the assent of the President of India on 31.7.2019. The statement of objects and reasons of the Muslim Women (Protection of Rights on Marriage) Bill, 2019 is relevant while considering the provisions in the Act, 2019. The statement of objects and reasons of the Bill is extracted hereunder :

> *"The Supreme Court in the matter of Shayara Bano Vs. Union of India and others and other connected matters, on the 22nd August, 2017, in a majority judgment of 3:2, set aside the practice of talaq-e-biddat (three pronouncements of talaq, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgment gave a boost to liberate Indian Muslim women from the age-old practice of capricious*

and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.

2. The petitioner in the above said case challenged, inter alia, talaq-e-biddat on the ground that the said practice is discriminatory and against dignity of women. The judgment vindicated the position taken by the Government that talaq-e-biddat is against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity guaranteed under the Constitution. The All India Muslim Personal Law Board (AIMPLB), which was the 7th respondent in the above case, in their affidavit, inter alia, contended that it was not for the judiciary to decide matters of religious practices such as talaq-e-biddat, but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice.

3. In spite of the Supreme Court setting aside talaq-e-biddat, and the assurance of AIMPLB, there have been reports of divorce by way of talaq-e-biddat from different parts of the country. It is seen that setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce. Therefore, to protect the rights of married Muslim women who are being divorced by triple talaq, a Bill, namely, the Muslim Women (Protection of Rights on Marriage) Bill, 2017,

was introduced in, and passed by, the Lok Sabha on the 28th December, 2017 and was pending in Rajya Sabha.

4. The aforesaid Bill proposed to declare the practice of triple talaq as void and illegal and made it an offence punishable with imprisonment upto three years and fine, and triable by a Judicial Magistrate of the first class. It was also proposed to provide subsistence allowance to married Muslim women and dependent children and also for the custody of minor children. The Bill further provided to make the offence cognizable and non-bailable. However, apprehensions have been raised in and outside Parliament regarding the provisions of the pending Bill which enables any person to give information to an officer in charge of a police station to take cognizance of the offence and making the offence non-bailable.

5. In order to address the above concerns, it has been decided to make the offence cognizable, if the information relating to the commission of an offence is given to an officer in charge of a police station by the married Muslim women upon whom talaq is pronounced or any person related to her by blood or marriage. It was also decided to make the offence non-bailable and compoundable at the instance of the married Muslim women with the permission of the Magistrate, on such terms and conditions as he may determine.

6. As the Bill was pending for consideration in Rajya Sabha and the practice of divorce by triple talaq (i.e., talaq-e-biddat) was continuing, there was an urgent need to take immediate action to prevent such practice by making stringent provisions in the law. Since both

Houses of Parliament were not in session and circumstances existed which render it necessary for the President to take immediate action in the matter, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 (Ord.7 of 2018), with aforesaid changes was promulgated on the 19th September, 2018.

7. In order to replace the said Ordinance, the Muslim Women (Protection of Rights on Marriage) Bill, 2018 was introduced in Lok Sabha on the 17th December, 2018 and was passed by that House on the 27th December, 2018. However, the Bill could not be taken up for consideration in Rajya Sabha and both Houses were adjourned. As both Houses of Parliament were not in session and the practice of divorce by triple talaq (i.e. talaq-e-biddat) was continuing, to give continued effect to the provisions of the aforesaid Ordinance, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 (Ord.1 of 2019) was promulgated on the 12th January, 2019.

8. Subsequently, to replace the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019, necessary official amendments to the Muslim Women (Protection of Rights on Marriage) Bill, 2018 were moved in Rajya Sabha. However, the Bill could not be taken up for consideration in Rajya Sabha and both Houses were adjourned. Since both Houses of Parliament were not in session, to give continued effect to the provisions of the aforesaid Ordinance, the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 (Ord.4 of 2019) was promulgated on the 21st February, 2019. Thereafter, the Sixteenth Lok Sabha

was dissolved on the 25th May, 2019 and the Muslim Women (Protection of Rights on Marriage) Bill, 2017 and the Muslim Women (Protection of Rights on Marriage) Bill, 2018 pending in Rajya Sabha lapsed.

9. Accordingly, to replace the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019, the Muslim Women (Protection of Rights on Marriage) Bill, 209 is being introduced in Parliament.

10. The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment.

11. The Bill seeks to replace the aforesaid Ordinance."

Therefore, while interpreting any provisions of the Act, 2019, the intention of the Parliament to enact the Act should be there in mind.

7. The Parliament passed the above bill with the salutary object of ensuring the larger constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment. The provisions in the Act, 2019 are to be read along with the statement of objects and

reasons. In the statement of objects and reasons, it is stated that it was decided to make the offence non bailable and compoundable at the instance of the Married Muslim Women with the permission of the Magistrate. The offence is now cognizable and non bailable.

8. There are only eight Sections in the Act, 2019. Section 1 of the Act, 2019 deals about the short title, extent and commencement. Section 2 of the Act is the definition clause. Chapter I of Act, 2019 consists of Section 1 and Section 2. Section 2(c) of the Act, 2019 defines talaq. Section 2(c) of the Act, 2019 is extracted hereunder :

> "(c) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband."

9. Chapter II deals about the declaration of talaq to be void and illegal. Section 4 of the Act, 2019 says that any Muslim husband, who pronounces talaq referred to in Section 3, upon his wife shall be punished with imprisonment for a term which may extend to three years and shall also be liable

to fine. Sections 3 and 4 of the Act, 2019 are extracted hereunder :

> *"3. Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.*
>
> *4. Any Muslim husband who pronounces talaq referred to in Section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine."*

10. Chapter III of the Act, 2019 deals about the Protection of Rights of Married Muslim Women. In Chapter III, Section 7 is included. Section 7(c) says about the disposal of Bail Application filed by an accused charged with an offence under the Act, 2019. Section 7 of the Act, 2019 is extracted hereunder :

> *"7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, -*
>
> *(a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage ;*
>
> *(b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim*

woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person."

11. Consideration of bail is dealt with in Section 7(c) of the Act, 2019. Section 7 starts with a notwithstanding clause. As per Section 7(c) notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable under the Act, 2019 shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person. So, on a reading of Section 7(c), it is clear that a separate procedure is contemplated for the disposal of Bail Applications of the accused against whom offence under the Act, 2019 is alleged. A hearing of the married Muslim woman upon whom talaq is

pronounced is mandatory while considering an application for bail by an accused. Moreover, a speaking order is necessary from the Magistrate, while granting bail to a person accused of an offence, under the Act, 2019.

12. When there are specific provision and specific procedure contemplated for consideration of bail by the Magistrate Court under Section 7(c) of the Act, 2019, whether an application under Section 438 Cr.P.C. is to be entertained is the question in this case. There is indeed no prohibition of the applicability of Section 438 Cr.P.C. in the Act, 2019. Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 clearly says that nothing in Section 438 of the Cr.P.C. shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under that Act. But, there is no such prohibitory Section in the Act, 2019 restraining the court in entertaining an application under Section 438 Cr.P.C. Therefore, it cannot be said that there is a total bar to entertain an application under Section 438 Cr.P.C. if an offence under the Act, 2019 is alleged

against an accused.

13. But, the next question is whether the discretionary jurisdiction under Section 438 Cr.P.C. is to be entertained in each and every case in which offence under the Act, 2019 is alleged. In its wisdom, the Parliament contemplated a separate procedure for consideration of Bail Application of an accused involved in an offence under the Act, 2019. As per Section 7 (c) of the Act, 2019, the Magistrate is empowered to consider an application under Section 7(c) of the Act, 2019 after hearing the Muslim woman upon whom talaq is pronounced. When there is such a specific provision mentioned in the Act, 2019, normally an application under Section 438 Cr.P.C. need not be entertained. I make it clear that there is no total prohibition in entertaining an application under Section 438 Cr.P.C. But when a specific Section is provided in the Act, 2019 for consideration of a Bail Application by the Magistrate Court, an accused should avail such a right before exercising his right under Section 438 Cr.P.C. It will be beneficial to the victims in the Act, 2019, because all of them

may not be able to appear before the District Centre where the Sessions Court situated or before the High Court because of their financial situation also. It will be easy for them to approach their jurisdictional Magistrate Court instead of Sessions Court or High Court. But, of course there may be an extraordinary situation in which remedy of an accused will be only under Section 438 Cr.P.C. But, in such cases, an accused should explain in his application filed under Section 438 Cr.P.C. about the reason for not approaching the learned Magistrate under Section 7(c) of the Act, 2019.

14. The apprehension raised by the counsel for the petitioner, in this case, is that if the accused appeared before the Magistrate court and files an application under Section 7(c) of the Act, 2019, the learned Magistrate can consider the Bail Application only after issuing notice to the accused. The offence under Section 4 of the Act, 2019 is a non bailable offence. In such situation, once the accused surrenders before the learned Magistrate, he will be remanded by the learned Magistrate and till his Bail Application is considered on merit,

he will be in remand. Such a possibility also cannot be ruled out. Then what is the remedy is the question. Before considering an application for bail on merit in accordance to Section 7(c) of the Act, 2019, if the accused is remanded, that will be definitely an infringement of his personal liberty. That amounts to confinement without hearing his case on merit.

15. In my opinion, for filing a Bail Application under Section 7(c) of the Act, 2019, the presence of the accused is not mandatory. An accused can file an application for bail under Section 7(c) through a lawyer. I am aware of the mandate of Section 437 Cr.P.C., which says that the learned Magistrate can consider a Bail Application only on certain situations. Section 437 (1) Cr.P.C. is extracted hereunder :

> *"**437. When bail may be taken in case of non-bailable offence***
>
> *(1) When any person accused of, or suspected of, the commission of any non bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but - ...."*

16. On a reading of Section 437(1) Cr.P.C., it is clear that the Magistrate can consider a Bail Application only ;

(a) when any person accused of, or suspected of, the commission of any non bailable offence is arrested or detained without warrant by an officer in charge of a police station

or

(b) appears before the Magistrate

or

(c) is brought before a court other than High Court or Sessions Court.

These three pre-conditions are necessary for considering a Bail Application by a Magistrate under Section 437 (1) Cr.P.C. So, it is clear that a Magistrate can entertain an application under Section 437(1) Cr.P.C. only if the accused is arrested or detained without warrant by an officer in charge of the police station or the accused appears before the court or the accused is brought before a court. But, Section 7 of the Act, 2019 starts with a notwithstanding clause. Section 7 starts with a

sentence “notwithstanding anything contained in the Code of Criminal Procedure, 1973”. What is the meaning of usage 'notwithstanding' in a statute is explained by this Court and the Apex Court in several decisions.

17. In ***Pannalal Bansilal Patil and others v. State of A.P. and another [AIR (1996) Supreme Court 1023]***, the Supreme Court observed like this :

> *“22. Section 16 with a non obstante clause abolishes the hereditary right in trusteeship of a charitable and Hindu religious institution or endowment. It is settled law that the legislature within its competence may amend the law. The language in Section 16 seeks to alter the pre-existing operation of the law. The alteration in language may be the result of many factors. It is settled legislative device to employ non obstante clause to suitably alter the pre-existing law consistent with the legislative policy under the new Act to provide the remedy for the mischief the legislature felt most acute. Section 16 therefore, applying non obstante clause, altered the operation of any compromise, agreement entered into or a scheme framed or a judgment, decree or order passed by any Court, tribunal or other authority or any deed or other document prior to the Act. The pre-existing hereditary right in trusteeship in the Officer of the hereditary trustee, mutawalli, dharmakartha or muntazim or by whatever name it is called and abolished the same*

prospectively from the date of the commencement of the Act. Article 15(1) of the Constitution prohibits discrimination against any citizen on grounds only of religion, race caste sex place of birth or any of them." [Emphasis supplied]

18. In ***A.G.Varadarajulu and another v. State of T.N. and others [(1998) 4 Supreme Court Cases 231***], the Supreme Court observed like this :

"16. It is well settled that while dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision orverriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In Aswini Kumar Ghose v. Arabinda Bose AIR 1952 SC 369 : 1953 SCR 1 Patanjali Sastri, J. observed :

> *"The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"*

In Madhav Rao Scindia v. Union of India (1971) 1 SCC 85 (SCC at p.139) Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions

> *which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. "A search has, therefore, to be made with a view to determining which provision answers the description and which does not."* **"**

19. From the above decisions, it is clear that by inserting a non-obstante clause in an Act, the intention of the legislature is to give overriding effect over another provision. Section 437(1) Cr.P.C. deals with the powers of the Magistrate to consider a Bail Application. Similarly, notwithstanding anything contained in Section 437(1) Cr.P.C., a separate procedure is contemplated in Section 7(c) of the Act, 2019 for consideration of Bail Application by the Magistrate. But, it is to be noted that the three pre-conditions to consider a Bail Application under Section 437(1) Cr.P.C. is not there in Section 7(c) of the Act, 2019.

20. In Section 7(c), it is only stated that 'on an application filed by the accused'. The appearance of the accused before the court is not insisted as per Section 7(c) of the Act, 2019. Similarly arrest and detention of the accused

without warrant by the police is not contemplated in Section 7(c) of the Act, 2019 for consideration of the Bail Application. Similarly arrest and production of the accused before the Magistrate are also not contemplated in Section 7(c) of the Act, 2019. As far as consideration of Bail Application under the Act, 2019 is concerned, Section 7(c) is a complete code. There is no insistence for the appearance of the accused for the consideration of a Bail Application in Section 7(c). Therefore, an accused charged under the provisions of the Act, 2019 can very well file an application before the Magistrate Court concerned through a lawyer. If an application is filed through a lawyer under Section 7(c) of the Act, 2019, the Magistrate should issue notice to the married Muslim woman upon whom talaq is pronounced. Married woman can also appear through a counsel, if she wanted to appear like that. Thereafter, the learned Magistrate has to hear both parties and pass an order on merit either rejecting the Bail Application or granting the Bail Application. On both situations, the presence of the accused is not contemplated in Section 7(c) of the Act, 2019. If the Bail

Application is allowed, the learned Magistrate can impose a condition that the accused should appear before the court personally to execute the bond and to comply other conditions of bail, if any. If the Bail Application is dismissed, the accused can work out his remedy. He can either challenge the order dismissing the Bail Application itself in accordance with law or the accused can file an application under Section 438 Cr.P.C. apprehending arrest on an accusation of having committed a non bailable offence. The personal presence of the accused before the Magistrate for considering a Bail Application or at the time when the final order is passed under Section 7(c) is not mandatory. Therefore, the grievance of the petitioner herein that if he appeared before the Magistrate Court under Section 7(c), he would be remanded is out of question. If the Magistrate is dismissing or allowing a Bail Application, the Magistrate should specifically mention the reason for the same in the light of the specific provision in Section 7(c). In other words, the order dismissing or allowing a Bail Application should be a speaking order, so that if any of the party wants to

challenge the order, the superior court will be in a better position to understand the case. Once the Bail Application is dismissed, the Investigating Officer can arrest the accused, if necessary. Therefore, from the above discussions, the following conclusions are emerged :

(i) An application under Section 438 Cr.P.C. is not barred in a case in which an offence under the provisions of Act, 2019 is alleged. But, if an accused wants to avail the right under Section 438 Cr.P.C., he should specifically plead in an application under Section 438 Cr.P.C. about the reasons for not approaching the Magistrate under Section 7(c) of the Act, 2019.

(ii) If an accused in a case registered under the provisions of the Act, 2019 filed a Bail Application before the Magistrate under Section 7(c), his personal presence before the Magistrate is not necessary till final orders are passed in the Bail Application. The personal presence of the victim is

also not needed. The accused can file the Bail Application through a lawyer if he intends to do so. The victim also can contest the bail application through a lawyer if she decides so.

(iii) If a Bail Application is filed under Section 7(c) of the Act, 2019, the Magistrate should hear the married Muslim woman upon whom talaq is pronounced.

(iv) The order passed in a Bail Application filed under Section 7(c) should be a speaking order.

(v) If a Bail Application filed by an accused under section 7(c) of the Act, 2019 is allowed, the Magistrate can direct the accused to appear before the court within a short period to comply the bail conditions including the execution of bond, etc.

(vi) If a Bail Application is dismissed by the learned Magistrate under Section 7(c) of the Act, 2019, the Investigating Officer can take up follow up action and arrest the accused, if necessary.

(vii) If a Bail Application is dismissed by the learned

Magistrate under Section 7(c) of the Act, 2019, the accused can challenge that order, if he intends to do so, in accordance with law. At that stage, the accused can even file an application under Section 438 Cr.P.C., if there is an apprehension of arrest.

(viii) If an application under Section 7(c) is allowed, the married Muslim woman upon whom a talaq is pronounced can challenge that order in accordance with law.

21. In the light of the above conclusions, the petitioner in this Bail Application can approach the learned Magistrate under Section 7(c) of the Act, 2019 with a Bail Application.

Therefore, this Bail Application is disposed of with the above observations.

Sd/-

P.V.KUNHIKRISHNAN
JUDGE

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