

Harikumar, vs State of Kerala,

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Court : Kerala

Decided On : Jun-02-2023

Judge : Honourable Mr. Justice Raja Vijayaraghavan V

Appeal No. : Crl.MC/2403/2020

Appellant : Harikumar,

Respondent : State of Kerala,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V FRIDAY, THE 2ND DAY OF JUNE 2023 / 12TH JYAISHTA, 1945 CRL.MC NO. 2403 OF 2020 IN CC 328/2019 OF JUDICIAL MAGISTRATE OF FIRST CLASS - II,PATHANAMTHITTA

PETITIONER/ACCUSED: HARIKUMAR, AGED 52 YEARS S/O.GOPALAKRISHNAN, PUTHUVELIL HOUSE, IRAVON, KONNI, PATHANAMTHITTA DISTRICT - 689 691. BY ADV D.ANIL KUMAR RESPONDENTS/STATE & DEFACTO COMPLAINANT: 1 STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 031. 2 D.ANIL KUMAR, SECRETARY, S.N.D.P.YOGAM, KONNI, KONNI

P.O.,PATHANAMTHITTA, PIN - 689 691. BY ADVS. SRI.ANIL KUMAR SRI.VIPIN NARAYAN, SR PP THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 02.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: CRL.MC NO. 2403 OF 2020 2

ORDER

This petition is filed invoking the powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (the Code for the sake of brevity).

2. The petitioner is the accused in CC.No.328 of 2019 on the file

of the Judicial Magistrate of the First Class-II, Pathanamthitta. In the said case, he is accused of having committed offenses punishable under Section 294(b) of the IPC, Section 67 of the IT Act, and Section 120(o) of the Kerala Police Act, 2011.

3. The de facto complainant is the Union Secretary of the SNDP

Yogam, Pathanamthitta Union. On 4.12.2018, he lodged a complaint before the Station House Officer, Konni, wherein he alleged that the party respondent, through his page in Facebook, an online social networking site, has posted obscenities against the General Secretary of the SNDP Yogam. Based on the aforesaid information, the above crime was registered.

4. When this matter had come up for admission, on 18.3.2020, this Court had granted an interim stay of all further proceedings as prayed for.

5. Sri. D. Anil Kumar, the learned counsel appearing for the petitioner, submitted that there is absolutely no material to suggest that it CRL.MC NO. 2403 OF 2020 3

was the petitioner who had posted the obscene message on Facebook. It is urged that even otherwise, the allegations in the complaint, if taken as such, without subtracting anything, offenses in the FIR will not be made out.

6. The learned public prosecutor has vehemently opposed the

submissions. However, it is fairly submitted that immediately after registration of the crime, a notice under Section 91 of the Cr.P.C. was sent to Facebook, Legal Department, USA, to provide account details of the Facebook account of Hari Puthuvelil Ayravan, but the same was not acceded to by the company. Nevertheless, the investigation was completed, and the final report was laid before the jurisdictional court.

7. I have considered the submissions advanced and have gone through the records.

8. From the final report, it is evident that the de facto

complainant, the Secretary of the SNDP Union, has been cited as CW1 and a certain Shaji N.K. is cited as CW2. From the final report, I find that no attempt has been made to identify the Facebook Page or obtain information about the source from which the abusive message emanated. The investigating agency has not attempted to direct their investigation into identifying the petitioner and linking him with the allegedly abusive messages that were posted on Facebook.

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9. The prosecuting agency would do well to note that where the

allegation in the crime registered by the police is that abusive messages have been posted in cyberspace or social networking sites, which in the instant case is Facebook, they will have to follow an established protocol for a successful prosecution. Though not exhaustive, these are the bare minimum things that the investigating officer may have to carry out for a successful prosecution. a) First and foremost, the prosecuting agency must attempt to link the accused with the Online Page of the networking/social media website from which the offensive messages originated. The investigating agency has a duty to gather information about the account that created the message. They should obtain the

username, profile picture, personal information, and any other associated email addresses or phone numbers. b) The investigating agency will then have to obtain the Internet Protocol (IP) address associated with the account that posted the abusive messages. This will help to establish the geographical location from which the post originated. The investigating agency should also obtain the IP address associated with the user account that posted the abusive messages. With the aid of the Internet Service Provider (ISP), the person who posted the message could be

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identified. c) The investigating agency will have to obtain the timestamps that record the time and date of the abusive messages. This information can be used to establish a timeline of events and to correlate the actions of the accused. d) It was also important for the investigating agency to collect details about the devices used to access the account. Unless details such as make, model, operating system, and unique identifiers such as International Mobile Equipment Identity (IMEI) and Media Access Control Address (MAC) are collected, it would not be possible to link the accused with the crime. e) The investigating agency will also have to obtain the login history, chat logs, and conversations to substantiate that the incriminating post is linked to the accused. The statements of persons who are followers of the accused or other witnesses could also be recorded. f) From the response of the company, it is evident that the information was required to be sought on the cover of a Mutual Legal Assistance Treaty (MLAT), if any, or a letter rogatory. The investigating officer could have requested for secure access to the Law Enforcement Online Request System as well. In the case on hand, Facebook has offices in India as well and if any such request is made, they were

CRL.MC NO. 2403 OF 2020 6 bound to comply and furnish such information, if the same is available, in terms of their service and applicable law. In the case on hand, no such attempts have been made to collect the relevant information.

10. Without linking the Facebook page with the petitioner, it would not be possible to connect the accused with the abusive messages that he has posted in cyberspace.

11. Furthermore, the offense alleged against the petitioner is under Section 67 of the IT Act, Section 294(b) of the IPC and Section 120(o) of the Kerala Police Act. In *Sreekumar v. State of Kerala* [2019

(2) KLT 642], a learned Single Judge, while considering an application for

anticipatory bail, relying on *Latheef v. State of Kerala* [2014 (2) KLT 987] *P.T.Chacko v. Nainan Chacko* [1967 KLT 799] and *Sangeetha Lakshmana v. State of Kerala* [2008 (1) KHC 812] had occasion to hold that in order to make the words used by the accused obscene and punishable under Section 294(b), the words used must be in a sense lascivious or it must appeal to the prurient sense or must be of such a nature to deprave and corrupt persons. It was also held that a comparison of the relevant wordings in Section 292(1) and Section 67 of the Information Technology Act, 2000 would make it clear that in order to make the publication or transmission or causing of publication or transmission in

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the electronic form to be brought within the contour of Section 67 of the IT Act, 2000, the message should be one which tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances to read, see or hear the matter contained in it. This Court had held that even if the words are extremely unparliamentary, unprintable, and abusive in nature, so long as the words in question are not capable of arousing sexual thoughts in the minds of the hearers and do not involve lascivious elements arousing sexual thoughts or feelings or the words does not have the effect of depriving persons and defiling morals by sex appeal or lustful desires, it cannot be brought within the

broad contours of the penal provisions as contained in Section 294 and 292 of the IPC corresponding to Section 67 of the IT Act. Having considered the allegations in the complaint lodged by the de facto complainant, I am of the view that the offense under Section 294(b) nor Section 67 of the IT Act will not be made out in the facts and circumstances.

12. Insofar as Section 120(o) of the Kerala Police Act, 2011 is

concerned, only if there are materials to show that any person, through any means of communication, causes a nuisance to any person by repeated or undesirable or anonymous call, letter, writing messages, email etc. can be

held liable. There is no material in the instant case to suggest that the post

has emanated from the account maintained by the petitioner. CRL.MC NO. 2403 OF 2020 8

13. The scope of exercise of power under Section 482 of the Code

and the categories of cases where the High Court may exercise its power under it relating to cognizable offenses to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal¹. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of rare cases. The illustrative categories indicated by the Apex Court has been detailed in paragraph 102 and 103 of the judgment, which reads 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 channelised 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.

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(2) Where the allegations in the first information report and other materials,

if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence

but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(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) Where there is an express legal bar engrafted in any of the provisions of

the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(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.

103. We also give a note of caution to the effect that the power of

quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do

CRL.MC NO. 2403 OF 2020 10 not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

14. Having considered the facts of the instant case, in the light of the

principles laid down by the Apex Court in Bhajan Lal (supra), I am of the view that the uncontroverted allegations made in the FIR and the charge and the evidence collected in support of the same do not disclose the commission of any offence against the petitioner. In that view of the matter, this Court will be well justified in invoking its powers under section 482 of the Code to quash the criminal proceedings against the petitioner.

Resultantly, this petition will stand allowed. Annexure-A1 final report in Crime No. 1655/2018 of Konni police station and all further proceedings pursuant thereto against the petitioner in C.C.No.328/2019 on the files of the Judicial Magistrate of First Class-II, Pathanamthitta are quashed. Sd/- RAJA VIJAYARAGHAVAN V JUDGE Sru CRL.MC NO. 2403 OF 2020 11 APPENDIX OF CRL.MC 2403/2020

PETITIONERS ANNEXURES Annexure A2 TRUE COPY OF THE RELEVANT PAGES OF PASSPORT BEARING NO.K8469597 ISSUED TO THE PETITIONER. ANNEXURE A1 CERTIFIED COPY OF F.I.R.NO.1655/2018 OF KONNI POLICE STATION ALONG WITH COMPLAINT FILED BY THE SECOND RESPONDENT AND THE FINAL REPORT SUBMITTED BY THE POLICE WHICH PENDING ON THE FILE OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II, PATHANAMTHITTA AS C.C.NO.328/2019.

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