

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 20TH DAY OF JUNE 2018 / 30TH JYAISHTA, 1940

Bail Appl..No. 3833 of 2018

CRIME NO. 1309/2018 OF PALA POLICE STATION , KOTTAYAM DISTRICT

PETITIONER/ACCUSED NO.4:

MAJEESH K. MATHEW,
S/O. K.U. MATHEW, AGED 39 YEARS, KOCHUMALAYIL HOUSE,
VETTIMUKAL P.O, ETTUMANOOR.

BY ADVS.SRI.SOORAJ T.ELENJICKAL
SRI.P.A.MOHAMMED SHAH
SRI.K.ARJUN VENUGOPAL
SMT.MARY RESHMA GEORGE
SMT.V.A.HARITHA
SRI.JEEVAN RAJEEV
SRI.R.NANDAGOPAL

RESPONDENT(S):

1. STATE OF KERALA,
THROUGH INSPECTOR OF POLICE, PALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.
2. NISHA JOSE, AGED 44,
W/O. JOSE K.MANI, KARINGOZHACKAL HOUSE,
VELLAPPAD P.O, PALA, KOTTAYM DISTRICT.

R1 BY SENIOR PUBLIC PROSECUTOR SRI.C.N. PRABHAKARAN.
R2 BY ADV. SRI.TOM JOSE (PADINJAREKARA)

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION
ON 20-06-2018, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

PBS
21/6/2018

“CR”

RAJA VIJAYARAGHAVAN V, J.

B.A. No.3833 of 2018

Dated this the 20th day of June, 2018

ORDER

1. The applicant claims to be the State General Secretary of the youth wing of the Democratic Kerala Congress. He apprehends arrest in a crime registered arraying him as the 4th accused at the Pala Police Station as Crime No.1309 of 2009. In the aforesaid Crime, he face accusations of having committed offences under Section 354(A)(3) of the IPC, Section 67A of the Information Technology Act, 2000 and under Section 120 of the Kerala Police Act , 2011.
2. The de facto complainant is a lady and the author of a recently published book. She claims to be a social activist and is the wife of a sitting member of Parliament. In her complainant, the victim states that she is very active in social media and has a “Facebook” account through which she keeps in touch with her family and friends and interacts with her followers. She recently noticed the accused indulging in

an organised vituperative campaign against her online. According to the de facto complainant, the accused have posted several comments in their facebook pages making scurrilous comments against her. The pictures of herself and her husband have also been posted, making her the subject of online sexual harassment. She has extracted the Facebook posts of the accused and asserts that the posting of such sexually coloured remarks in the respective facebook pages display their hostile attitude towards her. According to her, the accused have tagged the posts and have shared them. They have also liked the posts of others and thus endorsed the views of the abusers. This is with intent to spread the libellous messages online. She checked up the posts and found it grossly inappropriate, offensive and peppered with obscenity. Insofar as the applicant herein is concerned, the allegation is that he had tagged and shared the posts of some of the accused. He has also written in his page that the wife of a politician, who is also a Member of Parliament, used to rape him for about 16 years commencing from his days in college as a student. This apparently was with reference to the victim and this fact is evident from the context under

which the posts have been made. The posts have been liked, tagged and shared by the other accused as well. It is on these lines that she sought for prosecution of the offenders.

3. The learned counsel appearing for the applicant submitted that the applicant is innocent. According to the learned counsel, by no stretch of imagination, Section 67A of the IT Act, 2000, would be attracted as the posts cannot be categorised as relating to any sexually explicit act or conduct. The rest of the offences alleged are bailable. The learned counsel made an attempt to justify the slew of posts targeting the de facto complainant and it was urged that this was the making of the victim herself. The victim had authored a book recently and in the said book, she had levelled some allegations against a young political leader. The said revelation by the de facto complainant garnered much media attention and it was the subject matter of discussion in the social media. The applicant had also participated in the said discussion. However, he had no intention to denigrate the applicant or to tarnish her image. This, in essence, are the submissions fervently advanced by the learned counsel.

4. Opposing the prayer, the learned Public Prosecutor submitted that the investigation conducted till date clearly shows that the applicant herein and his associates had, in an organised manner, systematically targeted the de facto complainant and vilified her online in a most despicable manner. The investigation is in the early stages and it is too early to conclude that the offences alleged will not be attracted. It is urged that the applicant is a person who occupies a responsible position and he was not expected to revile a woman online. The posts would show that it was gender based harassment of the de facto complainant by persons wielding power with a view to subjugate her. According to the learned Public Prosecutor, the intention was to embarrass, humiliate and denigrate the applicant.

5. The de facto complainant filed an application to intervene in the matter and to oppose the prayer for pre-arrest bail. The learned counsel submits that the victim was the subject of gender based bullying. The intent was to denigrate the applicant on the basis of her sexuality. The abuse has been in a structured and organised manner and is characterised by sexist vitriol. According to the learned counsel, a reading of

the posts clearly shows the intent of the accused including the applicant. The perpetrators are all men and they are members of a rival political party. By using their clout, they have targeted the de facto complainant. The power of social media has been ruthlessly used to subject the victim to gross online sexual harassment. The allegations cannot be regarded as frivolous or vexatious and this Court should desist from exercising its discretionary powers in the submission.. Unless a very stringent view is taken, the applicant would continue to indulge in these reprehensible acts as what was pointed by the learned counsel. To buttress his submission, it was submitted that immediately after dismissal of the application for anticipatory bail by the Court of Session, the applicant had taken to his facebook page and had threatened the de facto complainant that the cyber wing would continue to target her even if he is put in jail. A screenshot of the said page was also made available by the learned counsel to bring home his point.

6. I have anxiously considered the submissions advanced. I have also had the advantage of going through the case diary which contains the printouts and screen-shots of the abusive posts

made by the applicant and others. The investigation appears to be still in the early stages. It is evident that there has been a concerted effort to target the de facto complainant herein for having made some references about a young leader in her book. The posts that the accused have posted have been in public domain for quite some time. It is futile to contend that their group is private, as the applicant, even according to him, is a prominent politician. He himself claims that he is the State General Secretary of the youth wing of the Democratic Kerala Congress. He was expected to act responsibly and desist from abusing women or for that matter anyone else. The messages which have either been liked, tagged or posted by the applicant have overtones of the subject raping young men, immorality, masturbation and promiscuous sexual behaviour. The photographs of the de facto complainant, her husband etc. are also peppered in those pages. There cannot be any doubt that the target is the de facto complainant and none else. The applicant had no business to throw muck and abuse at a woman online. After going through the posts which were made available, I am inclined to hold that the de facto complainant has been subjected to gross online sexual

harassment. The method adopted by the applicant and others clearly fall within what is called in these ages as cyber bullying, cybersexism or cybermisogyny. There is evidently discriminatory and abusive behaviour towards the de facto complainant apparently due to her political leanings. In the virtual world of social media, people feel that they are free to send insulting or abusive messages to others. Though the strength of social media has always been to easily connect and interact with friends and groups, it can also be subjected to gross abuse. The freedom that social media offers cannot be exploited to do online baiting such as in the instant case wherein the de facto complainant is branded as being sexually promiscuous. Prima facie, there are materials to conclude that the applicant has posted messages tinged with sexism with a view to embarrass and humiliate the lady.

7. One of the main contentions advanced by the learned Counsel is that the provisions of Section 67A of the IT Act would not be applicable. To appreciate the said contention, it may be necessary to have a glance at the said provision which reads as follows:

“Section 67A - Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.”

8. Sexually explicit act or conduct has not been defined in the the IT Act. The IT Act, 2000 is based on the United Nations Model Law on Electronic Commerce, 1996 (UNCITRAL Model) recommended by the General Assembly of United Nations by its resolution dated 30 January 1997. Sexually explicit material (video, photography, creative writing) may mean presenting sexual content without deliberately obscuring or censoring it. The term "sexually explicit" is often used as euphemism for pornography. It includes un-simulated

sexual acts, sexual intercourse and uncovered genitalia.

9. In the United States Code, 'sexually explicit conduct' has been defined as follows:-

“sexually explicit conduct” means actual or simulated —

- (i) sexual intercourse including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (ii) bestiality;
- (iii) masturbation;
- (iv) sadistic or masochistic abuse; or
- (v) lascivious exhibition of the genitals or pubic area of any person.

In the instant case, though there is prima facie material to conclude that there is online sexual harassment, the question whether the offence under Section 67A of the IT Act will be attracted is something that the investigating officer will have to consider in the course of investigation. At this preliminary stage, this Court will not be justified in discussing the merits or demerits of the evidence that is yet to be collected by the investigating agency.

10. Now the question is whether, in the facts and circumstances,

the applicant is entitled to an order as prayed for. It is settled that the parameters that are to be taken into consideration while dealing with an application for anticipatory bail are the nature and gravity of the accusation, the antecedents of the applicant, the possibility of the applicant fleeing from justice, the possibility of the accused's likelihood to repeat similar or the other offences, frivolity of the accusations and the impact of grant of anticipatory bail to a person such as the applicant. It has been held by the Apex Court that the society has a vital stake in the personal liberty of an individual and the investigational power of the police. The task cut upon this Court is how best to balance these interests while determining the scope of Section 438 of the Code of Criminal Procedure, 1973. The Court exercising powers under Section 438 has to exercise its discretion wisely and objectively and in consonance with principles governing the grant of bail.

11. After evaluating the entire materials, I am not persuaded to exercise the discretionary powers of this Court and arm the applicant with an order of pre-arrest bail. The applicant shall surrender before the Court having jurisdiction expeditiously. If an application for regular bail is preferred, the same shall

be considered expeditiously and orders shall be passed on its merits.

12.It is made clear that the observations made above are prima facie observations made for the sole purpose of considering the prayer for anticipatory bail. Needless to say, the parameters that are to be taken into consideration while dealing with an application for regular bail are different. The court below, while dealing with the application for regular bail, shall consider the merits of the case untrammelled by the observations made above.

This application will stand dismissed.

Sd/-
RAJA VIJAYARAGHAVAN. V.,
JUDGE

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P.S to Judge