



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS.JUSTICE SOPHY THOMAS

TUESDAY, THE 5TH DAY OF NOVEMBER 2024 / 14TH KARTHIKA, 1946

CRL.A NO.847 OF 2007

AGAINST THE JUDGMENT DATED 04.05.2007 IN SC NO.325 OF
2004 OF ADDITIONAL SESSIONS JUDGE (ADHOC)-II, KALPETTA

APPELLANTS/ACCUSED:

- 1 ABDUL KHADER, S/O.ASSAINAR,
EDAKANDAN HOUSE, POZHUTHANA, VYTHIRI, WAYANAD DISTRICT.
- 2 SULEKHA, W/O. ASSAINAR
EDAKANDAN HOUSE, POZHUTHANA, VYTHIRI, WAYANAD DISTRICT.
- 3 ASSAINAR, EDAKANDAN HOUSE
POZHUTHANA, VYTHIRI, WAYANAD DISTRICT.
- 4 SIRAJUDHEEN, S/O.ASSAINAR,
EDAKANDAN HOUSE, POZHUTHANA, VYTHIRI, WAYANAD DISTRICT.

BY ADV SRI.BABU S. NAIR

RESPONDENT/STATE:

THE STATE OF KERALA, REPRESENTED BY
SUB INSPECTOR OF POLICE, VYTHIRI POLICE STATION-
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,,
ERNAKULAM, KOCHI-31.

SMT.SEENA C, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
05.11.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

**C.R****J U D G M E N T**

This appeal is at the instance of accused Nos.1 to 4 in SC No.325 of 2004 on the file of Additional Sessions Judge (Ad hoc-II), Kalpetta, challenging their conviction and sentence under Section 498A read with Section 34 of IPC, vide judgment dated 04.05.2007.

2. The prosecution case is that, Asmabi, an 18 year old girl who was the wife of the 1st accused, committed suicide on 19.06.2002 due to the matrimonial cruelties meted out to her, by the accused persons, who are her husband and in-laws, and also due to the harassment on demand of dowry.

3. The accused persons (4 in number) were chargesheeted by Dy.SP, Kalpetta, for offences punishable under Sections 498A, 304B and 306 read with Section 34 of IPC.

4. After committal and on appearance of the accused before the trial court, charge was framed against them under Sections 498A, 304B, 306 read with Section 34 of IPC, to which, all of them pleaded not guilty and claimed to be tried.

5. From the side of prosecution, PWs 1 to 24 were examined, Exts.P1 to P14 were marked and MOs 1 to 3 were identified.



6. On closure of prosecution evidence, accused were questioned under Section 313 of Cr.P.C. They denied all the incriminating circumstances brought on record and pleaded innocence. Except marking of Exts.D1 to D5 contradictions through prosecution witnesses, no evidence was adduced from the side of accused.

7. On analysing the facts and evidence and on hearing the rival contentions from either side, the trial court found that the prosecution could not prove the guilt of the accused under Section 304B and 306 of IPC and so, they were acquitted thereunder. But, they were found guilty under Section 498A read with Section 34 of IPC and each of them was convicted and sentenced to undergo rigorous imprisonment for three years and fine of Rs.10,000/- with a default sentence of rigorous imprisonment for six months each. Aggrieved by the conviction and sentence, the accused preferred this appeal.

8. Heard learned counsel for the appellants/accused and learned Public Prosecutor for the respondent/State.

9. Appellants 1 to 4 can be referred as accused Nos.1 to 4 for the purpose of convenience.



10. There is no dispute with respect to the fact that Asmabi, a girl aged 18 years, who was the daughter of PW3, committed suicide on 19.06.2002, by consuming poison. The prosecution case is that, Asmabi was a Hindu by religion and her real name was Divya. She fell in love with the 1st accused Abdul Khader and she became pregnant from him. Accused Nos.2 and 3, the parents of the 1st accused, aborted her pregnancy forcibly in the hospital of PW7-Doctor Chakrapani. When her parents came to know about her love affair with the 1st accused and abortion of her pregnancy, the religious leaders of both communities mediated, and decided to convert Miss.Divya into an Islam for conducting her marriage with the 1st accused, as per Muslim rites and custom. She was taken to Ponnani for conversion and she embraced Muslim faith, and received the name Asmabi. Her marriage could not be conducted then, as she was a minor at that time. She was taken back from Ponnani, and after undergoing religious teachings, her Nikah with the 1st accused was solemnised and thereafter she started living with the 1st accused as his wife, along with his parents and siblings.

11. Life of Asmabi in the house of the 1st accused was miserable as they ill-treated her physically as well as mentally and they harassed her, on demand of dowry as well. Meanwhile, a



marriage agreement was registered between her and the 1st accused, on 10.06.2002. Unable to bear the ill-treatment from the part of the accused persons, Smt.Asmabi committed suicide by consuming poison.

12. Since the accused were acquitted of the offences alleged under Sections 304B and 306 of IPC, and no appeal has been preferred by prosecution against that acquittal, it has become final, and so, this Court is not expected to reconsider the evidence, with respect to those offences.

13. In this appeal, we are concerned only with the allegations under Section 498A read with Section 34 of IPC, for which, the accused persons are convicted and sentenced.

14. Learned counsel for the appellants would contend that, the harassment and cruelty mentioned in Section 498A of IPC must be of the nature, sufficient to drive the wife to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical), so as to convict the accused for that offence. According to him, ordinary quarrel between spouses cannot come under the definition of cruelty under Section 498A of IPC. So, he would argue that the conviction and sentence of the accused without any specific incidents of cruelty, or harassment on specific



demand of dowry, are liable to be set aside.

15. Learned Public Prosecutor drew the attention of this Court to the testimony of prosecution witnesses, especially PW3-the father of the deceased, PWs 4 and 5-her friends, PW15-her maternal aunt, PW17-her brother, PW16-executive member of the Mahal Committee and PW19-a neighbour, to say that prosecution succeeded in proving its case that, the girl named Asmabi committed suicide as she was subjected to cruelties by her husband and in-laws, and also due to harassment on demand of dowry.

16. PW3-her father categorically stated that, he came to know about the love affair between his daughter Divya and 1st accused-Abdul Khader, only after aborting her pregnancy. According to him, accused Nos.2 and 3 took her to the hospital of Dr.Chakrapani, where her pregnancy was aborted forcibly. Thereafter, on mediation talks between the Mahal Committee as well as Temple Committee, his daughter Divya was sent along with accused Nos.2 and 3, agreeing to conduct her marriage with the 1st accused, after attaining majority. She embraced Islam faith, married the 1st accused and thereafter she lived with him in his house along with accused Nos.2 to 4. She was ill-treated by them,



and the 2nd accused-mother-in-law was demanding dowry from her. He further stated that, the 2nd accused told PW16-Moideen that, she has to get dowry from the house of Asmabi.

17. PWs 4 and 5, who are the friends of deceased Asmabi, deposed before court that, they had seen Asmabi at the house of the accused few days before her death, and then she had told them that she was ill-treated and harassed by the accused demanding dowry, and moreover the 1st accused/husband was avoiding her. PW15-the maternal aunt of the deceased also would say that when she visited Asmabi at the house of the accused few days prior to her death, she told her about the ill-treatment, and harassment, she was suffering at the hands of the accused. PW17-brother of the deceased would say that, on the date of registration of marriage of Asmabi and the 1st accused, i.e. on 10.06.2002, he had seen the deceased in the jeep, while they were going to the Sub Registrar's office. Then he saw a burn injury on her hand, and on asking, she told him that, the 2nd accused-mother-in-law inflicted that injury. PW15 also stated that the deceased told her that her mother-in-law placed a heated spatula on her hand, as she woke up late. PW16 as well as PW19 also supported the case of prosecution that, the girl Asmabi was



subjected to cruelty and harassment by the accused persons, on demand of dowry.

18. PW6-Doctor, who conducted autopsy on the body of the deceased, certified that her death was due to poisoning. In Ext.P3-post mortem certificate, the Doctor had noted an abrasion of 0.5x0.5 cm on back of her left upper arm 8cm below armpit with contusion of fat underneath. Ext.P12-Chemical Analysis Report will show that, the black granular substance sent for analysis contained a toxic organophosphorus compound named 'Phorate'.

19. The appellants are also not disputing the fact that Asmabi committed suicide by consuming poison. The testimony of PWs 3, 4, 5, 15, 16, 17 and 19 are sufficient to substantiate the prosecution case that, the girl named Asmabi was driven to commit suicide by the ill-treatment and harassment meted out to her by her husband and in-laws on demand of dowry, which will come under the definition of cruelty under Section 498A of IPC. There are specific allegations of willful acts from the part of each accused, spoken to by the witnesses aforesaid. So, according to prosecution, there is no reason to interfere with the finding of the trial court, that an offence under Section 498A read with Section 34 of IPC was made out against the accused.



20. Learned counsel for the appellants contended that, Ext.P5 was only a marriage agreement between the 1st accused and the girl named Asmabi, and it was not a valid marriage. According to him, in order to convict the accused under Section 498A of IPC, there must be a valid marital relationship. Only when, the husband or the relative of the husband of a woman, subjects her to cruelty, he/she shall be punishable under Section 498A of IPC. So, his argument is that, a legal marriage is essential, and only a legally wedded wife, can claim protection under Section 498A of IPC, and in the absence of such a legal relationship as husband and wife, there cannot be a conviction under that Section.

21. In the decision **Narayanan v. State of Kerala** [2023 (6) KHC 427], this Court held that, a marriage agreement though registered cannot be a substitute for a legally valid marriage, and so it cannot be accepted as a valid marriage document. But, when there is some form of marriage, either religious or customary, which has the colour of a legal marriage, the woman can seek protection under Section 498A of IPC, though later, for some reason as to age, mental status, religion, consanguinity, spouse living etc. etc., the marriage was found to be invalid in the eye of



law. In that case there was no marriage at all, and there was only live-in-relationship on the basis of a marriage agreement. Under that circumstance, the court held that a woman cannot seek shelter under Section 498A of IPC, on the ground that they were holding out to the society, as man and wife, by their long cohabitation, after a marriage agreement.

22. Here, the scenario is entirely different. Deceased Asmabi was professing Hindu faith and she fell in love with the 1st accused who was a Muslim. She became pregnant from him but it was aborted. Later, religious leaders intervened, and decided to convert that girl into a Muslim, and so, she was taken to Ponnani along with the letter of the Mahal Committee, where she was administered 'Shahadath Kalima', the prayer for professing Islam. Since 3½ months were remaining, for her to attain majority, their marriage could not be conducted then, and so, she came back from Ponnani and completed her religious teachings in the house of PW16, and also in the house of one Mr.Pocker. The Nikah of the 1st accused and the deceased was conducted in the house of Pocker as deposed by PW16, and he further stated that, a gold chain of the 2nd accused-mother-in-law was given as 'mahar' to Asmabi. Thereafter, Asmabi stayed along with the 1st accused and his family,



as his wife. PW19 also supported PW16 in all material particulars.

23. In the case on hand, there is clear statement from PW16 and PW19 that 'Nikah' of Asmabi with the 1st accused was conducted at the house of Mr.Pocker. True that no records from the Mahal is produced to prove the 'Nikah' or its date. PW16 was the Executive Member of the Mahal Committee, and he is a responsible person to say about the conversion of Asmabi and her 'Nikah' with the 1st accused. There is nothing to show that Asmabi was a minor at the time of 'Nikah'. Since 3½ months remained, for her to attain majority, her marriage was not conducted immediately on professing Muslim faith at Ponnani. Thereafter she came back from Ponnani, attended religious teachings, and only thereafter her 'Nikah' was conducted. So, in all probability, she might have attained majority by that time. No evidence is there from the part of accused, to show that Asmabi was a minor at the time of 'Nikah'.

24. Learned Public Prosecutor would argue that even if Asmabi was a minor at the time of Nikah, under the Mohammedan Law a girl, who has attained puberty, can marry without the consent of her parents. Article 251 of Mulla's Principles of Mohammedan Law, held that, every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage.



Going by the explanation to the said Article, puberty is presumed, in the absence of evidence, on completion of the age of 15 years.

25. Learned counsel for the accused would contend that, even if Mohammedan Law permits a minor Muslim girl to marry on attaining puberty, under secular law, it cannot be treated as a valid marriage, as it will violate the provisions of the Prohibition of Child Marriage Act, 2006 (hereinafter referred as the 'Child Marriage Act'). Relying on a Single Bench decision of this Court in **Moidutty Musliyar v. Sub Inspector, Vadakkencherry Police Station, Palakkad** [2024 (5) KHC 187], he would argue that when the Child Marriage Act prohibits child marriage, it supersedes the Muslim personal law, and every citizen of the country is subject to the law of the land, irrespective of his or her religion.

26. Based on the decision of this Court in **Khaledur Rahman v. State of Kerala and another** [2022 (7) KHC 264], learned counsel for the accused contended that, if one of the parties to the marriage is a minor, irrespective of the validity of their marriage under the Muslim personal law, penetrative sexual intercourse with a child will come under the sweep of POCSO Act (Protection of Children from Sexual Offences Act), even if it is under the guise of a marriage. So, his argument is that, since the



'Nikah' of Asmabi with the 1st accused was conducted, while she was a minor, it cannot be treated as a valid marriage under secular law, and so an offence under Section 498A cannot be found against the accused. But, going by the facts, there is nothing to show that Asmabi was a minor at the time of 'Nikah'. If at all she was a minor, under Muslim Law, a minor girl can contract marriage after attaining puberty. Under Mohammedan Law, still that marriage is recognised as valid.

27. In order to reconcile the decisions of *Moidutty Musliyar* and *Khaledur Rahman* cited supra, with the facts of the case on hand, we have to say that, when a particular act complained of, constitutes an offence under a special statute, that statute will prevail, and the personal law or customary law shall stand abrogated to the extent of its inconsistency. It is trite law that when the provisions of a statute are repugnant to, or contrary to the customary law or personal law, in the absence of any specific exclusion of the said customary or personal law, from the statutory provisions, the statute will prevail. When a marriage which is valid under the customary or personal law or any act committed within that marriage are called in question as it constitute an offence under a special statute, inviting penal consequences, no doubt, the



special law will prevail, in spite of legality of that marriage under the customary or personal law. But the marriage under the customary or personal law, which is otherwise valid, has to be treated as valid between parties to that marriage for all practical purposes, unless and until it is challenged by any of the parties to that marriage, and declared void on any valid grounds.

28. In the case on hand, the accused persons were not disputing the Nikah between the deceased and the 1st accused as per Muslim Personal Law. In the 313 questioning of the 1st accused, to every question put to him regarding his marriage with the deceased, his answer was in the affirmative. There is no dispute with respect to the fact that the 1st accused married Asmabi after attaining puberty. If at all she was a minor at the time of marriage, after attaining majority, they acknowledged that marriage and never challenged their marriage contracted under the Muslim Law. The deceased accepted Islam faith and also accepted the Muslim name Asmabi and the prosecution evidence is sufficient to show that even her funeral was in accordance with the Muslim religious rites. So, even though there was no registration of marriage under secular law, marriage between the deceased Asmabi and the 1st accused was contracted as per Muslim Personal



Law and it was acknowledged by both of them.

29. The distinction we can draw from the decisions *Moidutty Musliyar* and *Khaledur Rahman* cited supra to the case on hand is that, the marriage of Asmabi with the 1st accused was never called in question under any special statute. True that when a particular act complained of constitutes an offence under a special enactment, even if it is committed within a marriage recognised under personal law, the special statute will prevail, in the absence of any specific exclusion of the customary or personal law from the statutory provisions.

30. Here, there is nothing to show that Asmabi was a minor at the time of 'Nikah'. If at all she was a minor, she had attained puberty, and so, that marriage was valid under Mohammedan Law. That marriage was never called in question under the Child Marriage Act or any other special enactment inviting penal provisions. There was clear admission from the accused that, Asmabi was the wife of the 1st accused. Their 'Nikah' was conducted at the house of Mr.Pocker as deposed by PW16, and that marriage is still recognised under Muslim personal law. It was not a case of 'no marriage' and only 'live-in-relationship'. Based on Narayanan's decision cited supra, we can say that if there was



some form of marriage, religious or customary, which has the colour of a legal marriage, then also the woman can seek protection under Section 498A, though later, for some reason, that marriage is found to be invalid in the eye of law.

31. In **Reema Aggarwal vs. Anupam and others** [(2004) 3 SCC 199], the Apex Court held that, the expression 'husband' would cover a person who enters into a marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any purposes enumerated in Sections 304B/498A, whatever be the legitimacy of the marriage. Paragraph 18 of that judgment reads as follows:

"18. The concept of "dowry" is intermittently linked with a marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an issue, further legalistic problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which Sections 498-A and 304-B IPC and Section 113-B of the Indian Evidence Act, 1872 (for short "the Evidence Act") were introduced, cannot be lost sight of. Legislation enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with a certain element of realism



too and not merely pedantically or hypertechnically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take shelter behind a smokescreen to contend that since there was no valid marriage, the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature "dowry" does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498-A. The legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages...".

32. Adopting the spirit of *Reema Aggarwal's* case, we can safely conclude that the contention taken up by learned counsel for



the appellants that, since there was no legal marriage between the deceased and the 1st accused, there cannot be a conviction under Section 498A of IPC, is not tenable.

33. As we have seen, prosecution succeeded in proving the guilt of the accused under Section 498A read with Section 34 of IPC. So, this Court finds no reason to interfere with the conviction of the accused by the trial court, for the offence under Section 498A read with Section 34 of IPC.

34. Coming to the sentencing part, learned counsel for the appellants would submit that, the incident occurred in the year 2002, and 22 years passed since then. The 1st accused was a boy aged 19 at the time of commission of offence and he fell in love with the deceased girl. The other accused persons are his parents and brother. The specific allegation against the 3rd accused-father-in-law was that, he confined the deceased in a room, and the allegation against the 4th accused-brother-in-law was that he slapped on her face. But, the allegations against accused Nos.1 and 2 are quite serious which ultimately drove that girl to commit suicide. An 18 year old girl was driven to commit suicide because of the ill-treatment and harrassment from the part of her husband and in-laws and that matter has to be viewed



seriously, and so they are not entitled to get the benevolence under the Probation of Offenders Act also. But, considering the fact that the 1st accused was aged only 19 and the other accused are his parents and brother, this Court is inclined to modify and reduce the sentence as follows:-

(i) A1 and A2 are sentenced to undergo simple imprisonment for 1½ years (18 months) and to pay fine of Rs.25,000/- each, with a default sentence of simple imprisonment for three months each.

(ii) A3 and A4 are sentenced to undergo simple imprisonment for four months each and to pay fine of Rs.10,000/- each, with a default sentence of simple imprisonment for two months each.

(iii) If the fine amount is realised, Rs.50,000/- shall be given to PW3-the father of the deceased as compensation under Section 357(1) of Cr.P.C. If PW3 is no more, the compensation amount shall be paid to his legal heirs.

(iv) Set off is allowed for the period undergone by the accused in custody, during trial.

Registry to forward a copy of this judgment along with the TCR to the trial court forthwith, for executing the sentence in



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accordance with law, without further delay.

The appeal is allowed to the extent as above.

sd/-

**SOPHY THOMAS
JUDGE**

smp