



1st BHC-JGU Moot Court, 2021 Competition Case

DEADLINE FOR SUBMISSION: 15th July 2021, 11:59 PM IST.

WORD LIMIT: Maximum 6000 words for the pleadings, and 1500 words for each other section. Word limits do not include footnotes. Explanatory footnotes are not allowed.

INSTRUCTIONS:

1. Read the order below and accordingly prepare a memorial as counsel for Mrs. ABC and Ms. XYZ (Petitioner in all cases) and accused Mr. PQR (Respondent in respective cases). The arguments for the Union of India or State of Delhi are not to be made by either parties. It is to be assumed that the arguments for the Respondent are in line with the arguments of the Union/State.
2. **Disclaimer:** Please note that the below is a fictional order and does not represent a real order of the Supreme Court. It is only meant to encourage participants to engage with orders of Courts and provide guidance on the kinds of arguments taken.
3. It is to be assumed that the Supreme Court has jurisdiction to hear the issues referred to in the order. Specifically, there is no need to consider grounds pertaining to (A) the questions regarding Supreme Court Rules and procedure in so far as they pertain to the roster and propriety of tagging these cases (b)The relevant High Court Rules and practice & procedure on intra-Court appeals and the jurisdiction of Division Benches/Single Benches.
4. It is specifically clarified that for the purpose of this moot, the parties may advance arguments on the maintainability of the Writ Petition (CrI) No. 543X/2021 mentioned below i.e. the Supreme Court can hear substantive arguments on maintainability at the stage of final arguments. However, the presumption of jurisdiction of the Supreme Court shall apply insofar as arguments on exhaustion of remedies before the High Court under Article 226 are waived.
5. The issue of Jurisdiction does not need to be argued, and the Jurisdiction will lie with the Supreme Court of India.
6. Questions of interpretation of international laws and obligations can also be taken up.

IN THE SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

SPECIAL LEAVE PETITION (CRL.) NO. 123X OF 2021

MRS. ABC

VERSUS

MR. PQR AND ANR.

WITH
WRIT PETITION (CRL) NO. 543X OF 2021

WITH
SPECIAL LEAVE PETITION (CIVIL) NO. 543X of 2021

Date: 25-03-2021

These matters were called on for admission today.

CORAM: HON'BLE MR. JUSTICE DORAEMAN
HON'BLE MR. JUSTICE PACMAN

For Petitioners: _____, Adv.
_____, Adv.

For Respondents: _____, Adv.
_____, Adv.

UPON hearing the counsel the Court was pleased to make the following

ORDER

1. The above-captioned matters came up for admission today. They arise out of a common factual situation and therefore, have been tagged together .
2. The present controversy arises out of an article dated 12.01.2021. The article, published in the British newspaper The Globe is reproduced as under:

Another #MeToo incident shocks the world! A senior official of Scambook has been accused of sexual harassment

In yet another #MeToo incident, the anonymous twitter account @Neverbackdown has posted a series of tweets that talk about the incident of a young female staffer at ScamBook who was sexually harassed by a 'senior

official' at Scambook. The Globe has learnt that the staffer in question has provided intimate and scandalous details of the 'men's club' that exists at the MNC where the senior male members of the staff hold parties without their families and spouses. At one such party last year, the female staffer alleges that the 'senior official' molested her and told her, "If you want a promotion you will keep quiet, because nobody will believe you anyway". The survivor then also tried to approach the 'higher ups' at the organisation but was made to believe that it was all 'in her head', and that he is a 'married man' so she should not 'ruin his career'.

The survivor has also spoken to the publication stating that she was shocked at the behaviour because she thought the accused was happily married to a British citizen. However, after confiding in a friend as to her harassment, she found out that was a video circulating on whatsapp which showed the accused raping his wife at a party. The Globe has attempted to verify the authenticity of the video however, the faces are not clearly visible, but it is clear that there were certain drugs used at the beginning of the video.

The Globe has also contacted the police in India. However, in yet another turn of events, an anonymous source at the Police made a statement that "foreign women are the root cause of all these problems, they take drugs and then try to blackmail their husbands by releasing these videos themselves. We are looking into what action can be taken against these individuals under The Narcotic Drugs and Psychotropic Substances Act, 1985." The Globe also approached Ms. Mann, the head of the Commission for Women who stated that while she had not seen the video, the offence in question was not a crime at all as "marital rape does not find place in the Indian Penal Code, 1860" and that "these are issues between a husband and wife, they must figure it out themselves."

The Globe has received no comments from the Media Relations at Scambook about the present incident, or their policies to prevent sexual harassment in the workplace. However, anonymous sources within the Company have said that they are contemplating appropriate legal action.

Despite the #MeToo movement, 57 percent of women said they've experienced some form of sexual harassment in the workplace at some point, ranging from sexist jokes to inappropriate touching.

3. In the aftermath of this article, three parallel cases led to the above-captioned petition/appeals before us. The cases also involve many parties in common. Therefore, they have been tagged and listed today for admission.

4. Before dealing with the petitions, it is worth mentioning that the employee mentioned in the above article is referred to herein as Ms. XYZ. Accordingly, I.A. No. 157x/2021 in SLP(C) No. 543X for redaction of the name is disposed of.
5. Similarly, the wife of the alleged perpetrator is referred to as Mrs. ABC. In the interest of parity and to protect the interests of the identity of the complainant/wife, the alleged perpetrator is referred to Mr. PQR Accordingly, CrI. M.P. No. 154X/2021 in SLP(CrI) 123X/2021 and CrI. M.P. No. 138X/2021 in W.P.(CrI) No. 543X/2021 are disposed of.
6. At the outset, before discussing the arguments, we wish to refer to some disturbing events that occurred during the course of hearing. The counsel for the Petitioners in referring to the impugned orders made remarks regarding the gender of judges who have passed these orders. It is worth mentioning that the present Bench also comprises two men. The insinuation of the statement is that a predominantly male judiciary cannot adequately appreciate the issues involved. Such an insinuation is not only contrary to the role of judges but also hinders the administration of justice. The judiciary is also not subject to any requirements of affirmative action. When we sit as judges, we don't sit as men or women, but as representatives of the Lady of Justice. While we regard the statement as contemptuous, we accept the apology tendered and acknowledge that such statements are sometimes made at the bar. The judiciary is above the opinions of individuals and therefore, the present statement is disregarded and no contempt proceedings are being instituted.
7. In view of the above, the issues in the afore-mentioned matter are summarized as under:

SLP(CrI) No. 123X of 2021

8. The present SLP came up for hearing on 15.02.2021, when this Court was pleased to issue notice. Pleadings are complete.
9. Briefly, the issue in the said Petition arises from an order granting bail to Respondent No. 1 Mr. PQR in Cr.App.437348/2021 before the High Court of Delhi at New Delhi. The operative portion of the said order is reproduced as under:

“This is an application that has been filed under Section 439 of Cr.P.C for grant of bail. The applicant in question was arrested on 30.01.2021 in connection with FIR No. 8990/2021 registered at Police Station Basant Kunj, New Delhi for the offences punishable under Sections 498A, 354 and 355 of the Indian Penal Code, 1860.

A perusal of the FIR brings to light the following fact situation: The complainant wife filed an FIR against the accused husband on 30.01.2021 alleging that on the night of 20.08.2020, she and the accused attended a party where she was raped by him. She is a British citizen and he is an Indian citizen who have been married for 5 years. She claims that she did not immediately file a complaint as she was getting legal advice from her counsel as how to proceed.

The accused was thereafter arrested, and he has now moved this bail application. The Applicant has submitted that the act between him and the complainant wife was consensual. In fact she left the party along with him, and she did not make any such claims to him or complain to their family members of the alleged act. He has also submitted that there is also no provision of marital rape in the statute book, which is what this case would be if at all any. He further submits that he wishes to remain with his wife and forgive her for this case, as she has clearly been influenced by certain persons to file it against him out of a certain vendetta.

Marriage is a sacred institution which binds a husband and wife for all eternity. The importance of marriage can be seen from the Ramayana, where Sita followed her husband Ram into exile, and even after being kidnapped by Ravana remained faithful to her vows made before God. It is a travesty that we are now living in a world where the sanctity of marriage is under threat which undermines the balance of family and society.

This is admittedly a dispute between a man and his wife, who continue to remain legally married. We are not inclined to believe the explanation in the FIR, that there was no consent on behalf of the complainant, when in fact the incident took place at a party where she had consumed alcohol.

Western culture has seriously threatened the institution of marriage in our country, which was held in high regard. This is visible in the increased rates of divorce. Indian culture regards women as goddesses to be cherished and worshipped, as harbingers of good luck to the household. By contrast, the women of today's generation consume alcohol and drugs and commit acts while under the influence of intoxicating substances. Indian law protects the dignity of women. However, we are forced to consider whether the law would penalize men for women's disregard for their own safety and dignity.

Further, the Court has been informed that there is allegedly a video being circulated on whatsapp which shows evidence of drugs being consumed by the complainant at this party. It is shocking behaviour which is not becoming of a wife, and a woman of good repute and reflects loose morals. The Court is inclined to afford some leeway to the complainant, as she is not an Indian citizen, and is thus unaware of the morals of Indian society. However, the fact situation before this Court raises doubts over the veracity of the allegations and makes the Court question whether these are true. It is also relevant to mention that it took over the complainant over 5 months to approach the Police. This

Court is thus, of a prima facie opinion that this is a marital dispute which has been brought in the garb of a rape allegation.

This application is thus allowed. The accused is directed to be released on a personal bond in the sum of Rs.50,000/- (Rs. Fifty Thousand Only) with separate surety in the like amount to the satisfaction of the concerned Trial Court for their appearance before the Trial Court on all such dates as may be fixed in this behalf by the Trial Court during the pendency of trial. This order will remain operative subject to compliance of the following conditions by the applicants:

- 1. The applicant will comply with all the terms and conditions of the bond executed by them;*
- 2. The applicant will cooperate in the investigation;*
- 3. The applicant will not leave India without prior permission of the Trial Court.”*

10. The counsel for the Petitioner Mrs. ABC contended that the bail order must be set aside for failure to grant hearing to the complainant/Petitioner herein. In addition, they have submitted that the remarks made by the Judge were wholly irrelevant and contrary to guidelines issued by this Hon'ble Court on bail conditions. In such a situation, they reflect non-consideration of the case before it. Therefore, the bail order is liable to be set aside.
11. The counsel for the Respondent on the other hand contests that there is no right to hearing at the stage of bail. This is because the bail is a question of personal liberty. It is settled law that bail is the rule, and jail is the exception. The remarks made by the judge only reflect the personal views of the judge and have no bearing on the grant of bail. In any case, the reference to the marriage between the Petitioner and Respondent is not wholly irrelevant or alien to Indian law. In this context, this Court has also considered issues of bail in similar cases under Section 498-A.
12. Heard counsels for the parties. Leave granted.

WRIT PETITION (CRL) NO. 543X/2021

13. Counsel for Mrs. ABC states that Mrs. ABC was deeply disturbed by the comments in the aforesaid bail order dt. 10.02.2021. It is stated on affidavit in the Writ Petition that on 18.12.2020, which are also the contents of the FIR to which the aforementioned Bail application pertains, that the accused Mr. PQR committed “rape” on her in an inebriated state. She has denied being in a drugged state herself and stated that she was unaware

that the gruesome acts were also being filmed. We reiterate that this is not a Court of facts, it's a Court of law. We therefore propose to consider only the constitutional issues involved.

14. It is submitted on behalf of the Petitioner that she has been put in a position where the alleged rape, having occurred in India, cannot be prosecuted here due to her marital status and cannot be prosecuted elsewhere as a result of territoriality. As a result, it is submitted that she has been constrained to approach this Court by way of the present Writ Petition under Article 32 of the Indian Constitution. Notice was issued by order dt. 16.02.2021 to Respondent No. 1, Union of India and the said matter was tagged with the above SLP(Crl) No. 123X/2021.
15. Counsel submits that the exception to Section 375 of the Indian Penal Code is manifestly arbitrary and discriminatory. She further submits that it creates a perception of conjugal rights of the man in a manner contrary to the dignity of women. There is also no basis to this exception, applied uniquely to married women and not to persons who are otherwise in sexual relationships. She submits that it is also against international human rights law and the Convention Against Elimination of Discrimination Against Women.
16. Crl. M. P. No. ____/2021- application for impleadment by Mr. PQR is allowed and he is arrayed as Respondent No. 2. The Court is convinced that the impleading-Respondent is a necessary party in the facts and circumstances of the case.
17. Heard counsel for the Respondent No. 1.
18. The counsel for the Respondent No. 2 suggests that it is important to consider the perspectives of the accused in such a case. The counsel undertakes to make detailed submissions on the impact on the rights of the accused, in terms of burden of proof as well as scope of abuse.
19. The counsel for the Respondent also adopts the arguments of the Respondent No. 1 that the Writ is not maintainable as the Petitioner is not a citizen of India. The Counsel for the Petitioner submits that certain Fundamental Rights are available to non-citizens as well.
20. The challenge to the constitutionality by a non-citizen raises important questions of law. Both parties are directed to consider this issue in their submissions.

21. The facts leading to the said Petition arises out of the article reproduced above in para 9. In a suit before the Delhi High Court, the impugned order dt. 01.03.2021 was passed. The operative portion of the said order is reproduced as under:

“1. The said suit was filed against an article dt. 12.01.2021 published by one The Globe, which is Defendant No. 1 in the said suit. The Plaintiff has filed the present defamation suit averring that the article, though it doesn't name him, creates the adverse impression that the plaintiff is a “sexual harasser.” This is because the Plaintiff is married to a foreigner and is a senior official at Scambook. As such, it is averred that the article is defamatory. It appears that the said article reproduces the allegations made on Twitter by an anonymous account- @NeverBackDown. However, the newspaper article suggests that the newspaper reached out to the account in order to corroborate.

2. The Plaintiff has cited his inability to attend meetings with foreign clients. As a result, several ‘deals’ have not gone through, evidence of which is duly presented in the said Plaint. This Court issued notice to the Defendant No. 1. It appears that the parties have reached a compromise and therefore, there is no need for interference by the Court.

3. The parties agree that the Defendant No. 1 will take down the said article from its online and offline publications. They also undertake to issue an apology in the offline publications, in terms of Prayer No. 1 of the said suit. The suit is decreed to this extent.

4. However, another question has arisen before us. One Ms.Elizabeth Harmon states that she is appearing on behalf of the ‘anonymous source’ referred to in the said article, one Ms. XYZ. She states that she is a necessary party to the suit. She seeks permission to file an impleadment application.

5. While we were inclined to permit her this indulgence, she has further stated that she wants to file a vakalatnama with an application to contest this suit anonymously.

6. We are deeply troubled by the new trend of anonymity that has been enabled by the internet. We follow the principles of Satyagraha that Gandhi espoused- that if you believe in the truth, you are willing to make sacrifices. However, the Me Too Movement as it is called has quickly turned into a sullying campaign. Anyone under the cover of anonymity can tarnish the reputation of any person.

7. *There is no provision recognizing the right to anonymity during defamation trials. We are also not sure of how the suit will be contested anonymously. In any case, the said Ms. XYZ has not been made party to the proceedings.*

8. *Ms. Harmon, on questioning, states that she is relying upon the right to anonymity of sexual harassment survivors. The question before us is who is a "survivor". On inquiry from the Plaintiff as well as Ms. Harmon, it appears that no sexual harassment proceedings are pending in Scambook by anyone. No complaints have been filed at any time against Mr. PQR.*

9. *Prima facie, the article is defamatory as no sexual harassment complaint has been filed by anyone against the accused. With these observations, we decree the suit in terms of para 27 of the suit, in light of the compromise between the parties i.e. "grant an injunction against Defendant No. 1 any other party which reproduces the content of the article dt. 12.01.2021 at Exh. 1.*

10. *No order as to costs. "*

22. The SLP against the said order came up for hearing on 05.03.2021. By the said order, notice was issued and the SLP was tagged with the SLP (CrI) No. 123X/2021. Pleadings have been filed by parties. Heard counsels for the parties.
23. Ms. XYZ has approached this Court against the above order submitting that she has the right to contest the suit anonymously as she is a sexual harassment survivor. Further, the counsel for the Petitioner has also emphasised that there is no requirement to approach the Internal Complaints Committee under the Sexual Harassment of Women in the Workplace (Prevention, Prohibition and Redressal) Act, 2013. Failure to utilize statutory remedies does not preclude the complainant from making allegations of sexual harassment online. The failure to approach the Internal Complaints Committee also does not imply that the allegations of harassment are false. The counsel submits that the author of the tweets was a necessary party to the proceedings. It is stated that it has become a routine practice before Courts to file defamation suits against newspapers and search engines, who are not in a position to contest the suit on facts. Though the above order is a compromise, the manner in which the prayer is framed is, in effect, an 'Ashok Kumar' injunction which can become the basis of notice and takedown orders against any parties including the owner of the Twitter account.
24. Counsel for the Respondent, Mr. XYZ has also appeared on Caveat and argued that the order of the High Court is correct, because if Ms. XYZ were allowed to contest the suit anonymously, he would have no way of denying the allegations so made. Further, his

right to reputation is protected under Article 21 of the Constitution. It is also submitted that in view of the compromise between the parties, the Special Leave Petition is infructuous and without any basis.

25. Heard counsels for the Petitioners and Respondents in all the aforementioned cases. Pleadings are complete. The parties in all the aforementioned matters are directed to file detailed written submissions by 16.04.2021. The counsels are encouraged to address the following issues, among others:
 - a. SLP(CrI) No. 123X/2021-
 - i. Whether the complainant has a right of hearing at the stage of bail?
 - ii. Whether the bail order is in compliance with the provisions of the Code of Criminal Procedure and guidelines laid down by this Hon'ble Court in cases concerning sexual violence and cruelty under Section 498A?
 - b. W.P. (CrI) No. 543X/2021
 - i. Whether the Writ Petition by a non-citizen challenging the Exception to Section 375 is maintainable under Article 32?
 - ii. Whether the exception to Section 375 is unconstitutional, being in violation of Part III of the Indian Constitution, read with relevant international human rights law?
 - c. SLP(C) No. 543X/2021
 - i. Whether the order dt. 01.02.2021 is liable to be set aside on the basis that the original author of the tweets @NeverBackDown was a necessary party to the suit?
 - ii. If yes, whether alleged victims of sexual harassment may be permitted to contest defamation suits anonymously? What is the scope of right to anonymity of Defendants of civil suits bearing in mind the equality of arms and the rights of the Plaintiff to cross-examine etc?
26. List for final hearing in 20 weeks at the top of the board.