

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Rev. P. No.393/2009**

Date of Decision : 20.07.2009

Smt. Suresh Khullar

.....Petitioner

Through: Mr. Rajesh Ranjan,
Advocate

Versus

Shri Vijay Khullar

..... Respondent

Through: Nemo.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J. (Oral)

1. This is a criminal revision petition filed by the petitioner against the order dated 13.2.2009 passed by Sh. Neeraj Kumar Gupta, learned ASJ, Dwarka Courts discharging the petitioner for an offence under Section 376 IPC in respect of which the learned MM had committed the case to the learned ASJ.
2. Briefly stated the facts of the said case are that the petitioner as early as 1992 or so had filed a complaint under Section 498A/406 IPC against her husband Vijay Khullar, his parents and other relatives who were numbering around seven in all. The entire family was dragged in the said case on account of the matrimonial

differences/disputes arising between the petitioner, Smt. Suresh and the respondent, her husband Vijay Khullar.

3. The learned Magistrate after recording the preliminary evidence issued order of summoning for an offence under Section 498A/406 IPC only against Vijay Khullar and his mother, Bimla Rani. Bimla Rani, died during the pendency of the case and thus only one accused Vijay Khullar-respondent herein was left to face the trial.
4. The complainant, after the accused had put in appearance, was permitted to adduce her evidence at the stage of pre-charge level. After the said stage of adducing evidence at the level of pre-charge, the learned Magistrate, Ms. Geetanjali Goel passed an order on 27.6.2008 directing that according to her, prima facie case under Section 376 IPC was made out against Vijay. The reasoning given by the learned Magistrate for arriving at such a finding was that in the statement of the petitioner it transpired that at the time when the respondent, Vijay Khullar had contracted marriage with the petitioner, he had obtained an ex-parte decree of divorce against his previous wife. But later on after the marriage of the respondent with the petitioner, the said ex parte decree was set aside during the subsistence of the present marriage. On the basis of these facts, the learned Magistrate erroneously assumed that the ex parte decree having been set aside, the consent of the petitioner in the instant case was not a free consent and

therefore any physical relationship established by the respondent, Vijay Khullar with the petitioner was covered by clause 4 of Section 375 IPC and it tantamounts to commission of offence of rape punishable under Section 376 IPC.

5. That matter was committed to the Court Sessions. The learned Additional Sessions Judge to whom the case was allocated, vide his detailed order dated 13.2.2009 has set aside this order on the ground that there was no specific and direct evidence to the effect that the ingredients of Section 376 IPC were established, namely having sexual intercourse with the petitioner by the respondent.
6. It was also observed by the learned Sessions Judge that since an offence punishable under Section 376 IPC is very serious in nature and there are no averments, it could not be assumed from certain vague references in the statement of the petitioner that an offence under Section 376 of IPC is made out by the petitioner. The learned Sessions Judge was of the opinion that no offence under Section 376 of the IPC is made out and accordingly set aside the order of committal and remanded the matter back to the learned Magistrate to be tried in accordance with law.
7. The petitioner feeling aggrieved by the aforesaid impugned order dated 13.2.2009 passed by the learned Additional Sessions Judge has filed the present revision.

8. I have heard the learned counsel for the petitioner and perused the record. The main contention of the learned counsel for the petitioner is that since the ex parte decree against the first wife obtained by the respondent, Vijay Khullar, was set aside during the subsistence of the second marriage, therefore the consent obtained by the respondent from the petitioner for contracting the marriage was vitiated by fraud and any physical relationship established by the respondent with the petitioner constituted rape within the definition of Section 375(4) IPC. The learned counsel for the petitioner has also placed reliance on case titled ***Bhupinder Singh Vs. Union Territory of Chandigarh*** (2008) 8 SCC 531 and urged that in the said case also, the Supreme Court was of the view that since the consent of the victim who happened to be the second wife of the petitioner in the said case had been obtained during the subsistence of the first marriage, therefore offence was held to be duly covered by Section 375 Sub-Section (4) and accordingly his conviction and sentence was upheld by the Supreme Court. The Supreme Court even went to the extent of setting aside the order of the High Court whereby the sentence of the said petitioner was reduced.
9. I have carefully considered the submissions and perused the record. At the outset, it must be stated that the judgment which has been relied by the petitioner is not applicable to the facts of the present case for the simple

reason that in the case reported, there was a conviction which was handed down by the Court against Bhupinder Singh for an offence under Section 376 of the IPC by the Trial Court in a police case and he was sentenced to rigorous imprisonment of seven years by the Trial Court which was reduced to three years by the High Court by enhancing compensation from Rs.10,000/- to Rs.1.00 lac. It was this order of the High Court, which was interfered by the Supreme Court.

10. The noticeable fact in the reported case was that the second marriage was contracted during the subsistence of the first marriage and there was no dispute about the fact that it was a police case which was registered against the petitioner in the said case. As against this, in the case in hand, it has come in evidence at the stage of pre-charge evidence that when the marriage had been contracted between, Vijay Khullar with the petitioner, he had obtained decree of divorce from his first wife and the same was ex parte. It has also come on record that it was after a period of six months from the said ex parte decree he had contracted the second marriage. The said ex parte decree was set aside later in point of time after having contracting the marriage with the petitioner between the two cases. So, this is one of the distinguishable fact between the two cases.

11. The second distinguishable fact is that as against the FIR which was registered in **Bhupinder Singh's** case (supra) in the present case, the complainant/petitioner had put criminal justice machinery into motion way back in 1992 and only Sections 498A/406 IPC were invoked. There was not even an iota of averment either about the ingredients of offence of rape given in Section 375 IPC or mention about the Section itself in the said complaint. It seems that at later stage, the petitioner had become wiser to put the respondent/accused for trial for such a heinous offence in order to teach him a lesson.
12. Needless to say that the learned Magistrate in the instant case also seems to have fallen into error by assuming that in a criminal complaint case in respect of which the warrant trial procedure is to be followed at the time of framing of charge, only a prima facie evidence is to be seen. It is in this context that the learned Magistrate seems to have referred to the judgment of Supreme Court in case titled **Onkar Nath Mishra & Ors. Vs. State (NCT of Delhi) & Anr.** 2008 (1) JCC 65. The learned Magistrate seems to be oblivious of the fact that in a warrant trial case instituted on the basis of a complaint at the stage of framing of the charge, quantum of proof which is required for framing of the charge is much higher than in a State case for the purpose of framing of the charge. This would be evident from the fact that Section 245(1) says that in

such cases, charge could be framed only when the evidence, which is adduced by the complainant at the pre-charge level, is of such a nature that it is left unrebutted would result in conviction. Therefore, the said quantum of proof would be much higher than the prima facie case and slightly lesser than the beyond reasonable doubt. The Magistrate seems to have fallen into grave error on account of her ignorance about the said provision of law. The exact language of the Section is as under :

“245(1). If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.”

13. The learned Magistrate also seems to have assumed that prima facie ingredients of Section 376 IPC are made out. While dealing with Section 376 IPC, the Apex Court has interpreted it specifically that it must be established that there was penetration while as in the instant case there is not an iota of averment made by the petitioner about the said fact much less the evidence. Only some vague and stray averments against the husband that he would not indulge in sexual intercourse or use contraceptive to avoid pregnancy could not be assumed that there was sexual intercourse between the petitioner and the respondent. In a serious offence like this, things could not be left for assumptions and presumption of the complainant. The learned Sessions Judge has rightly observed that no prima

facie offence under Section 376 of IPC is made out warranting framing of the charge and has rightly remanded the matter back to the learned Magistrate.

14. I do not find any illegality, impropriety or incorrectness in the order passed by the learned Sessions Judge. I accordingly dismiss the present petition.
15. A copy of this order be sent to the learned ACMM so as to bring it to the knowledge of the learned Magistrate.

V.K. SHALI, J.

July 20, 2009
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