

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA NO. 460/2010

Judgment pronounced on December 20th, 2011

Rizwan Shah Appellant
Through: Mr.A.C. David, Advocate
Versus

Shweta Joshi and Others Respondents
Through: Mr.Bhupender Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S. SISTANI, J.

1. The present appeal has been filed by the appellant under section 96 of the Code of Civil Procedure 1908 against the judgment and decree dated 30.01.2010 passed by learned ASJ, dismissing the suit of the appellant claiming damages for his malicious prosecution by the respondents herein.
2. The brief facts that are necessary to be noticed for disposal of the present appeal are that on 22.10.1999, FIR No. 748/99 under sections 363/366/376/511/506 IPC was registered against the appellant in Police Station Patel Nagar on a complaint lodged by

respondent no. 3 Satish Joshi alleging that his daughter respondent no.1 Shweta Joshi has been kidnapped by the appellant. On 24.10.1999, respondent no. 1 was recovered from the house of the appellant at 1731, Second Floor, Kucha Dakhni Rai, Darya Ganj, Delhi. Her statement was recorded under section 164 Cr.P.C and after completing the investigation, challan was filed in the court indicting the appellant Rizwan Shah under section 363 IPC. After the trial, the accused (appellant herein) was acquitted by the learned trial court by a judgment dated 31.10.2001 and the judgment attained finality as no appeal was filed. Pursuant to his acquittal, the appellant served a notice dated 31.07.2002 upon the respondents for recovery of a sum of Rs. 8.5 lakhs towards malicious prosecution and defamation. Since despite service of notice, respondents failed to pay the said damages, the appellant was forced to file a suit against the respondents claiming damages to the tune of Rs. 5 lakhs alleging malicious prosecution by the respondents. The said suit was dismissed by the learned Additional District Judge vide judgment dated 30.01.2010 which has led to the filing of the present appeal.

3. Appellant has examined thirteen witnesses. Since the evidence of PW-1 is extremely important I deem it appropriate to reproduce the same.

“That the deponent developed love affairs with Defendant No.1 Ms. Shweta Joshi and Defendant no.2 and 3 namely Rani and Satish Joshi are the parents of defendant no.1. During love affairs the defendant no.1 wrote letters to the deponent. The letter dt. 3.10.1999 written by Defendant no.1 and the other of her letter are Ex. as Ex.PW-1/B1 and PW-1/B2.

That the deponent was looking for a job in Saudi Arabia and was interviewed by M/s. Continental Holding and was selected to Hotel Hilton in Madina as English Secretary with wages @1400/- Saudi Riyal equivalent to Rs.18,200/- India Rupees. Besides lodging, boarding, Food, Medical and Ticket. The said contract was initially for 2 years and extendable. In July 1999 the Foreign Deligate assured the deponent that he will get formal appointment letter in Dec., 1999.

That the deponent told the said information of job to defendant No.1 who after knowing that pressurized the deponent to get marry with her soon so that the deponent ask her to take permission of her parents as there was difference in religion between both as Muslim and Hindu Brahmin. But the defendant no.1 on avoiding the same on one pretext or the other.

That on 22.10.1999 around 8:30 a.m. the defendant no.1 came to deponent's residence and handed over Certificate issued by CGHS on 21st of Jan., 1993 as a proof of her age which was 6.2.1981. The information/ entries in the said form were filled by the defendant No.2. Besides this the defendant no.1 also handed over him her personal diary and note book, copy of CGHS certificate dt. 21.1.1993 is mark 'B' and the personal diary and note book are Ex. As Ex. PW-1/C1 and PW-1/C2, respectively.

That after reaching the deponent's house, the defendant No.1 by black-mailing emotionally on the threats that in case the deponent refused to marry she will commit suicide, compelled that the deponent to marry with her and out of love and affection and under the pressure of Defendant no.1 on the same day in a Mandir both are married as per Hindu rites and ceremonies. The defendant no.1 told the deponent that if they marry in Mandir then her parents will accept the marriage.

That the deponent received Bullet shot in Srinagar, J & K in the year 1995 by the Militant due to which he lost two of his nerves of abdomen i.e. Lumber and Sacral which resulted Foot Drop Problem in deponent enabling him to apply any force from his feet on the objects like clutch, break and exelator and thus disentitles him from driving car etc. Copy of the Medical Papers are Ex.PW-1/C3 and PW-1/C4.

That as per the defendant No.1 desire both got married in a Temple near Oberoi Hotel and both stayed together at plaintiff/deponent residence for about two nights after marriage, however, during the said period of stay the deponent did not establish sexual relations with defendant no.1.

That due to the false allegations of Defendant No.3 the police visited the house of defendant and defendant No.1 opened the door at the knock of the police and the deponent was arrested by the Police in his own locality before the known people, of Darya Ganj.

That the defendant no.1 was examined by the Doctor after her recovery from the deponent and on 24.10.1999 examined by the Lady Doctor Smt. Ritu Gupta in presence and permission of defendant no.2. The M.L.C. dt. 24.10.1999 is exhibited as Ex.PW-1/E1 and the statement of Dr. Ritu Gupta before Court is Ex. as Ex.PW-1/E2. In the said examination the defendant No.1 deliberately, knowingly and wilfully told her age as 17-1/2 years in conspiracy with defendant no.2 and 3. All the defendants were aware about this fact that the statement was false and the defendant no.1 was major in age at that time.

That the defendant no.2 was confronted with the photocopy of CGHS certificate mark 'B' to which she denied knowingly that she was doing wrong. At the time of making these false allegations against the deponent before Trial court on oath the defendants were aware of this fact that their false deposition will prejudice the interest of deponent and will amount defamation.

That the deponent never abducted or threatened the defendant no.1 nor indulge in any illegal activities as alleged by the defendants before Police and Court of law.

That the deponent was arrested from his own locality in Darya Ganj where he was having high estimation in the eyes of society and due to which his image and reputation lowered considerably in the eyes of people who started talking about his character and conduct. Due to the defendants act of levelling reckless false allegations on the deponent which has been done by maliciously, intentionally, deliberately and wilful to willfully, destroy, denigrate the reputation, image and personality of the plaintiff/ deponent in public estimation and also to put the deponent in false and frivolous criminal trial and litigation.

That due to the baseless, reckless and nonsense allegations of the defendants that the deponent is criminal in nature facing number of criminal trial, has abducted, threatened and raped the defendant No.1 the reputation of deponent has lowered and he was humiliated amongst his friends, relations, social circle. Not only this the deponent was forced to face a false trial for around 3 years and judicial custody for 8 months he could not properly treated and he also lost handsome prospective job in Hotel Hilton, Madina, Saudi Arabia which caused a loss of Rs.4,36,800/- and he further find difficult to get job. Not only this due to the conduct of the defendants the deponent also suffered mental pain and agony, inconvenience and also loss his right to move freely for year together. The defendants were fully aware about this fact that due to their above said act the state machinery will set in motion against the deponent and he will face a malicious prosecution in the court of law.”

4. **PW-1, Rizwan Shah** deposed in his cross –examination as under:

“I have placed on record the documents to prove that I am unable to drive car. When I was in custody, I was operated upon surgically. Shweta remained Hindu throughout and marriage was solemnized in Temple as per her will and consent. I have not stated anywhere the fact that the parents of Shweta were not aware about her missing. It is wrong to say that any drug was administered to Shweta. (objection raised beyond pleadings). It is wrong to say that after administering her drugs, I put Shweta to my house in car with my friend. (Objected to beyond pleadings). It is correct that police arrested me from my house with Shweta after report was lodged by her father. Vol. I made a call at Shweta’s house to her father that she was residing with me and was insisting for marriage with me.

It is wrong to say that I started sending signed or unsigned letters to Shweta and her parents after acquittal.

No formal document is supplied to the employees by employer if one gets employment in Dubai. Only visa has to be obtained and Visa has been obtained and due to Gulf War it has been kept by authorities. Work permit has also been sanctioned.”

5. PW-2 Mohd. Farid deposed in his evidence by way of affidavit that being a neighbour he had very good relations with Rizwan and his family and the ladies of both the families visited each other. He deposed that in November, 1999 Gulfam told him that Rizwan had been arrested by police in rape and abduction of some minor Hindu girl and sent to Jail. He was shocked to see this information as Rizwan had a very good image in his eyes and estimation and even his sisters used to visit Rizwan House but they never complained anything about Rizwan. Even after shifting Rizwan’s family from his neighbour there was visits of his family members including the

females to Rizwan family, but after knowing that Rizwan was arrested by Police in rape and abduction case he stopped his sister to visit Rizwan's family / house. That the news of Rizwan's arrest was got wide publicity in the Society as Rizwan was having very good reputation in society. He did not invite Rizwan in the marriage of his sister Shehnaz who married in year 2000, keeping in view the criminal allegations on Rizwan.

6. PW-2 Mohd. Farid in his cross-examination has deposed that :

He was born at given address and he got education upto fifth standard. He deposed that the affidavit filed in the court was prepared on his instance and not at the instance of his advocate. The affidavit was got attested from Oath Commissioner close to the seat of the plaintiff counsel. He deposed that he went to Oath Commissioner and signed the registered kept by him. He also deposed that he had come to court at the asking of plaintiff and without any summon. He next deposed that he has close relations with plaintiff and he has been in visiting terms with plaintiff and participates in marriages in his family since long for last several years. He also deposed that the family of the plaintiff is respectable because his NANAJI was Deputy Mayor of Delhi and his name was Maulana Imdad Sabri. The witness also deposed that he was residing in his house. He also deposed that it is

wrong that being neighbour of the plaintiff, he is deposing falsely and has mentioned false fact in the affidavit filed by him.

7. **PW-7, Shiv Kumar**, UDC, All India Radio deposed in his examination-in-chief as under:

“I have brought relevant record from my office. Certified copy of official record are Ex.PW-7/A and Ex.PW-7/B. Original I have brought. According to our record, Smt.Rani Joshi, took maternity leave of 90 days from 3/2/1981 to 3/5/1981. Smt. Rani Joshi did not take any maternity leave on 6/12/1981.”

8. **PW-9, Sh.K. Mahalingam** deposed in his examination-in-chief as under:

“Kumari Shweta Joshi sought admission in BPP Programme vide enrolment no.996423315. She got admission in June, 1998 again said July 1998. The minimum age of the candidate for such course is 18 years.”

9. In his cross-examination by counsel for respondent, **PW-9, Sh. K Mahalingam** deposed that:

“It is correct that application form brought by me Regn. no.996423315/ Admission-99 does not bear signature of candidate. However, original form 137658 brought by me bears signature of candidate.”

10. The respondents have examined three defence witnesses. It is relevant to reproduce the evidence of **DW-1, Ms Shweta Joshi** stated in her evidence by way of affidavit as under:

“That on 22.10.1999 the plaintiff met me at Wadhwa College, Patel Nagar. I was waiting for my father. The plaintiff came there and asked me where the classes were held. I told him to inquire from the reception. I was waiting for my father as he used to pick me from there and as such I was standing there.

That the plaintiff asked me to sit in the car on the pretext that he would drop me at my residence. I refused to sit in car but the plaintiff persistently told me that instead of wasting the time here, it is better to reach the home at the earliest. On this inducement I sat in the car and instead of going towards my residence he turned the car on another direction. I immediately asked him as to where he was going he then told me that he had to go to a marriage of his friend and thereafter he would drop me at my residence.

That plaintiff took me to a place where there were two dilapidated rooms and a boundary wall. On my asking where he had brought me he told me that it was a temple. There was no murti, there was garlands. He asked me to put garlands around his neck but I strongly opposed and refused. I told him that my parents were waiting but instead of taking at my residence, he took me to a building which I came to know was his house. The plaintiff told me that I should marry him as he was having good business and that I would be happy after marry him. But I desisted and refused to accept his proposal. He threatened me that if I would not say yes then he would kill my parents. I asked him to allow me to telephone my parents but he refused and did not allow me to move from there. The plaintiff created horrible atmosphere and he continuously threatened me and asked to face dire consequences if I did not bow before his wishes. There was a great panic in my mind.

That on the same night police along with my parents reached the house of the plaintiff. I was recovered from his room. I was taken to police station and I was got medically examined. During the course of illegal confinement the plaintiff wanted to have sexual intercourse with me but he could not be succeeded in his illegal design due to my stiff resistance.

I do not know who is or who was Shah. I was having no love affair with any Shah. On the other hand on 22.10.99 he forced me to sit in the car on the inducement that he would drop me at my residence. I further state that I did not make any call to the plaintiff. On 22.10.99 my father did not reach the college at 9:15 a.m. and as per direction of my father I was to go to my residence by auto/ three wheeler. But my father could not reach there and I was waiting for his arrival. The plaintiff met me and he by deceitful means, compelled me to sit in his car on the assurance that he would drop me at my residence. As a result of his assurance, I sat in his car. I found that his intention was not good so I immediately objected and protested by saying that where he was taking me as he took another way not leading to my house. On my objection and protest, plaintiff threatened me not to raise voice and compelled me to sit without any objection but the fact remains that I was perceiving his malafide intention but the car was with speed so I was helpless in getting myself rescued from his clutches.

I never recorded my date of birth as 6.12.78 in any application from at I.G.N.O.U. My parents were married in 1979 much after 6.12.78. It is quite strange that my date of birth is shown prior to date of marriage of my parents. This fact itself shows that the plaintiff with the connivance of officials of I.G.N.O.U. Delhi has managed the preparation of these documents which are forged. He also attempted to rape but due to my stiff resistance, he could not succeed in his nefarious activity.”

11. **DW-1 Ms.Shweta** deposed in her cross–examination by counsel for appellant as under:

“I do not remember if plaintiff was all alone on 22.10.1999 when he met me in car near Wadhwa College, Patel Nagar. Plaintiff was driving the car when he gave me lift. I do not remember if I have mentioned in my written statement that some other person was driving the car and not plaintiff. The attention of the witness brought to para no.13 of WS where it is recorded that some other person was driving the car. It is incorrect to suggest that plaintiff did not come to Wadhwa College, Patel Nagar nor he gave me any lift on 22/10/1999. It is incorrect to suggest that on 22.10.1999, I reached house of plaintiff at Darya Ganj at about 8:30 a.m. along with photocopy of CGHS of my mother and other documents mentioned exhibited above. My statement was recorded by police. I do not remember if I stated before Magistrate/ police/ Session Court that some other person was driving the car on 22/10/1999. It is incorrect to suggest that on 22/10/1999 nothing happened on behalf of plaintiff and on account of that fact; I have not stated this fact before any authority. I was forcibly made to sit in the car.

The plaintiff took me to one place having no Murti under threat. Later on, plaintiff told me that it was his house. I do not remember if I stated before Magistrate that plaintiff took me to Mandir near Oberoi Hotel on that day. I do not remember for how many days I remained in the house of plaintiff. I also do not remember as to where I remained on the night of 22/10/1999. I also do not remember whether I was with my parents on 22/10/1999 or with plaintiff at night. I do not remember as to after how many days of 22/10/1999 police came to the house of plaintiff. I also do not remember if police came to plaintiff's house on 22/10/1999 or 23/10/1999.

Letter Ex.PW-1/B-1 is in my handwriting. It was obtained by plaintiff under threat. It bears my signature at point A.

Ex.PW1/B-2 is not in my handwriting. It is incorrect to suggest that PW1/B2 is in my handwriting. PW1/E bears signature of my mother at point A. It is incorrect to suggest that I mentioned before Doctor at the time of my medical examination that I got married with plaintiff voluntarily. It is incorrect to suggest that now I am telling lie under impression of parents. On 22/10/1999, I was not allowed to telephone to my house. I cannot say if plaintiff telephoned at my residence or not. I do not remember if there was telephone at the house of plaintiff at that time. I do not remember if plaintiff remained with me throughout on 22/10/1999 and 23/10/1999 or he left for elsewhere. It is incorrect to suggest that I was having love affairs with plaintiff. It is incorrect to suggest that we both used to have talks on telephone. It is also incorrect to suggest that we both used to have talks on telephone. It is also incorrect to suggest that I have noted down telephone number of plaintiff in my personal diary. It is incorrect to suggest that offer of service was received by plaintiff from South Arabia and he disclosed this fact to me, I insisted to get married before his departure to South Arabia. It is incorrect to suggest that I sent this message through my friend Pooja to plaintiff in this regard.

It is incorrect to suggest that I submitted form in Indira Gandhi National Open University in BPP Programme.

My date of birth is 6/12/1981. I have not placed any document on record to show that my date of birth is 6/12/1981 nor I have brought any such document. It is incorrect to suggest that my date of birth is not 6/12/1981 and it is also incorrect that my date of birth is 6/2/1981. It is incorrect to suggest that I have mentioned my date of birth as 6/12/1981 to see the plaintiff convicted in that case. It is incorrect to suggest that I have concealed my actual date of birth knowingly.

I do not remember if I moved application for cancellation of bail of plaintiff through that counsel. I do not know who

opened the door from arrival of police to plaintiff's house. It is incorrect to suggest that I opened the door on 22/10/1999."

12. In her evidence by way of affidavit, **DW-2 Smt. Rani Joshi** stated as under:

"That I was married to Satish Joshi in the year 1979 and Shweta is my daughter. That police recovered Shweta from the custody of Rizwan. Shweta thereafter was given to us. My husband used to drop and pick Shweta to Wadhwa College, Patel Nagar and after classes were over he used to pick up Shweta from there.

That on 22.10.99 as usual my husband took Shweta to Wadhwa College Patel Nagar where she was prosecuting her studies and at 9.30 A.M. my husband again went there to bring her back but she was not there. He made enquiries from college and it was revealed that Shweta had already left the college on the same day at about 2 P.M. a telephonic call was received to the effect that the caller was Rizwan who was taking Shweta to Bangalore. After receipt of this information the matter was reported to the police as my daughter Shweta was kidnapped/abducted by Rizwan.

That after facing trial Rizwan was given benefit of doubt and was acquitted. After acquittal and I order to harass the respondents, he filed the present suit with ulterior motives.

I did not fill up the C.G.H.S. Form, nor my daughter ever filled the admission form in the I.G.N.O.U. where her date of birth is shown as 6.12.78 much earlier to my marriage.

I say that my marriage took place in 1979 and the date of birth is shown in form is much earlier to my marriage. This forged document is prepared by the plaintiff. It is further stated that on the affidavit signatures of Shweta are forged.

That the plaintiff had sent letters containing vulgar language and wherever it was objected he did not desist from his nefarious activities. I and my husband and daughter were put under great stress and we were so terrorized but we adopted non violence attitude and tolerated the violence of the plaintiff for nothing. The document produced by the plaintiff are not correct. He did so in order to pressurize me, my husband and my daughter to yield to his wishes.

That my daughter Shweta had never developed love affairs with the plaintiff, who adopted all sort of illegal acts. But he could not succeed in his evil design. No legal marriage took place between Shweta and the plaintiff.

Shweta never pressurized the plaintiff for marriage. The plaintiff has taken a falsely stand that Shweta pressurized him to marry her. The intentions of the plaintiff remain throughout to exploit my family. My daughter Shweta has no friend by name of Pooja. I know all the girls familiar to my daughter. But Pooja is not friend/familiar of my daughter Shweta. Shweta never received any letter through any body. Nor any conversation/message were exchanged by my daughter. On 22.10.99 as usual Shweta had gone to attend her classes and after the class was over she was waiting for her father. The plaintiff with a mischievous design offered lift in his car. The plaintiff acted in such a fashion and Shweta reluctantly and under compulsion sat in his car. Shweta was induced that she would be taken to her house. She was taken by the plaintiff to his residence, force and threats were used by the plaintiff. Shweta was threatened that she would be killed and the family members will be eliminated. She was taken to an isolated place and she was forced to put a garland around his neck. She was illegally confined. She was also threatened to kill me and my husband if Shweta would cry for help. I and my husband alongwith the police reached the house of the plaintiff and police recovered Shweta from custody of the plaintiff.

That my daughter Shweta attended her classes on 22.10.99 and she herself did not go to the house of the plaintiff but she was abducted. No personal diary or note book were given by Shweta but these documents were snatched by the plaintiff when Shweta was in his custody.

A timely intervention of the parents and the police saved Shweta and police recovered her from his custody. No marriage has ever taken place with Shweta. Shweta was compelled to sit in the car, which was being driven by another person. The plaintiff did so in order to achieve his object of abducting Shweta.

That Shweta was illegally confined by the plaintiff. During the period of illegal confinement, plaintiff attempted to commit rape but could not succeeded because of stiff resistance from Shweta. With the assistance of police Shweta was released when Shweta was released from the custody of the plaintiff face of Shweta was pale and perplexed. She was weeping bitterly.

I and my husband after receipt of telephone from the plaintiff were confident that Shweta was kidnapped / abducted by the plaintiff. That at time of kidnapping / abducting my daughter was put under pressure/ threat and under such circumstances she was kidnapped/ abducted. During the course of investigation her statement was recorded by the Metropolitan Magistrate. My daughter clearly stated in her statement that how she was kidnapped and abducted and how she was threatened by the plaintiff. I further say that I my husband and Shweta were threatened by the plaintiff. He was compelling me, my husband and Shweta not to depose against him otherwise we will be done to death and as such an application for cancellation of bail was moved.”

13. **DW-2, Ms. Rani Joshi** deposed in her cross-examination as under:

“It is correct that my affidavit in this court is based upon the feedback which I received from my daughter.

It is correct that when my daughter was born I was employed in All India Radio at Jalandhar and thereafter I got transferred to Delhi. At the time when my daughter was born I had given correct particulars in my leave for maternity. It is correct that I had applied for maternity leave from 3.2.81 to 3.5.81 regarding the birth of my daughter Shaveta. It is further correct that I resumed my duties on 5.5.81 at Jalandhar.

It is incorrect to suggest that we deliberately to falsely implicate the plaintiff, I had given the date of birth of my daughter Shaveta as December '81 instead of 6.02.1981. Vol. We have disclosed the actual date of birth of my daughter to police but the police insisted upon the certificate of my daughter in which the said date was given, the police told us that it is the date given in the certificate which is required to be submitted to the court. I have also stated this position to the court.

I have not furnished the original certificate in the court as we did not have the same in our possession.

In our application the cancellation of bail we have described the plaintiff as Kashmiri on the information given towards police. It is incorrect that we have described in this manner so that he may not be bailed out. It is correct that in all our applications, my daughter was shown as a minor. Vol. This was because the police has told us that the date of birth of my daughter as given in the certificate is admissible only.”

14. **DW-3, Sh. Satish Joshi** has stated in his affidavit as under:

“That my daughter Shweta used to go to Wadhwa College Patel Nagar for getting coaching in the morning at 8:00 A.M.

I used to drop her in the morning and used to pick up her from the college at 9:15 A.M.

That as usual on 22.10.99, I dropped my daughter at 8 a.m. and when I reached Wadhwa College Patel Nagar at 9:30 a.m. for bringing my daughter. My daughter was not there. I searched here and there but whereabouts of my daughter were not known I came back to my house but she was not present in the house also.

That at about 1:30 p.m. my wife came from her office till then I made enquiries from every corner but my daughter was not traced. At about 2:00 p.m, I received a telephonic call from one Rizwan that Shweta was with him and he was taking Shweta to Bangalore. After receipt of this call I immediately went to police station Connaught Place and then Mandir Marg ultimately I was directed by P.S. Mandir Marg to go to P.S. Patel Nagar where I lodged the FIR regarding kidnapping of my daughter Shweta. On 22.10.99 at 11:30 p.m. I and my wife were called by the police of Patel Nagar. We went there, police took us to the house of Rizwan at Darya Ganj from the second floor of the house, police recovered my daughter Shweta from the custody of Rizwan. None else except Rizwan and my daughter were present there. Police prepared recovery memo regarding recovery of my daughter. At the time of receiving my daughter Shweta was very perplexed, her face was pale, mentally she was very upset for some time, she was unable to speak Rizwan confessed his guilt who was arrested by the police.

That my daughter was got medically examined. She was sent to Nari Niketan and I moved an application on 24.10.99 before the Ld. M.M. for seeking custody of my daughter Shweta. After hearing me and the state custody of my daughter Shweta was given to me. Statement of Shweta u/s.164 Cr. P.C. was recorded.

That my daughter was not born on 6.12.78 as mentioned in the application form neither she submitted any affidavit. Her signatures are forged.

That no marriage took place between the plaintiff and defendant no.1 i.e. my daughter. She was all alone and the plaintiff enacted the drama of garlanding which is false and my daughter was put under great stress. I have been receiving threats from the plaintiff. He also sent vulgar and obscene and objectionable letters and by this way he had terrorized me and my family.

That my daughter Shweta had joined English speaking course in British School of Language at Kasturba Gandhi Marg where the plaintiff had enquired something, my daughter told him that it be enquired from the reception. My daughter refused to tell her telephone number to the plaintiff.

That I and my family members still are being harassed by the plaintiff to marry Shweta with him. My daughter never accompanied him but she was forced and was abducted by the plaintiff to force her to marry with him. In the locality at the time of recovery of my daughter there was tense atmosphere as the plaintiff was terrorize the persons of the locality. My daughter has no friend in name of Pooja. My daughter had never contacted anybody including the plaintiff on phone or otherwise. She is very religious and a devotee of Hinduism.

That the plaintiff kept my daughter in his custody illegally, solely with intent to compel her to yield to his wishes. My daughter continued to protest and tried to save her from his clutches. The plaintiff directly or indirectly advances threats to me, to my wife and to my daughter, as a result of which the entire family lives in a horrible situation. My daughter was abducted with intent to compel her to marry but my daughter objected and protested against such designs of the plaintiff. The plaintiff is responsible for causing great mental agony to me and to my family.”

15. In his cross-examination by counsel for appellant, **DW-3, Sh.Satish Joshi** deposed as under:

“My daughter Shweta was taking coaching from Wadhwa College, Patel Nagar during the period 22.10.99. She was to appear in 10th class examination. I am not sure whether my daughter Shweta was taking coaching classes for class 10th. My daughter appeared in examination for 10th class from central School, Gole Market. Later on she joined IGNOU for further studies. I cannot say in which class she was taking coaching as she had already sought her admission at WADHWA College, Patel Nagar. It is correct that my daughter was taking coaching classes for Bachelor Preparatory Programme in Wadhwa College. I do not know whether my daughter had taken admission for BPP in IGNOU. It is incorrect that I am deliberately showing ignorance about admission of my daughter for BPP Course in IGNOU. I don't know whether the minimum age in admission in BPP Course is 18 years. My daughter might have taken admission in BPP Course on 15.07.98 Vol. I have no knowledge about it.

As at the time the application for cancellation of bail of the plaintiff was moved on 19.11.99, it was only under the mental harassment and the circumstances it was mentioned in that application in para 8 that the accused was criminal by nature and various cases were pending against him. I cannot tell now as to in how many cases the plaintiff was involved. I had stated in my said application on the basis of the feedback, I received from the neighbour of the plaintiff. I do not remember, now, the name and other particulars of those neighbours. I had reached the house of the plaintiff at about 11:30 p.m. I remained there till my daughter was recovered from there, say for about 15 minutes.

The DOB of my daughter is 06.12.1981, as per certificate, in fact, it is 06.02.1981. This thing was duly communicated to the police. It is incorrect that intentionally and deliberately I have not produced any document to show her DOB as 06.02.1981. I do not remember as to on what basis as stated in para no.7 of my application dt. 21.03.2001 that the plaintiff was a permanent resident of Kashmir and that it will not be possible to arrest him if he absconds.

It is incorrect that my daughter was in love with the plaintiff and that she had left on her own with him. It is incorrect to say that as I lodged a false case against the plaintiff, he had to remain in custody for about nine months. It is further incorrect that the plaintiff was maliciously prosecuted at my instance. It is further incorrect that because of my action against the plaintiff he has been defamed and that he lost his job in Hotel Madina, Saudi Arabia.”

16. The counsel for appellant submits that the judgment of the trial court is bad in law and is contrary to the facts on record. The counsel next submits that the trial court has lost sight of the findings of learned additional sessions judge that the conduct of the respondents was highly suspicious, unfair and an afterthought and rather the conduct of the appellant was fair and more reliable. Placing reliance upon the case of *Prempal & Others v. Commissioner of Police* reported at 168(2010) DLT 285 wherein relying upon the findings of the additional sessions judge (ASJ), the court came to the conclusion that the petitioner was falsely implicated in a number of criminal cases; the counsel for appellant has drawn the attention of the court to the various findings arrived at by the learned Additional Sessions Judge while acquitting the appellant wherein the Additional Sessions

Judge has observed that the respondents have withheld the best evidence of the proof of date of birth of respondent no. 1 Shweta Joshi and that respondents have furnished incorrect information to the investigating officer. Counsel for appellant has drawn the attention of this Court to para 12 of the appeal filed by appellant which reads as follows:

“12. That in the same judgment the Ld. ASJ held the age of the respondent no. 1 is more than 18 years and criticised the respondent no. 2 and 3 of withholding the real document of age with respect to the age of respondent no.1. The Ld. Trial Court observed that;

“I have come to the conclusion that the parents withheld the best evidence and hence adverse inference can be drawn against them.”

The Ld. ASJ. , further observed that;

“in their effort to seek the accused convicted for the act done by him, they have furnished incorrect information to the Investigating Officer”

Further held that;

“the best documentary evidence in this case has been withheld by the prosecution and it raises serious doubt about the intention of the parents and not handing over the reliable documents to the police”“

17. It is the case of the appellant that the appellant and respondent no. 1 had a love affair. When the appellant informed respondent no. 1 Shweta Joshi that he has secured a job with Hotel Hilton, Madina in Saudi Arabia, respondent no. 1 insisted on marriage. On the fateful

day of 22.10.1999, respondent no. 1, instead of going to her coaching classes at Wadhwa College, Patel Nagar, directly came to the house of the appellant along with a copy of the CGHS certificate dated 21.01.1993 as a proof of her date of birth which was recorded as 06.02.1981 in the said certificate. As per the version of the appellant, when the appellant refused to marry respondent no.1 and asked respondent no. 1 to first take permission from her parents as the appellant was a Muslim and respondent no. 1 a Hindu Brahmin, respondent no. 1 blackmailed him emotionally that she would commit suicide if the appellant did not marry her. The appellant surrendered to the wishes of respondent no. 1 out of love and affection and they got married as per Hindu rites and ceremonies in a temple near Oberoi Hotel. On the same day at about 2.00 pm, the appellant telephonically informed the parents of respondent no. 1 that he has married their daughter and they are flying to Bangalore. It is further the case of the appellant that respondent no. 1 was a major and was a consenting party to the marriage but later on, she deposed falsely against the appellant in connivance with respondent no. 2 and 3 so as to falsely implicate the appellant and the respondents maliciously prosecuted the appellant for kidnapping, abduction and of attempt to rape respondent no. 1.

18. Counsel for appellant submits that respondents have deliberately maliciously prosecuted the appellant in the criminal case alleging that respondent no. 1 Shweta Joshi was a minor at the time of the marriage between appellant and respondent no. 1 though the respondents were very well aware about the fact that respondent no.

1 was not only a major but was also a consenting party to the marriage. It is further the contention of counsel for appellant that to set the state machinery in motion, the respondents misled the police by not handing over the matriculation certificate of respondent no. 1 but a xerox copy of a transfer certificate issued by Joseph's Convent School, Jalandhar in which the date of birth of respondent no. 1 was incorrectly recorded as 06.12.1981 and the said document was issued only on the instance of the respondents. The counsel has drawn the attention of the court to the medical examination of respondent no.1, which was conducted in the presence of the mother of respondent no.1 (*respondent no.2 herein*), wherein it has been recorded that respondent no. 1 had married appellant Rizwan Shah on Friday, i.e., 22.10.1999 in a mandir on her own consent (willingly); and contends that later on at the instance of respondents no. 2 and 3, respondent no. 1 made false allegations against the appellant that the appellant abducted her in a car and married her forcibly. Further relying upon the MLC of respondent no. 1, the counsel submitted that despite living together for about three nights, the appellant did not develop any sexual relations with respondent no. 1. It is the contention of counsel for appellant that respondents falsely implicated the appellant with mala fide intention to teach him a lesson for marrying their daughter against their wishes since the appellant was of a different religion. To further his case, the counsel next submitted that the respondents had not filed any missing report with the police till 2 o'clock in the day and it was only when the appellant informed respondents no. 2 and 3 that he has married

respondent no. 1 Shweta and that they are flying to Bangalore that the respondent no. 2 and 3 approached the police station to lodge an FIR. The counsel contends that the date of birth of respondent no. 1 has been deliberately withheld from the court to prove that she was a minor so as to invalidate the marriage since consent of a minor is invalid.

19. The counsel for appellant next submits that the date of birth of respondent no. 1 has been conclusively proved to be 06.02.1981 from the service records of respondent no. 2 Smt Rani Joshi (mother) which clearly show that she was on maternity leave from 03.02.1981 to 03.05.1981 whereas the date on 6.12.1981, date of birth as shown in the transfer certificate, cannot be relied upon as the mother was on duty at the All India Radio Office at Jalandhar. The counsel further submits that the date of birth is also proved from the deposition of respondent no. 3 Sh. Satish Joshi who deposed before the trial court that the date of birth of his daughter is 06.02.1981 and has categorically denied her date of birth to be 06.12.1981. Attention of the Court is also drawn to the notebook exhibited as Ex. PW2/D2 of respondent no. 1 wherein she has admitted to have written her date of birth as February 6 in her own handwriting. The counsel further draws the attention of the court to the police verification report dated 11.11.2000 exhibited as Ex. PW-11/1 wherein the CGHS dispensary has confirmed the date of birth of respondent no. 1 to be 06.02.1981.
20. It is contended by counsel for appellant that the learned trial court has grossly erred in holding that the appellant has failed to prove the

falsity of the transfer certificate dated 24.08.1986, which records the date of birth of respondent no. 1 as 06.12.1981, in view of the fact that the appellant had successfully proved from the service record of respondent no. 2 Smt. Rani Joshi that the date of birth of respondent no. 1 is 06.02.1981 and further that respondent no. 2 had deposed in her cross-examination that the date of birth of respondent no. 1 is 06.02.1981. It is the contention of the counsel for appellants that once the date of birth of respondent no. 1 Shweta Joshi was proved to be 06.02.1981 then any certificate recording a date different from the actual date of birth of respondent no. 1 is *ipso facto* false and bogus.

21. Counsel for appellant has strongly urged before this court that the respondents have made improvements in their statements before the court which makes the falsity in the case of the prosecution apparent. The counsel contends that in the FIR, and in statements before the police and the court, it has been deposed by respondent no. 1 that it was the appellant who was driving the car and there is no mention of any other person in those statements whereas in the written statement filed by the respondents, it has been alleged that the car was being driven by some other person since the appellant cannot drive. The counsel next contends that the appellant suffers from Foot Drop Ailment due a bullet injury received by the appellant in the year 1995 by a militant in Jammu and Kashmir as a result of which the appellant cannot apply force on objects like clutch, break, and accelerator thereby debarring the appellant from driving any vehicle.

22. It is vehemently argued by counsel for appellants that the respondents had not only set the criminal law in motion maliciously, but have also vigorously pursued the prosecution to ensure the conviction of the appellant. In support of the aforementioned contention, the counsel submits that the respondents filed an application on 24.10.1999 for custody of respondent no. 1 further alleging the fact that respondent no. 1 was a minor. It is next submitted that respondents had even filed two applications for cancellation of bail of the appellant; the first application was filed on 19.11.1999 which is one and a half month after the recovery of respondent no. 1 alleging that appellant is criminal by nature and various cases are pending against him. Another application for cancellation of bail was filed on 23.03.2001, which is after two years of moving of the first application, alleging that appellant is a permanent resident of Kashmir and thus would abscond if granted bail. While submitting that both the applications were dismissed by the trial court, the counsel contends that respondents not merely lodged FIR simpliciter but tried their level best at each and every stage of the prosecution to secure conviction of the appellant by moving applications for custody and cancellation of bail stating false facts.
23. Counsel for appellant vehemently argued before the court that due to the false allegations of rape, kidnapping and abduction by the respondents, the appellant has suffered immense damage. The counsel submits that due to the false complaint, the police approached the house of the appellant in Darya Ganj and he was

arrested from his own locality harming his image and reputation among his friends, relations and social circle and has been humiliated by his neighbours and other people. The counsel next submits that due to these false allegations, the appellant was forced to face criminal trial for about three years and was in judicial custody for eight months all of which have given immense mental pain and agony to the appellant. The appellant lost his job with the Hilton Hotel, Madina in Saudi Arabia and due to the false allegations made by the respondents; his future employment prospects have also been hampered since the allegations got wide publicity inside and outside the court and thus, he is duly entitled for damages from the respondents. To support his claim for damages, the counsel for appellant places reliance on ***RK Soni v. S. Singhara Singh*** reported at AIR 1992 Delhi 264 and more particularly at para 6 which reads as under:

“6. As far as damages are concerned, the plaintiff has not faced the trial and had not incurred any expenditure in defending the complaint in the Court of law. However, there is evidence led by the plaintiff which I have no reason to doubt that the plaintiffs reputation has suffered because of said malicious prosecution brought by the defendant inasmuch as the defendant had tried to serve non bailable warrants of arrest on the plaintiff and on finding that plaintiff was not available he had tried to show the plaintiff as a criminal and absconder from law by his utterances while trying to serve the said warrants in presence of the workers of the plaintiff and other persons. In an action for malicious prosecution the damages would represent first the general damages, a solatium for injured feelings and reputation. The second would be special damages for actual damages incurred by the plaintiff as a pecuniary loss. In the present case, the plaintiff is claiming

general damages because of his being humiliated and harassed by such malicious prosecution and his esteem having been lowered in the eyes of his relations and friends. As far as quantum of the said general damage is concerned, I think the plaintiff has brought the claim of Rs. 2,00,000/- which assessment of damages is on a very higher side. Counsel for the plaintiff has made reference to Smt. Manijeh v. [Sohrab Peshottan Kotwal](#), AIR 1949 Nag 273, wherein it has been held that in an action for malicious prosecution vindictive damages are permissible. The learned Judge has referred to the law laid down in 10 Halsbury's Laws of England, p. 87, para 108 in this respect. He has also cited Lala Punnalal v. Kasturichand Ramaji AIR 1946 Mad 147, in which it was held that exemplary damages are consolatory rather than penal, resting upon the principle that, where there is malice, the mental pain caused to the plaintiff must be taken note of and a solatium awarded for it. It was held that the exemplary damages for torts can be awarded not only under English law but also under the Indian law in cases where the defendant has acted contumaciously.”

24. *Per contra*, counsel for respondents has denied any love affair of respondent no. 1 with the appellant and has argued that appellant used to harass respondent no. 1 by repeatedly calling her at her residence telephone number and pressing her for marriage. On 22.10.1999, respondent no. 1 had gone to Wadhwa College to attend her coaching class and after the class finished, she was waiting for her father, respondent no. 3 herein, to pick her up when appellant accosted her and offered a lift. After great reluctance, respondent no. 1 sat in the car but appellant instead of dropping her to her residence, took her to a dilapidated building and forced her to marry her. As per the version of the respondents, no marriage took place between the appellant and respondent no. 1 and the appellant failed

to develop sexual relations with respondent no. 1 due to stiff resistance offered by her. It has been alleged by the respondents that appellant illegally detained respondent no. 1 till she was recovered by the police from the house of the appellant.

25. The counsel for respondents submit that there is no infirmity in the judgement of the learned trial court as the trial court has passed the judgment after perusing the pleadings and the evidence lead by the parties as well as the law laid down in the judicial pronouncements. The counsel submits that no false allegations have been made against the appellant and the appellant is only trying to encash his acquittal and to harass the respondents so as to seek revenge for initiating criminal proceedings against the appellant.
26. It is strongly urged by counsel for respondents that the major premise on which the appellant has brought a suit for malicious prosecution against the respondents is the acquittal of appellant by the Additional Sessions Judge and it is on the basis of his acquittal only that the appellant asserts that complaint filed by respondents is false and malicious. The counsel contends that the appellant was acquitted by the Learned Additional Sessions Judge on the grounds of benefit of doubt and there has been no categorical finding by the court of sessions that the complaint and FIR lodged by the respondents were false or were lodged with any mala fide intention. Relying upon a judgment of Division Bench reported at 105 (2003) DLT 678, it has been asserted by counsel for respondents that there were various reasons for which the accused is given benefit of doubt and is acquitted and this by itself cannot lead to a conclusion that the

complaint was based on extraneous consideration leading to entitlement for damages. A further reliance is sought on *Radhey Mohan Singh v. Kaushalya Devi and Another* reported in 105 (2003) DLT 678 (DB) wherein the Hon'ble High Court had held that because of non-corroboration of story by the prosecution, accused was given benefit of doubt. The relevant para relied upon by counsel for respondent reads as under:

“7. Learned Counsel for the appellant placed reliance on *Ucho Singh v. Nageshar Prasad*, AIR 1956 Patna 285. In this case, the Court observed where the finding of the Courts of fact is that the accusation against the plaintiffs made by the defendant was false to his knowledge and that there was enmity between the parties and their supporters, the conclusion would follow that the prosecution of the plaintiffs was malicious as well as without any reasonable and probable cause. There is no quarrel with the proposition as enunciated in this case but when the principle of this case is made applicable to the facts of this case, the conclusion is irresistible. In the instant case, the appellant himself had committed the offence, giving the respondent reasonable and probable cause for filing of complaint which on investigation was found to be correct. It is true that because of the lapses of the prosecution and non-corroboration of the story by the prosecution, the accused was given benefit of doubt but in the facts of this case, on the finding arrived at by the learned trial Court, it cannot be construed that there was no reasonable or probable cause of filing the complaint. The trial Court came to a definite finding that prosecution of the appellant by the respondent was not a malicious prosecution and consequently the appellant is not entitled to damages.”

27. It is further the contention of counsel for respondents that the findings by a criminal court have no bearing on a civil suit for malicious prosecution and the judgement of the criminal court can only be used as an evidence to prove the acquittal of the appellant and not beyond. To support the aforementioned contention, the counsel for respondent places reliance upon *Kishan Singh (D) through LRS. v. Gurpal Singh & Others* reported in (2010)4 JCC 2547 and more particularly at para 19 which reads as under:

“19. Thus, in view of the above, the law on the issue stands crystallised to the effect that the findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject-matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Indian Evidence Act, 1872, dealing with the relevance of previous judgments in subsequent cases may be taken into consideration.”

28. The counsel for respondent contended that there was reasonable and probable cause for approaching the police authorities and lodging a complaint. It is submitted by counsel for respondents that such a conduct is natural and justified for a parent whose daughter was missing and untraceable and the situation was further aggravated when respondent no. 3 was telephonically informed by appellant that he is taking respondent no. 1 to Bangalore which created a doubt in the mind of respondent no. 3 that the appellant has kidnapped

respondent no. 1 since the appellant used to make frequent calls at the residence of respondents. In such circumstances, the respondent no. 3 had no other option than to approach the police to recover his daughter. The counsel next submits that it is the truthfulness of the fact explained by the complainant at the time of getting a criminal case registered which is material for deciding as to whether the complainant was having reasonable cause or not and whether those facts are ultimately held to be true or false by the court of law is immaterial. The counsel asserts that malice and absence of reasonable cause must co-exist before the suit for malicious prosecution is allowed. In support of the aforesaid contention, the counsel for respondent placed reliance on the facts of the case in ***KB Mathur & Others v. Sheel Kumar Saxena and Others*** reported in 46 (1992) DLT 114 wherein the Hon'ble High Court of Delhi was dealing with a situation where the plaintiff was released on anticipatory bail and charge-sheet was quashed by the court against the landlord and the question arose whether tenant prosecuted the landlord maliciously and without reasonable and probable cause. The Hon'ble Court came to a conclusion in the negative since reasonable and probable cause was available to the defendant to lodge the complaint.

29. Further contending that the only material time when reasonable and probable cause has to be found out is the time when the criminal proceedings are commenced or set into motion, the counsel for respondents places reliance on the case of ***Bharat Commerce***

Industries v. SN Shukla reported at AIR 1966 Calcutta 388 (DB) and more particularly at para 7 which reads as under:

“7. In our opinion, the whole approach of Mr. Das is erroneous. In a suit for malicious prosecution, the plaintiff must prove (1) that the defendant prosecuted him, and (2) that the prosecution ended in the plaintiff's favour, and (3) that the prosecution lacked reasonable and probable cause, and (4) that the defendant acted maliciously. In the instant case, admittedly there was a prosecution and an acquittal, the only question that we shall have to find out on the facts and circumstances of this case is whether the prosecution under Sections [408](#) and [420](#) I. P. C. lacked reasonable and probable cause and whether Bharat Airways Ltd. acted maliciously. In the past, "malice" was identified with "lack of reasonable and probable cause" and often malice was inferred from lack of reasonable and probable cause and vice versa. But the present state of law seems to be that the concept of malice is to be kept distinct from the concept of lack of reasonable and probable cause. Ordinarily, malice denotes spite or hatred against an individual but it is often difficult to infer spite or hatred from the conduct of a person. It is said that the devil does not know the mind of man. Therefore, the ordinary meaning of malice cannot be determined by any subjective standard. Clarke and Lindsell have rightly said in their book on Law of Tort, 11th Edition. Article 1444 at page 870:

"The term 'malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malice animus and as denoting that the party is actuated by an improper motive. The proper motive for prosecution is of course a desire to secure an end to justice."

Professor Winfield has also made similar observations in his book on the Law of Torts (3rd Edition) at page 604:

"Judicial attempts to define malice have not been completely successful. 'Some other motive than a desire to bring to justice a person whom he (the accuser)

honestly believes to be guilty", seems to overlook the fact that motives are often mixed. Moreover anger is not malice; indeed, it is one of the motives on which the law relies in order to secure the prosecution of criminals, and yet anger is much more akin to revenge than to any desire to uphold the law, perhaps we are nearer the mark if we suggest that malice exists unless the pre-dominant wish of the accuser is to vindicate law."

Thus, in order to give an objective meaning to the term, 'malice', it should be found out whether the accuser has commenced prosecution for vindication of justice e.g., for redress of a public wrong. If he is actuated by these considerations, he cannot be said to have any malice. But if his object to prosecute is to be vindictive or to malign him before the public or is guided by purely personal considerations he should be held to have malice in the matter. Similarly, the lack of reasonable and probable cause should be also understood objectively. Reasonable and probable cause does not connote the subjective attitude of the accuser. If the accuser thinks that it is reasonable to prosecute, that fact by itself cannot lead to the conclusion that judicially speaking, he has reasonable and probable cause for the prosecution. The term 'reasonable' shows that the causes must conform to the standards of a reasonable and prudent man and the term 'probable' shows that the causes may result in the proof of the guilt. Therefore, a reasonable and probable cause can only mean that the grounds for the plaintiffs guilt are reasonable according to a reasonable and prudent man and that there are materials which might result in the conviction of the accused. It can never be said that the reasonable and probable causes are grounds which must inevitably result in conviction. If acquittal means that the prosecution has been commenced without any reasonable and probable ground, then it would not have been necessary to say that apart from or in addition to the acquittal the plaintiff, in a suit for malicious prosecution, must prove that the defendant lacks reasonable and probable cause in prosecuting the plaintiff. A man may be acquitted and yet there may be a reasonable and probable cause for prosecution. This analysis

of the legal position shows that the probative value of the evidence or the legal conclusions on the evidence cannot be very relevant in determining whether the accuser has a reasonable and probable cause in prosecuting the plaintiff. It is not necessary that in order to come to the conclusion that the accuser has a reasonable and probable cause, the evidence adduced must be commensurate with the conviction of the accused. In a criminal trial, benefit of doubt often plays an important part. If some part of the evidence leads to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting nature can be spelt out from the entire facts of the case, the accused gets benefit of doubt. Therefore, the only relevant and material time when a reasonable and probable cause for prosecution has to be found out is the time when the criminal proceeding is commenced or set in motion. It is only from this point of view that the evaluation of the evidence in a suit for malicious prosecution should be made. Mr. Das's whole approach is that as the guilt of the plaintiff was not proved, or insufficient or contradictory evidence was adduced during the hearing of the criminal case, there cannot be a reasonable and probable cause for the prosecution. He has not made any distinction between 'malice and reasonable and probable cause and has contended that as there was lack of reasonable and probable cause, there must have been malice. He has referred us to that part of the plaintiff's evidence where he has deposed that in or about November, 1952 he has been unjustly superseded by a junior man who was a nominee of Mr. Kejriwal, an important officer of the Company. But apart from that uncorroborated oral evidence there is nothing to show that Bharat Airways Ltd. had an animus against him. It is true that the same set of facts may lead to the conclusion that there is malice as well as lack of reasonable and probable cause. It is also true that in some cases the existence of malice may be a relevant consideration to determine lack of reasonable and probable cause and vice versa. But as stated earlier, the two concepts cannot be held to be identical. In this connection, attention may be drawn to the

following observations of Mr. Winfield at page 662 in the same book:

"At one time malice was not always kept distinct from lack of reasonable and probable cause but a cogent reason for separating them is that, however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth. The probability or improbability of X having stolen my purse remains the same however much I may dislike X. And it has long been law that malice and lack of reasonable and probable cause must be separately proved. Malice may, however, be inferred from want of probable cause, but it cannot be established by that alone."

With these observations, the oral and documentary evidence may now be examined. (After examining the oral and documentary evidence his Lordship went on to hold.)

It should be remembered that we are not deciding in this appeal the guilt or innocence of Mr. Shukla in the context of the criminal charges levelled against him; nor are we enjoined to assess the evidence of the criminal case in its applicability to Section 222(2) of the Code of Criminal Procedure, except in an indirect way. In this connection we should remember the following observations of Mr. Winfield in his book at p. 608:

"If there is an honest belief that the accusation is true, then even though the belief is mistaken, the charge may still be reasonable and probable. Nor under the facts upon which the prosecution was founded be such as would be admissible as evidence to establish the guilt of the accused. "The distinction between the facts to establish actual guilt and those required to establish a bona fide belief in guilt should never be lost sight of in considering such cases. But this does not entitle a man, not making an accusation, to shut his eyes to facts which would make any reasonable person infer that the accused party's conduct was not criminal."

We should, therefore, try to find out whether the appellant commenced the prosecution without any honest belief of the plaintiff's guilt and whether it failed or neglected to take

reasonable care to inform itself of the true facts before commencing or proceeding with the prosecution.”

30. It is next contended by counsel for respondents that all the witnesses had deposed in the trial court as to how respondent no. 1 was kidnapped by the appellant and there was a reasonable and probable cause for respondent no. 3 to lodge a complaint with the police authorities. Counsel further submitted that respondent no. 1 Shweta Joshi was forcibly taken to a temple and later on the appellant tried to develop sexual intimacy with her but could not succeed due to her stiff resistance.
31. Counsel for respondent points out that the main thrust of the case for malicious prosecution by the appellant is the age of respondent no. 1 Shweta Joshi as the counsel for appellant has submitted that the respondents implicated the appellant in false criminal case alleging that respondent no. 1 was a minor and thus incapable of giving consent despite being well aware of the fact that respondent no. 1 was a major at the time of marriage. It was next submitted by the counsel that the appellant was charged for offences under section 363/366/506 Part II IPC and for the offence under section 366, age is not a consideration at all. The counsel contends that the correct date of birth has not been proved in the lower court nor did the court direct the respondent no. 1 to undergo ossification test in order to determine the age of respondent no. 1 Shweta Joshi.
32. It is further contended by counsel for respondents that the applications for cancellation of bail were moved only because the appellant had threatened the respondents that they will have to face

dire consequences if the complaint was not withdrawn and for deposing against the appellant once the appellant gets released on bail. It is next submitted that a complaint to this effect was lodged by the respondents with the police authorities.

33. I have heard counsels for the parties and have carefully perused the entire material placed on record. The contentions of counsel for appellant are summarised as under:

- The trial court has lost sight of the findings of the learned ASJ wherein while acquitting the appellant, the learned ASJ has observed that the respondents withheld the best evidence of proof of age of respondent no.1, furnished false information to the investigating officer and has also cast a serious doubt on the intention of parents of respondent no. 1.
- The respondents have maliciously prosecuted the appellant by knowingly deposing false facts to the police authority that respondent no. 1 is a minor and the marriage was forcible.
- The respondents have vigorously prosecuted the case so as to ensure the conviction of the appellant by repeatedly alleging before the court of sessions that respondent no. 1 is a minor.
- Due to the false allegations of the respondents, the appellant has suffered immense mental agony and pain since his reputation has been tarnished, he lost his job in Saudi Arabia and his future employment prospects have also been hampered; he had to face criminal trial for three long years and remain in judicial custody for around eight months.

34. The contentions of counsel for respondents is summarised as under:

- The appellant has been acquitted by only giving him a benefit of doubt due to lapses in the prosecution case and has not been totally exonerated from the charges.
- The findings of a court in criminal proceedings have no bearing on a civil suit for malicious prosecution.
- Respondents no. 2 and 3 had reasonable and probable cause to lodge a complaint with the police authorities as it is natural of any parents whose daughter went missing.
- There is no malice in prosecuting the appellant but the only intention was to recover respondent no. 1 and to punish the appellant of the offences committed by him.
- The age is not the sole criteria of the prosecution case.

35. The law relating to malicious prosecution has been elaborately laid down by the Apex Court in ***West Bengal State Electricity Board v. Dilip Kumar Ray*** reported in AIR 2007 SC 976 as under:

“14.....*Malicious prosecution—Malice.*—Malice means an improper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill will. It may be due to a desire to obtain a collateral advantage.

The principles to be borne in mind in the case of actions for malicious prosecutions are these:—Malice is not merely the doing of a wrongful act intentionally but it must be established that the defendant was actuated by *malus animus*, that is to say, by spite or ill will or any indirect or improper motive. But

if the defendant had reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause,' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.

OTHER DEFINITIONS OF 'MALICIOUS PROSECUTION'.—'A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it.'

'A prosecution begun in malice, without probable cause to believe that it can succeed and which finally ends in failure.'

'A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause.'

'A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy.'

The term 'malicious prosecution' imports a causeless as well as an ill-intended prosecution.

MALICIOUS PROSECUTION is a prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy.

In malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favourably to the defendant therein.

1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. 2. The cause of action resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages—Also termed (in the context of civil proceedings) *malicious use of process*. (*Black's*, 7th Edn., 1999)

‘The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect—the improper use of a regularly issued process. For instance, the initiation of vexatious civil proceedings known to be groundless is not abuse of process, but is governed by substantially the same rules as the malicious prosecution of criminal proceedings.’ 52 Am. Jur. 2d *Malicious Prosecution* S. 2, at 187 (1970).

The term ‘malice,’ as used in the expression ‘malicious prosecution’ is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives.

As a general rule of law, any person is entitled though not always bound to lay before a judicial officer information as to

any criminal offence which he has reasonable and probable cause to believe has been committed, with a view to ensuring the arrest, trial, and punishment of the offender. This principle is thus stated in *Lightbody case*, 1882, 9 Rettie 934 ‘When it comes to the knowledge of anybody that a crime has been committed a duty is laid on that person as a citizen of the country to state to the authorities what he knows respecting the commission of the crime, and if he states, only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime. In such cases to establish liability the pursuer must show that the informant acted from malice i.e. “not in discharge of his public duty but from an illegitimate motive,” and must also prove that the statements were made or the information given without any reasonable grounds of belief, or other information given without probable cause; and Lord Shand added (p. 940): “He has not only a duty but a right when the cause affects his own property.”

Most criminal prosecutions are conducted by private citizens in the name of the Crown. This exercise of civic rights constitutes what with reference to the law of libel is termed a privileged occasion; but if the right is abused, the person injured thereby is, in certain events, entitled to a remedy. (See H. Stephen, *Malicious Prosecution*, 1888; Bullen and Leake, *Prec. P1.*, Clerk and Lindsell. *Torts*, Pollock, *Torts*; LQR, April 1898; Vin., Abr., tit. ‘Action on the Case’ *Ency. of the Laws of England*.)

MALICIOUS PROSECUTION means that the proceedings which are complained of were initiated from a malicious spirit i.e. from an indirect and improper motive, and not in furtherance of justice. (1905-06)10 CWN 253 (FB)

[The performance of a duty imposed by law, such as the institution of a prosecution as a necessary condition precedent to a civil action, does not constitute ‘malice’. [*Abbott v. Refuge Assurance Co* (1962) 1 QB 432]

[‘Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted’ (per Diplock U in *Dallison v. Caffery* (1965) 1 QB 348]. (*Stroud*, 6th Edn., 2000)”

15. “[‘Malice’ means and implies spite or ill will.] Incidentally, be it noted that the expression ‘mala fide’ is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances.” (See *Prabodh Sagar v. Punjab SEB*, (2000) 5 SCC 630)

16. The legal meaning of malice is ‘ill will or spite towards a party and any indirect or improper motive in taking an action’. This is sometimes described as ‘malice in fact’. ‘Legal malice’ or ‘malice in law’ means ‘something done without lawful excuse’. In other words, ‘it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others.’ (See *State of A.P. v. Goverdhanlal Pitti*(2003)4 SCC 739)

17. [T]he word ‘malice’ ... in common acceptance means and implies ‘spite’ or ‘ill will’. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence

available on record.... In the case of *Jones Bros. (Hunstanton) Ltd. v. Stevens*, (1955)1 QB 275; (1954)3 All ER 677 (CA) the Court of Appeal has stated upon reliance on the decision of *Lumley v. Gye*(1853)2 E&B 216 : 22 LJQB 463 as below:

‘For this purpose maliciously means no more than knowingly. This was distinctly laid down in *Lumley v. Gye* where Crompton, J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse—*Bromage v. Prosser* (1825)1 C&P 673: 4 B&C 247 “Intentionally” refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact has to be proved.’(See *State of Punjab v. U.K. Khanna* (2001)2 SCC 330)

18. “[Malice in law.] Malice in law is, however, quite different. Viscount Haldane described it as follows in *Shearer v. Shields*1914 AC 808 as:

‘A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of mind is concerned, he acts ignorantly, and in that sense innocently.’

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or

probable cause.” (See *S.R. Venkataraman v. Union of India* (1979)2 SCC 491; AIR 1979 SC 49)

19. [Malice per common law.] Malice in common law or acceptance means ill will against a person, but in the legal sense it means a wrongful act done intentionally without just cause or excuse.” (See *Chairman and MD, BPL Ltd. v. S.P. Gururaja and others* (2003)8 SCC 567 and *Chairman and MD, BPL Ltd. v. S.P. Gururaja and others*, JT 2003 (Suppl2) SC 515)

20. While it is true that legitimate indignation does not fall within the ambit of malicious act, in almost all legal inquiries, intention, as distinguished from motive is the all-important factor. In common parlance, a malicious act has been equated with intentional act without just cause or excuse.” [See *Jones Bros. (Hunstanton) v. Stevens*, (1955)1 QB 275: (1954)3 All ER 677 (CA), *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant* (2001)1 SCC 182”

36. The case of the appellant rests primarily upon the finding of the learned ASJ while acquitting the appellant of the charge of kidnapping respondent no. 1. The counsel for respondent vehemently opposed the reliance placed by appellant on the findings of the criminal court and urged that in a civil suit for malicious prosecution, the civil court has to come on its own findings as to the facts and the findings in the criminal proceedings have no bearing on a civil suit for malicious prosecution. In the circumstances of the present case, I do not find force in the aforesaid contention of counsel for respondent as the judgement dated 30.10.2001 passed by learned ASJ has been duly exhibited as Ex. PW-1/K by the appellant

before the trial court and therefore, merits consideration. Further, the judgement of acquittal has attained finality since the said judgement was passed in 2001 and no appeal or review has been stated to be preferred by the respondents against the said judgment.

37. The Blacks' Law Dictionary (eighth edition at pg 977) defines malicious prosecution as the institution of criminal or civil proceedings for an improper purpose and without probable cause. It further says that the tort requires an adversary to prove four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; (4) favourable termination of the lawsuit. While it is not disputed that the respondents had filed a case against the appellant for allegedly kidnapping respondent no. 1 and that the prosecution was terminated in favour of the appellant thereby acquitting the appellant of the criminal charges; the questions to be determined are whether there was any reasonable and probable cause in initiating/sustaining a complaint and whether the respondents were motivated by malice.
38. It is the contention of counsel for respondents that there was no malice since the intention of the respondents was only to recover their daughter, Shweta Joshi and to see that the appellant is punished for the offence committed by him. It is further put forth by the counsel that the respondents no. 2 and 3 were in such a state of mind that they could not depose the correct age of their daughter respondent no. 1 to the police. I do not find any merit in the contention of counsel for respondents. I have perused the contents of the FIR wherein respondent no. 3 has even given details about the

clothes and slippers that respondent no. 1 was wearing. It is hard to believe that though such minute details have not slipped from the mind of respondent no. 3, the date of birth of respondent no. 1 was wrongly deposed. Even in the wildest of imagination, it cannot be believed that respondents no.2 and 3, who are none else but parents of respondent no.1 Shweta Joshi and respondent no. 1 herself are not aware of the correct date of birth of respondent no. 1. It is also not the case of respondents where all the respondents have uniformly deposed a date of birth of respondent no. 1. There has been a specific finding by the additional sessions judge that the respondents have withheld the best evidence of proof of date of birth of respondent no. 1 which is the senior secondary examination certificate which was in their possession and power and hence an adverse inference can be drawn against them. After appreciating the entire evidence put forth by the prosecution, there is a categorical finding by the learned additional sessions judge that respondent no. 1 was above 18 years of age at the time of alleged incident. The relevant portion of the judgement dated 30.10.2001 passed by the additional sessions judge is reproduced below:

““12.....The sole question is whether prosecution has successfully proved it that she was born on 6.12.81 or not. On the one hand there is an oral testimony of Shweta and her mother that she was born on 6/12/1981 and on the other hand there is the testimony of Shri Satish Joshi in the examination-in-chief itself that his daughter was born on 6/2/1981 and not on 6/12/1981. Once I thought that it might be and not on 6/12/1981. Once I thought that it might be a typographical error but I have checked it and I am satisfied that there is no

typographical error in recording the statement of Satish Joshi because he stated in the affirmative that his daughter was born on 6/2/1981 and in the next sentence he made a statement in the negative stating that it was incorrect that his daughter was born on 6/12/1981. Rani Joshi was confronted with photocopy of her CGHS Card where the date of birth of her daughter was recorded as 6/2/1981. She denied the document and legally as it was a photocopy, the same could not be put to the witness. She offered to show her CGHS card which was never shown. It is correct that in this case opportunity was granted to the accused to summon the office record of Smt. Rani Joshi to verify the correct date of birth of Shweta but he missed that opportunity on the advise of his advocate. Subsequently, the applications were moved by the accused to summon that record but these applications were rejected for legal reasons. In spite of this I cannot lose sight of the fact that the accused was in possession of documents which has raised suspicion in the mind of the court that whether she was born on 6th February or on 6th December, 1981. This doubt is created by placing on record admissible evidence also. The accused has placed on record one autograph book which is admittedly in the handwriting of prosecutrix Shweta. On the page of Ex. PW2/D2 she has written in her own hand her name. She has recorded her date of birth as 6/2 and sunsign as Aquarius. The explanation added by the prosecutrix that she wrote her wrong date of birth and sunsign on the advise of a friend is neither probable nor believable, especially in the circumstances of this case when the accused is claiming that this was the date of birth furnished by her mother in her office record and she herself gave the photocopy of their CGHS Card to the accused. The documentary evidence placed on record by the prosecutrix was photocopy of a transfer certificate issued by Joseph Convent School, Jullundhar. Firstly, this document is not proved as per

Indian Evidence Act and the same cannot be read in evidence. It's only photocopy and it is no evidence that on what basis her date of birth was recorded in this certificate. PW-2 specifically deposed that she was admitted in cross examination that Shweta was admitted in UKG in M.P Bengali, Sr. School Gole Market. No certificate from that school has been produced. The girl had already passed Secondary School Examination from CBSE , Delhi and the date of birth of a child is recorded in that certificate. Why that certificate was not handed over by the parents to police? She was a student of a school in Gole Market, very close to the house of her parents but no certificate from that school has been placed on record. It is not stated where she was born and whether her date of birth was recorded in any municipal authority or not and no such certificate has been placed on record. The best documentary evidence in this case has been withheld by the prosecution and it raises a serious doubt about the intention of the parents in not handing over the reliable documents to the police. Instead of handing over secondary school examination certificate to the police, a transfer certificate issued by school in Jullundhar was handed over to the police which was issued in 1985, as against this evidence led by the prosecution, accused has proved on record through DW-1 that prosecutrix applied for admission in Indira Gandhi National Open University in 1998 and in the admission form she gave her date of birth as 6/12/1978. This form was filled by her in 1998. This evidence led in defence also raises reasonable doubt about the prosecution claim that she was below 18 years of age at the time of incident. As against oral testimony of Shweta and her mother, this documentary evidence, that too furnished by the prosecutrix herself while seeking admission that she was born in 1978 cannot be ignored. Hence, from the entire quality of evidence led by prosecution I have come to the conclusion that

the parents withheld the best evidence and hence adverse inference can be drawn against them. The prosecutrix herself wrote her date of birth in her autograph book as 6/2. The photo copy of the transfer certificate handed over by the complainant to the Investigating Officer is not proved on record and the oral testimony of PW Shweta and Rani Joshi is not worth relying. In their effort to seek the accused convicted for the acts done by him they have furnished incorrect information to the Investigating Officer. Above all the complainant Satish Joshi himself deposed that his daughter was born on 6/2/81 and not on 6/12/1981. There is no reason to disbelieve his testimony. The incident took place on 22/10/1999 and in any case whether she was born on 6/2/1981 as told by Satish Joshi or on 6/12/1978 as stated by Shweta in her admission form, she was above 18 years of age on the day of the incident. Even otherwise, I find the version given by the accused more reliable and trustworthy that while coming to him, Shweta herself brought a photocopy of her mother's CGHS Card as a proof that she was born on 6/2/1981 and she was recorded in her autograph book that she was born on 06.02.1981. Hence for sole reason that the prosecutrix was above 18 years of age, the charge u/s 363 IPC fails."

39. I have carefully gone through the autograph book of respondent no. 1 exhibited as Ex. PW-1/C1 wherein respondent no. 1 has admittedly written in her own handwriting that her date of birth is 6th Feb and her sunsign is Aquarius. I have also perused the police verification report dated 11.11.2000 exhibited as Ex. PW-11/1 wherein the police officer has submitted that he went to the CGHS Dispensary at 31, North Avenue, New Delhi and a doctor Dr. Krishan Kumar, CMO, after checking the records of CGHS,

confirmed that the date of birth of respondent no. 1 Shweta Joshi is 6.02.1981. The appellant has also placed on record the service records of respondent No. 2 Smt Rani Joshi who is the mother of respondent no. 1. A bare perusal of the said service record exhibited as Ex. PW-7/A shows that respondent no. 2 was on maternity leave for a period of ninety days from 03.02.1981 to 03.05.1981 and resumed her duty from 05.05.1981. In her cross-examination, respondent no. 2 Smt Rani Joshi has herself admitted that she took maternity leave during the said period regarding the birth of respondent no. 1 Shweta Joshi. The next leave period is shown to be from 13.12.1981 to 24.12.1981 which makes it amply clear that on 06.12.1981, respondent no. 2 was on duty at her All India Radio Office, at Jullundhar. PW-7, Sh. Shiv Kumar, UDC, All India Radio has also deposed in his examination-in-chief that respondent no. 2 Smt Rani Joshi was not on any maternity leave on 06.12.1981. Admittedly, respondent no. 1 is the only child of respondent no. 2 and the date alleged to be date of birth of respondent no. 1 Shweta Joshi is a date on which respondent no. 2 was in office, which is highly improbable.

40. Furthermore, respondent no. 3 Sh. Satish Joshi has deposed in his cross-examination that the date of birth of respondent no. 1 is 06.12.1981, as per certificate but in fact it is 06.02.1981. I have carefully perused the statements of respondents before the additional sessions judge as they have duly been exhibited as Ex. PW-1/J1, Ex. PW-1/J2 and EX PW-1/J3. I have also gone through the statements of the respondents made before the additional district judge in the

suit for malicious prosecution. While before the additional sessions judge, respondents no. 1 and 2 have repeatedly said that the date of birth of respondent no. 1 is 6.12.1981 and not 06.02.1981 whereas before the additional district judge, respondent no. 2 Smt Rani Joshi has deposed in her cross-examination that she stated the actual date of birth to the police but it was the police who insisted that it is the date given in the certificate which is required to be submitted to the court. This shows a clear admission on the part of respondent no. 2 that the date of birth in the transfer certificate is not the actual date of birth of respondent no. 1.

41. The counsel for appellant has also drawn the attention of the court to the admission form of Indira Gandhi National Open University exhibited as Ex. PW-9/A filled in by respondent no. 1 where she has filled her date of birth to be 06.12.1978. The minimum age for admission to the BPP program in the said University is 18 years as has been deposed by PW-9, Sh. K. Mahalingam. He has further deposed in his examination-in-chief that Shweta Joshi got admission in the said University in July 1998 further corroborating the fact that Shweta was above 18 years of age at the time of alleged incident. Therefore from the observations made above, I am of the view that the respondent no. 1 was above 18 years of age at the time of alleged incident and the state machinery was set into motion by deposing false and incorrect information to the police authorities. The prosecution itself was based upon false facts.
42. It is contented by counsel for respondent that there was a reasonable and probable cause to complain to the police authorities as their

daughter respondent no. 1 had not returned home after attending college and the situation further aggravated when appellant called the respondent no. 3 to inform that he is taking respondent no. 1 to Bangalore. The Black's Law Dictionary clearly lays down that there must be a reasonable and probable cause for initiating the proceedings as well as for continuation of the said proceedings. Though I find little force in the contention of counsel for respondents that it is natural and justified for parents of respondent no.1 (respondents no. 2 and 3 herein) to approach the police authorities at the very first instance rather than making enquiries from friends/relations or from the college/coaching classes, but the fact that the respondent no. 1 Shweta Joshi is also a prosecutor in the criminal proceedings instituted against the appellant and after being duly recovered on 24.10.1999, she still chose to prosecute the appellant knowingly that the allegations are false, casts a cloud of suspicion on the bona fide of the respondents. Respondent no. 2 Smt Rani Joshi has categorically stated in her affidavit that the entire affidavit is based upon the feedback given to her by respondent no. 1. There has been a categorical finding by the additional sessions judge to the effect that there is no evidence to show that respondent no. 1 was dragged in the car or that she was enticed by the appellant. It is further the finding of the Additional Sessions Judge that there was no evidence led by the prosecution to prove that any threat was extended by appellant to respondent no. 1 that her parents would be killed if she disclosed anything to them. The relevant extract of the judgment dated 30.10.2001 is as under:

“13.....Her entire cross-examination suggest that in the absence of her parents, she used to telephone the accused as well as to receive his telephone. Has she not been a willing partner in the exchange of his telephone there was no occasion for her to take lift from the accused on the fateful day for going back to her house. She deposed that her father used to pick her up at 9.15 a.m from Wadhwa College, Patel Nagar. On 22/10 he did not come till 9.25 a.m and hence she accompanied the accused. She knew that accused used to telephone her at her residence and he used to offer to marry her and if she was not interested in marrying him there was no occasion for her to take lift from a boy who used to tease her by telephoning her or pressing her for marriage. That too just after 10 minutes of the usual arrival time of her father.

Her conduct only shows that she of her own free will took the lift from the accused. There is no evidence that she was dragged in the car or was forced to sit in the car. Even if her testimony taken as a gospel truth, the accused only offered a lift. She could have easily refused it, why she took the lift and went with the accused. It only suggests that she wilfully accompanied the accused.”

43. I have also perused the MLC of respondent no. 1 exhibited as Ex. PW-1/E wherein it has been recorded that respondent no. 1 got married to appellant Rizwan Shah willingly and voluntarily. In her evidence by way of affidavit, respondent no. 1 has deposed that appellant had tried to develop physical intimacy with her but could not succeed due to stiff resistance of respondent no. 1. This version is clearly proved to be false as a bare perusal of the MLC indicated that there were no marks of assault nor were there any external marks of injury seen anywhere on the body of respondent no. 1. Her hymen was also found to be intact ruling out any possibility of sexual intercourse between the appellant and respondent no. 1. Had the version of respondent no. 1 been true, there must have been some injury marks on the body of respondent no. 1 that she would have sustained while offering the stiff resistance. Furthermore, the learned ASJ has held that respondent no. 1 was not confined to the

house of the appellant since investigating officer in whose presence respondent no. 1 was recovered and respondent no. 1 herself deposed that when police came to the house of the appellant, the door was opened by respondent no. 1 and not the appellant and therefore charge under section 366 IPC also fails.

44. The respondents not only levelled false charges against the appellant but also prosecuted the entire case vigorously with the sole intention of getting the appellant convicted. Apart from initiating the prosecution on false facts, the respondents also filed applications for cancellation of bail alleging the appellant to be a habitual criminal and a permanent resident of Kashmir without any rational basis for the same. Respondent no. 3, Sh. Satish Joshi deposed in his cross-examination that the allegations that appellant is a habitual criminal or that he is a permanent resident of Kashmir was made solely upon the information given by the police and by a neighbour of the appellant whose name and details he does not remember. The respondents have deposed false facts one after the other throughout the proceedings. The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations. There are several discrepancies in the deposition of the respondents. While in the written statement filed before the trial court, it has been alleged by the respondents that the car was being driven by some other person since the appellant cannot drive but in her evidence by way of affidavit, respondent no. 1 asserts that the appellant was driving the car when he offered lift to respondent no. 1. While respondent no. 1 and respondent no. 2

clearly deny that respondent no. 1 has filled any form for admission in the Indira Gandhi National Open University; respondent no. 3 Sh. Satish Joshi deposed in his cross-examination that respondent no. 1 joined IGNOU for further studies and further deposed that respondent no. 1 might have taken admission for BPP course in the said University.

45. In view of the observations made above, I am of a view that the respondents maliciously prosecuted the appellant without any reasonable and probable cause. I find this to be a typical case where the daughter of the family decided to marry a man outside her own community and faced strong opposition from her family, and later on under the pressure of her family and relatives, the daughter deposed against the appellant in order to save her and her family's honour.
46. Lastly, it has contended by counsel for appellant that the appellant has suffered mental agony and pain due to false charges levelled against him by the respondents. His reputation has been tarnished and he faced humiliation at the hands of his friends, relatives, neighbours and people in his social circle. The counsel further contends that due to malicious prosecution, the appellant had to remain in judicial custody for eight months and faced a long trial which exhausted him mentally and financially; he lost his job in Saubi Arabia and that his future employment prospects have also been hampered. I find merit in the said contention.
47. The appellant has filed his affidavit by way of evidence before the trial court which has been extracted above. As per this affidavit, the

appellant has deposed that on account of his arrest and imprisonment for a period of more than eight months and having regard to the grave and serious allegations, his image and reputation was greatly lowered in the eyes of his neighbours, friends and relations. The appellant has also relied on the evidence of one of his neighbours, PW-2, Sh. Mohd. Fariq. As per PW-2, being a neighbour he had very good relations with the appellant and his family, and ladies from their household would visit the house of the appellant. PW-2 has also deposed that in November, 1999 one Gulfam told him that Rizwan, appellant herein, had been arrested by police in rape and abduction of some minor Hindu girl and sent to Jail, and after learning about the same, he stopped his sister from visiting the family of Rizwan. PW-2 has also deposed that news of appellant's arrest was given wide publicity in the Society and keeping in view the criminal allegations on the appellant, he was not invited to the marriage of his sister. In support of his evidence that his reputation has suffered immensely, he has relied on the evidence of PW-2. The appellant has also deposed that on account of malicious prosecution his reputation was degraded, he lost a handsome prospect of his job in Hotel Hilton, Madina, Southi Arabia, which caused loss of Rs.4,36,800/, besides he suffered mental pain and agony, inconvenience and legal expenses. Although the appellant was cross-examined, but not a single question was put with regard to loss suffered by him. During the cross-examination of Mohd. Fariq, PW-2, this witness has deposed that the family of the appellant is respectable because his NANAJI (maternal grand-father) was a

Deputy Mayor of Delhi. There is nothing in the cross-examination of PW-1 or PW-2 which would shake the evidence of the said witness. During the cross-examination, PW-1 has deposed that no formal document is supplied to employees by employer if one gets employment in Dubai and only Visa is to be obtained and the Visa has been obtained, however, due to Gulf War it has been kept by the authorities. PW-1 has also stated during the cross-examination that the work permit has been sanctioned. Although there is no documentary evidence on record that the appellant had been offered a job in Dubai and he was to be paid annually Rs.4,36,800/-, he has suffered loss in the sum of Rs.4,36,800/- as he could not join Dubai, but in the absence of any evidence this figure is not proved.

48. PW-1 has further deposed in his evidence that his family enjoys a great reputation. His father is a reputed businessman, his elder brother is a doctor, his younger brother is an Engineer, and both are employed in Southi Arabia and his sister is B.Sc. and M.B.A. and his maternal-grand-father (NANAJI, Sh.Imdad Sabri) was Deputy Mayor of Delhi and his father was Chairman of MCD, Freedom Fighter and Former M.L.A. from Matia Mahal Constituency.
49. There is also no evidence to show as to what would have been spent on legal expenses by the appellant, but taking into consideration the antecedents and status of the appellant and also looking into the grave and serious allegations of rape, abduction of a minor, which could not be proved, certainly the reputation of the appellant would have suffered, as is evident from the evidence of PW-2, who did not even invite the appellant in the marriage of his sister and also

keeping in view that the appellant was in custody for eight months and had to face a lengthy trial, this court assesses the damages on the conservative side of Rs.2,50,000/-.

50. The appeal is allowed in the above terms.

G.S.SISTANI,J

DECEMBER 20, 2011
'ssn'