

Court No. - 77

Case :- CRIMINAL REVISION No. - 4671 of 2023

Revisionist :- Shailendra Ahirwar

Opposite Party :- State Of U.P. And 3 Others

Counsel for Revisionist :- Arun Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Arun Kumar Singh, the learned counsel for revisionist and the learned A.G.A. for State-opposite party-1
2. Perused the record.
3. This criminal revision has been filed challenging the order dated 31.05.2023, passed by Special Judge (Pocso Act), Hamirpur in Sessions Case No.341 of 2023 (State Vs. Shailendra Ahirwar), arising out of Case Crime No.664 of 2022, under Sections 363, 366, 376 (3) IPC and Section 4 POCSO Act, Police Station-Rath, District-Hamirpur, whereby court below has framed separate and distinct charges against accused-revisionist under Sections 363, 366, 376 (3) IPC and Section 4 Pocso Act.
4. Record shows that in respect of an incident which is alleged to have occurred on 22.11.2022, a delayed FIR dated 02.12.2022 was lodged by first informant-opposite party-2 Anil Kumar (father of the prosecutrix) and was registered as Case Crime No. 0664 of 2022, under Sections 363, 366 IPC, Police Station-Rath, District-Hamirpur. In the aforesaid FIR, revisionist Shailendra Ahirwar has been nominated as solitary named accused.
5. The gravamen of the allegations made in the FIR is to the effect that that named accused enticed away the daughter of first informant i.e. the prosecutrix namely-X aged about 15 years.
6. After aforementioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. After the prosecutrix was recovered, her statement under Section 161 Cr.P.C. was recorded.

Same is on record at page 46 of the paper book. The prosecutrix in her aforesaid statement has stated that she has solemnized marriage with the revisionist and on account of above, physical relations between the parties were established. She has further stated that she was not enticed away by the named accused but she herself willingly join the revisionist. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her as is explicit from the document occurring at page 52 of the paper book. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 54 of the paper book. The prosecutrix in her aforesaid statement has clearly stated that neither her modesty was dislodged nor any type of physical relations were developed in between herself and the revisionist. Thereafter, the Investigating Officer recorded the statement of other witnesses under Section 161 Cr.P.C. On the basis of above and other material collected by Investigating Officer, during course of investigation, he came to the conclusion that criminality alleged against the revisionist is fully established. He, accordingly, submitted the police report dated 16.01.2023 in terms of Section 173(2) Cr.P.C., whereby named accused has been charge sheeted under Sections 363, 366, 376(3) IPC and Section 4 POCSO Act.

7. Learned counsel for revisionist submits that charge-sheet has been submitted against revisionist on the basis of statements of the prosecutrix recorded under Section 161 CrPC and 164 CrPC. The same are on record at pages 48 and 55 of the paper book. According to the learned counsel for revisionist, the prosecutrix, in her statement under Section 164 Cr.P.C., which has greater evidentiary value, has not implicated the revisionist for having committed any offence punishable under Sections 363, 366 IPC nor she has alleged that her modesty was dislodged forcibly or deliberately or the parties entered into physical relationship consensually. On the basis of above, he submits that no offence under Section 376 (3) IPC and Section 4 Pocso Act can be said to have been committed by revisionist. He also submits that the prosecutrix has not been medically examined and, therefore, there is no medical evidence in support of the charges framed by court below under Section 376 (3) IPC and Section 4 Pocso Act.

8. In order to appreciate the controversy in hand, it is necessary to

reproduce the statements of the prosecutrix recorded under Section 161 CrPC and 164 CrPC as verbatim. Accordingly, the same are extracted herein-under :-

"Statements of the prosecutrix recorded under Section 161 CrPC-

" बयान पीड़िता धारा 161 सीआरपीसी बयान पीड़िता अन्तर्गत धारा 161 Crpc रेशमा पुत्री अनिल राजपूत उम्र 17 वर्ष नि० ग्राम नौहाई थाना राठ जनपद हमीरपुर सम्बन्धित मु०अ०सं०, 664/22 धारा 363/366 IPC थाना राठ हमीरपुर पीड़िता ने पूछने पर बताया कि मेरा नाम रेशमा पुत्री अनिल राजपूत उम्र 17 वर्ष नि० ग्राम नौहाई थाना राठ जनपद हमीरपुर की रहने वाली हूँ मैं कक्षा 10 में G.G.I.C इण्टर कालेज राठ से पढ़ाई कर रही हूँ। दिनांक 20/11/22 को मैं घर में बिना बताये घर के बाहर जाकर रिवशा पकड़कर उरई स्टैण्ड राठ आ गयी फिर वहाँ से बस पकड़कर उरई गयी और उरई से बस पकड़ कर इटावा आ गयी इटावा में फोन करके मैं शैलेन्द्र S/o परसुराम रैकवार नि०ग्रा० नौहाई थाना राठ हमीरपुर को बुलाकर इटावा से दिल्ली की बस पकड़कर दिल्ली गयी फिर वहाँ से गुड़गांव गयी वहीं पर एक मुहल्ला बसयी में जहाँ शैलेन्द्र रैकवार किराये से रुम लेकर रहते थे वही हम भी दि० 21/12/22 को एक मंदिर में मैंने शैलेन्द्र के साथ शादी कर लिया और पति पत्नी के तरह रहने लगे प्र० 1 शैलेन्द्र रैकवार को कब से और कैसे जानती हो उ० मेरे गांव के हैं और मेरे पड़ोसी हैं हम 4 साल से एक दूसरे से बातचीत होती थी। प्र० 2 क्या आपके घर वालों को शैलेन्द्र और तुम्हारे बारे में पता था पहले से उ० नहीं मैंने कभी नहीं बताया था। प्र० 3 क्या शैलेन्द्र रैकवार और आपके बीच कब शारीरिक सम्बन्ध बना और कब और शैलेन्द्र के साथ कितने दिन रही उ० जब हम दोनों शादी कर लिये दि० 21/11/22 को हमारे बीच शारीरिक सम्बन्ध बना। मैं शैलेन्द्र के साथ 1 माह तक थी। प्र० 4 घर से जब गयी थी तब अपने साथ क्या लेकर गयी क्या तुम्हें कोई लेकर गया या अकेले गयी उ० मैं सिर्फ 1 जोड़ी कपड़े पहनकर अकेले ही गयी। प्र० 5 क्या शैलेन्द्र ने तुम्हें भागने के लिए बोला था या अपनी इच्छा से गयी उ० नहीं मेरे माता पिता आपस में लड़ाई झगड़ा करते थे जिससे परेशान होकर मैं शैलेन्द्र रैकवार को फोन से बोलने लगी कि मैं आ रही हूँ मैं अपनी इच्छा से गयी थी। मुझे अपने पति शैलेन्द्र रैकवार के साथ रहना है मैं अपने माता पिता के साथ नहीं रहना चाहती यही मेरा बयान है। यह बयान मैं बिना किसी के डराये धमकाये अपनी स्वेच्छा से दे रही हूँ। नोट मैं म०का० निशा प्रमाणित करती हूँ कि

पीड़िता द्वारा जो भी बताया गया मेरे द्वारा वही अक्षरशः अंकित किया गया। बयान लेखिका म०का० निशा देवी PNO 182200625 थाना राठ जनपद हमीरपुर दि० 26.12.22 बयान पीड़िता रेशमा।"

"Statements of the prosecutrix recorded under Section 164 CrPC-

“ बयान पीड़िता धारा 164 सीआरपीसी... रेशमा पुत्री अनिल राजपूत उम्र 16 वर्ष निवासी नौहाई थाना राठ जनपद हमीरपुर ने माननीय न्यायालय के समक्ष सशपथ बयान किया कि दिनांक 20.11.2022 को मैं सुबह 8.00 बजे अपने घर से बस पकड़कर उरई गयी थी बस उरई स्टैंड से पकड़ी थी बस स्टैंड तक आटो से गई थी मैं घर से अकेले इसलिए चली गयी थी क्योंकि घर पर हर दिन लड़ाई होती रहती है 16.11.2022 को रात में 9,10 बजे लड़ाई हुई थी क्योंकि मैं पापा को शराब पीने से मना कर रही थी मम्मी मौसी के यहां थी भाई भी वहीं था उरई लगभग 10, साढ़े 10 बजे पहुंच गई थी मेरे पास 3000 रु० थे पैसे खुद जोड़े थे उरई से इटावा बस से गये थे गुड़गांव गये थे फिर 21.11.2022 को गुड़गांव सुबह 9,10 बजे पहुंचे बस स्टैंड से 1 किमी दूर साइट पर शैलेन्द्र के मम्मी पापा मिले शैलेन्द्र मेरे गांव का रहने वाला है वह गुड़गांव रह रहा था उसके मम्मी पापा गांव आते रहते थे फिर वहां पर उन लोगों ने हेल्प करी और बसही मे उनके साथ रहने लगे उसी घर मे शैलेन्द्र भी रहता था हमने उन लोगों को घर पर बताने से मना किया था मेरे साथ कोई बलात्कार नहीं हुआ है न ही मेरे किसी से शारीरिक सम्बन्ध रहे है शैलेन्द्र ने मेरे साथ कोई गलत काम नहीं किया अब मैं घर जाना चाहती हूं घर वाले डराते है कि हमारे हिसाब से बयान दो यही मेरा बयान है।

9. Learned counsel for revisionist has invited the attention of court to the provisions contained in Section 375 IPC, wherein 'rape' has been defined. With reference to above, it is contended by the learned counsel for revisionist that in order to bring home the charge under Section 376 (3) IPC either of the conditions referred in Section 375 IPC must be satisfied. For ready reference, Sections 375 IPC and 376 (3) IPC are extracted herein-under :-

"Section 375. Rape.--

A man is said to commit "rape" if he ---

(a) penetrates his penis, to any extent, into the vagina, mouth,

urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

Firstly.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent."

"Section 376. Punishment for rape.

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the

medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.”

10. It is then contended by the learned counsel for revisionist that the provisions of Section 4 of the Pocso Act can be invoked only in case a penetrative sexual assault has been committed upon a child. With reference to the statements of the prosecutrix as recorded under Section 161 CrPC and 164 CrPC, he submits that the prosecutrix in her statement under Section 164 CrPC has made a categorical statement that no wrong act was committed by the accused-revisionist upon her. On the above premise, he therefore contends that whatever may be statement of other witnesses, since offence complained of in the first information report giving rise to the present criminal proceeding is personal to the prosecutrix therefore, it is the evidence of the prosecutrix alone which shall be a determining factor for framing of charges under Section 376 (3) IPC and Section 4 Pocso Act. Once the prosecutrix in her statement before the Investigating Officer under Section 161 CrPC or before the court under Section 164 CrPC has not added that her modesty was deliberately or forcibly dislodged by the accused-revisionist by committing rape upon her, no charge under Section 376 (3) IPC or Section 4 Pocso Act could have been framed against the revisionist. It is lastly contended by the learned counsel for revisionist that court is powerful to amend the charge against an accused during the course of trial by virtue of the provisions contained in Section 216 CrPC. In case, in her deposition before the court below, the prosecutrix takes a departure from her previous statements recorded under Section 161 CrPC or 164 CrPC then in that eventuality the court below shall be within its jurisdiction to amend/alter the charge accordingly. However, at the present stage, no charge under Section 376 (3) IPC or Section 4 Pocso Act can be framed against revisionist. On the above premise, he therefore contends that court below has not exercised its jurisdiction diligently but in a casual and cavalier fashion. The court below has failed to consider the import of the statements of the prosecutrix recorded under Section 161/164 CrPC and has therefore committed an error which is apparent on the face of record itself. In view of above, it is thus urged by the learned counsel for revisionist that framing of charge order passed by the

court below vide order dated 31.05.2023 is liable to be modified by this Court.

11. Per contra, the learned A.G.A. has vehemently opposed the present criminal revision. He submits that the order passed by the court below is not liable to be interfered with by this Court. Considering the fact that the prosecutrix is a young girl about 16 years of age, coupled with the fact that the prosecutrix in her statement recorded under Section 164 CrPC has clearly and specifically stated that she has solemnized marriage with the accused-revisionist therefore, in that eventuality, it cannot be said that physical relation would not have been entered into by the parties. On the above conspectus, the learned A.G.A. contends that in the facts and circumstances of the case, the framing of charge against accused-revisionist under Section 376 (3) IPC and Section 4 Pocso Act cannot be said to be illegal or in excess of jurisdiction. As such, the court below has not committed any illegality in passing order impugned. Consequently, the present criminal revision is liable to be dismissed by this Court.

12. Having heard the learned counsel for revisionist, the learned A.G.A. for State and upon perusal of record this Court finds that the occurrence giving rise to the present criminal proceeding is not in dispute. What is in dispute is as to whether the modesty of the prosecutrix was dislodged by the accused-revisionist or not either on the basis of her consent or forcibly. As per the material on record, particularly, the statements of the prosecutrix recorded under Section 161/164 CrPC, it is apparent that the prosecutrix in her aforesaid statements has not added that her modesty was dislodged by the accused-revisionist. Admittedly, an offence under Section 376 (3) IPC and Section 4 Pocso Act is personal to the prosecutrix and there can hardly be an eye-witness of said occurrence, therefore, it is the statement of the prosecutrix alone which shall be the guiding factor for framing of charge under Section 376 (3) IPC and Section 4 Pocso Act. In the present case, though the prosecutrix was examined by the Investigating Officer under Section 161 CrPC and ultimately her statement was also recorded under Section 164 CrPC but the prosecutrix has not added that her modesty was dislodged by the accused-revisionist. This being so, neither any of the conditions precedent under Section 375 IPC has been attracted nor the condition precedent for

framing of charge under Section 4 Pocso Act is present in the present case. At this stage, reference is made to the judgement of Supreme Court in **Asian Resurfacing of Road Agency Private Limited and Another Vs. Central Bureau of Investigation, (2018) 16 SCC 299**, wherein the Court has held that an order of framing of charge can be interfered with in rarest of rare cases. When the facts of the present case are examined in the light of above, the caution given by the Apex Court is squarely awaited in the present case. In view of above, court below has thus erred in framing charge against accused-revisionist under Section 376 (3) IPC and Section 4 POCSO Act. In the absence of any material to record to establish the condition under Section 375 IPC, prima-facie, the Court below appears to have framed charges against accused revisionist under Section 376(3) Cr.P.C. and Section 4 of the POCSO Act on the basis of suspicion/inference. It is well settled that suspicion howsoever strong cannot take place of truth. Moreover, no inference regarding commission of rape upon the prosecutrix can be inferred either from the material on record. In view of above, the order impugned passed by court below in so far as charges have been framed against accused-revisionist under Section 376 (3) IPC and Section 4 Pocso Act cannot be sustained.

13. As a result, the present criminal revision succeeds and is liable to be partly allowed.

14. It is, accordingly, partly **allowed**.

15. The charges framed against revisionist under Section 376 (3) IPC and Section 4 Pocso Act are hereby set aside.

Order Date :- 16.5.2024.

Rks.