

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL PETITION No.1731 OF 2017

ORDER:

Aggrieved over the order dated 29.11.2016, in Criminal M.P. No.475 of 2016 in C.C. No.685 of 2007 on the file of V-Metropolitan Magistrate, Anakapalle, whereby and whereunder the learned Magistrate, while dealing with an application under Section 322 of the Code of Criminal Procedure (for short, 'the Code') filed by the State, represented by the Station House Officer, Parvada P.S., opined that the offence punishable under Section 376 of I.P.C. also would attract, though, the investigating officer laid charge-sheet against the petitioner/accused for the offences punishable under Sections 417 & 420 of I.P.C., the present criminal petition is filed by the accused requesting to quash the said order by exercise of power under Section 482 of the Code.

2. Heard Sri B.V. Rama Rao, learned counsel for the petitioner. It is his submission that the learned Magistrate was wrong in entertaining application under Section 322 of the Code and treating it as one filed under Section 323 of the Code, and opining that the offence punishable under Section 376 of I.P.C. would also attract.

3. The learned Additional Public Prosecutor for the State of Andhra Pradesh would submit that the fact situation occurring in the instant petition clearly reflects that the petitioner did commit the

offence punishable under Section 376 of I.P.C. and, thus, supports the order passed by the learned Magistrate.

4. The learned counsel for the petitioner would also submit that the *de facto* complainant, in fact, filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 bearing D.V.C. No.4 of 2008 on the file of V-Metropolitan Magistrate, Anakapalle, wherein in paragraph-3, she has clearly mentioned that she was staying in the matrimonial home set up by the petitioner in a separate house and they lived together as husband and wife for about one year to the knowledge of whole public, during which time she conceived, the petitioner has taken care of her. Therefore, it cannot be said that the offence punishable under Section 376 of I.P.C. would attract and, certainly, the alleged offence punishable under Section 376 of I.P.C. is misconceived and, sought to set aside the order.

5. Perused the order.

6. The learned Magistrate referred to the provisions of Section 90 of I.P.C. in the context of definition of 'Consent' more particularly, the expression "under a misconception of fact" occurring in Section 90 of IPC and placed reliance in **Bhumpaka Praven Kumar v. State of Telangana, Rep. by the Public Prosecutor, High Court at Hyderabad** (Criminal R.C. No.1818 of 2014, dated 7.11.2014) rendered by this Court in almost alike situation in **State of Uttar**

Pradesh v. Naushad (Criminal Appeal No.1949 of 2013, from which S.L.P. (Crl.) No.5390 of 2008, on 10.11.2013 arises), wherein the Hon'ble Supreme Court placing reliance on **Yedla Srinivasa Rao v. State of A.P.**¹ extracted paragraphs-10 & 11, and in **Deepak Gulati v. State of Haryana**² wherein the Hon'ble Supreme Court declared that “intercourse under promise to marry would not constitute rape unless from very beginning, accused had never intended to marry prosecutrix and that an accused can be convicted of rape if Court reaches a conclusion that intention of accused was *mala fide*, and that he had clandestine motive.”, acceded to the request made by the State, opining that the request falls within the mischief of Section 323 of the Code., and accordingly allowed the Criminal M.P. No.475 of 2016 in C.C. No.685 of 2007.

7. It is no doubt true, the *de facto* complainant has filed D.V.C. No.4 of 2008 seeking interim maintenance and compensation, but the case set out by the petitioner can only be examined during trial when she steps into witness box as prosecutrix, but not at this stage to arrive at a conclusion that the offence under Section 376 of I.P.C. would not attract. It is unnecessary to go into details at this stage for the reason the order under challenge, viewed from any angle, does not suffer from patent illegality warranting interference.

8. Therefore, the Criminal Petition is dismissed.

¹ (2006) 1 SCC 615

² 2013 (2) ALD (Crl.) 492 (SC)

As a sequel thereto, Miscellaneous Petitions, if any, pending in the Criminal Petition stand closed.

A. SHANKAR NARAYANA, J

Dt.20.03.2017
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