

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

RESERVED ON : 7th FEBRUARY, 2017
DECIDED ON : 17th MARCH, 2017

+ **W.P.(CRL.) 1945/2016 & CRL.M.A.No.10171/2016**

BRIJESH BAVARVA

..... Petitioner

Through : Mr.Sudhir Nandrajog, Sr.Advocate
with Mr.Santosh Krishnan &
Mr.V.Siddharth, Advocates.

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Through : Ms.Nandita Rao, ASC.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J. (ORAL)

1. Instant petition under Article 227 of the Constitution of India read with Section 482 Cr.P.C. has been preferred by the petitioner to impugn an order dated 05.05.2016 of learned Addl. Sessions Judge in Sessions Case No.13/2015 arising out of FIR No.528/2014 registered under Sections 376(2)/377/506 IPC at PS Moti Nagar whereby charge under Sections 376(2)/377/506 IPC was ordered to be framed against him. Status report is on record.

2. I have heard the learned Senior Counsel for the petitioner and learned Addl. Standing Counsel for the State.

3. Learned Senior Counsel for the petitioner urged that there was no incriminating material whatsoever to charge the petitioner for the

commission of offences mentioned therein. Allegations levelled in the FIR are vague and misleading. Physical relationship between the petitioner and the prosecutrix was consensual. It was not elaborated by her as to how and in what manner, the petitioner committed unnatural sex. Statement recorded under Section 164 Cr.P.C. does not contain any allegations of rape or other offence. Learned Addl. Standing Counsel urged that there are specific allegations against the petitioner in the FIR. The enquiry at the time of framing of charge must necessarily be limited to decide if the facts emerging from the record and documents constitute the offence with which the petitioner is charged.

4. Admitted position is that both the prosecutrix and the petitioner were acquainted with each other between the incident. The petitioner was employed as a Pilot with Indigo Airlines since 2009. The complainant had joined Indigo Airlines on 26.08.2009 as an air hostess. The complainant was earlier married to one Anurag Wadhwa on 24.12.2010 and the said marriage came to an end by a decree of divorce by mutual consent on 04.07.2015 (Annexure P-11, page 134). It is informed that on 06.06.2014, the petitioner got married and has been blessed with a child in February, 2016. FIR in question was lodged by the complainant on 12.06.2014. The petitioner was granted anticipatory bail by this Court by an order dated 03.09.2014. Upon completion of investigation, a charge-sheet was filed against the petitioner for commission of offence punishable under Sections 376(2)/377/506 IPC.

5. Learned Trial Court was of the view that offence under Section 376 IPC was not made out as the physical relationship between the petitioner and the prosecutrix was with consent. The prosecutrix, aged 29 years, was

already a married lady and there was no question of her giving consent for sexual intercourse on the alleged promise to marry. She was well aware that in the absence of dissolution of her marriage with her husband Anurag Wadhwa, the promise to marry could not be fulfilled. So there was no 'misconception of fact' and physical relationships (if any) were with consent.

6. The Trial Court, however, fell into grave error to observe that since the petitioner used his 'authority' to force the prosecutrix to have physical relation, *prima facie*, there was sufficient material to frame charge against him for commission of offence under Section 376(2) IPC. It is a matter of record that the victim joined Indigo Airlines in 26.08.2009 and quit it by January, 2013. It is the complainant's case that the petitioner approached her only in October, 2013. Apparently, at that time, the complainant was not in employment of Indigo Airlines where the petitioner was a pilot and she was not in any manner under his supervision/dominance. There was no occasion for the petitioner to establish physical relation with the prosecutrix using his position or authority as pilot. Learned Addl. Standing Counsel fairly conceded that charge under Section 376(2) IPC is unsustainable.

7. Regarding Section 377 IPC, in the complaint forming basis of the FIR, the complainant gave detailed account as to how on 02.02.2014 the petitioner came at her house at Moti Nagar, New Delhi and offered to drop her for her flight that day. She further disclosed that on reaching her place and finding her alone at home, the petitioner forced himself upon her to have unnatural sexual intercourse, after which he promised to marry her soon. These allegations cannot be brushed aside or ignored at this stage. The

allegations are specific and definite. Under Section 227 Cr.P.C., the Court has undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. It is not required to make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it were conducting a trial. Truthfulness and falsity of the allegations primarily pertains to the realm of evidence and cannot be gone through at this stage.

8. Similarly, there are allegations whereby the prosecutrix was threatened of being defamed by showing her obscene pictures if she tried to reveal the incident to anyone. She was also threatened to be killed if situation so demanded.

9. Considering the facts and circumstances of the case, impugned order framing charge under Section 376(2) IPC against the petitioner is set aside.

10. The petitioner shall face trial for commission of offences punishable under Sections 377/506 IPC.

11. The petition stands disposed of in the above terms. Pending application also stands disposed of.

12. Observation in the order shall have no impact on merits of the case.

(S.P.GARG)
JUDGE

MARCH 17, 2017 / tr