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

RESERVED ON : MAY 05, 2017
DECIDED ON : AUGUST 16, 2017

+ **CRL.REV.P. 110/2017 & CrI.M.A.1875/17, 1877/17**

X (Assumed name) Petitioner

Through : Mr.V.K.Garg, Sr.Advocate, with
Mr.Ankur Chhibber and Ms.Noopur
Dubey, Advocates.

VERSUS

STATE & ANR. Respondents

Through : Mr.Amit Gupta, APP.

+ **CRL.REV.P. 166/2017 & CrI.M.A.3602/2017**

STATE (NCT) OF DELHI Petitioner

Through : Mr.Amit Gupta, APP.

VERSUS

HARJOT SINGH PELIA Respondent

Through : None.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P GARG, J.

CrI.M.A.1875/17, 1877/17 (delay in filing and refiling) in
CRL.REV.P. 110/2017
CrI.M.A.3602/2017 (delay) in CRL.REV.P. 166/2017

For the reasons mentioned in the applications, the delay in filing and refilling the revision petitions is condoned.

The applications stand disposed of.

CRL.REV.P. 110/2017 and CRL.REV.P. 166/2017

1. Present revision petitions have been preferred one by the victim 'X' (changed name) and the other by the State to challenge the legality and correctness of an order dated 30.08.2016 of learned Additional Sessions Judge in Sessions Case No.441333/2016 emanating from FIR No.157/2016 registered under Sections 376/506 IPC at Police Station Dwarka (South) whereby the respondent was discharged of the offences.
2. I have heard the learned counsel for the parties and have examined the file. Learned Senior counsel for the victim urged that the Trial Court did not appreciate the case in its proper and true perspective. The trial court fell into grave error in not appreciating that the victim's consent to have physical relations with the respondent was under misconception of facts. The respondent had given false assurance to the prosecutrix that he would marry her. Subsequently, the respondent did not fulfill the promise to marry her; he had no intention from the very inception to perform marriage with 'X' and obtained her consent to sexual intercourse by deceit. Presumption under Section 114A of the

Indian Evidence Act was ignored for no sound reasons. The respondent had even taken 'X' to Golden Temple and had performed marriage ceremony there. There was credible evidence on record to prove that the prosecutrix was criminally intimidated and after taking undue advantage of her situation whereby she had a disturbed marriage with her previous husband which led to divorce, she was allured to have physical relation on the false promise to marry. Reliance has been placed on *Deelip Singh @ Dilip Kumar vs.State of Bihar* (2005) SC 203; *Onkar Nath Mishra and Ors vs.State (NCT of Delhi) and Anr.*(2008) 2 SCC 561; *State of Uttar Pradesh vs.Naushad* (2013) 16 SCC 651; *Karthi @ Karthick vs.State represented by Inspector of Police, Tamil Nadu* (2013) 12 SCC 710; *Deepak Gulati vs.State of Haryana* (2013) 7 SCC 675.

3. Admitted position is that the prosecutrix was previously married to Lt.Col.Aveek Day on 17.04.2003 and had a child aged around 9 years out of the said wedlock. She was aged 22 years of age at the time of her first marriage. Relations between the prosecutrix and her previous husband Aveek Day became strained. They sought divorce by mutual consent and first motion petition was filed in February, 2014. The said marriage came to an end finally on 25.08.2014 by grant of a decree of divorce by mutual consent. It is further relevant to note that the respondent too was a married man and the said marriage was subsisting at the time of lodging of the FIR. Undisputedly, the prosecutrix and the respondent were acquainted with each other. In June, 2013, the prosecutrix with her husband came to Delhi on his posting. There were visiting terms between the two families.

Seemingly, intimacy developed between the prosecutrix and the respondent during this period.

4. 'X' lodged a comprehensive written complaint forming basis of the FIR, on 9.3.2016; she gave detailed account as to how and in what manner, the respondent allured her to have physical relation by promising to marry her and also to take the responsibility of her nine year old son. Since she was mentally distressed, the respondent encouraged her not to consider her previous marriage and gave her a shoulder to rely on and insisted her to break the marriage and marry him for a promising and a better future. She disclosed that in October, 2014, the respondent took her and her son to Golden Temple and after taking 'circles' (rounds) and offerings prayer convinced her that they were married. After an assurance of a beautiful and secured future, he tried to convince her to have a physical relationship. At first attempt, he forced himself on her and had sex without her consent. She further informed that on 16.01.2016, the respondent took her to Chandigarh; made false promise to buy her a flat in Mohali. On 17.01.2016 they returned to Delhi and he informed her that his brother-in-law was coming for getting the mutual divorce and he would keep her posted. Similar allegations were reiterated in her 164 Cr.P.C. statement.

5. It is pertinent to note that during investigation, the prosecutrix was medically examined. No injuries, whatsoever, were found on her body including private parts to infer forcible rape. Needless to state that there was considerable delay in lodging the FIR. The first incident of alleged commission of rape had occurred in October, 2014. No plausible explanation has been offered as to why the prosecutrix

maintained complete silence for long and did not lodge the report promptly. Contrary to that, she continued to have sexual relations with the respondent subsequently without demur.

6. The prosecutrix admittedly had physical relationship with the respondent with consent. No material has emerged on record to infer if any promise to marry was made by the respondent to the prosecutrix to obtain her consent for physical relationship. The prosecutrix was well aware that there was no possibility of legal marriage between the two as the respondent was already having a living spouse and no proceedings, whatsoever, had been initiated to seek divorce. Even the prosecutrix herself was a married lady having the custody of a nine year old child and divorce was finally granted on 25.08.2014. The prosecutrix was a mature and educated lady. She had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to. The physical relationship between them had occurred with her active consent as there was neither any resistance nor she had lodged any complaint anywhere at any time for long two and a half year. She did not initiate any steps to get alleged promise to marry fulfilled. She was conscious of the complications surrounding her marriage to the respondent. There was no question of her giving consent under some misconception. She herself is not clear and certain if physical relations at first instance were consensual on respondent's promise to marry or it were against her wishes forcibly. Had the respondent established physical relations against victim's consent in October, 2014, there was no reason for her not to raise hue or cry or alarm or to report the incident to the police immediately. Soon after the

incident in October, 2014, she continued to have physical relations with the respondent prior to lodging of the FIR. When the marriage between the two did not materialize due to certain factors particularly the respondent being already a married man, the prosecutrix lodged the FIR. Prior to that she had even approached the respondent's wife and some confrontation had taken place between the two.

7. On perusal of the entire evidence collected during investigation, it can safely be inferred that ingredients of Section 376 IPC are not attracted; the allegations in the complaint do not constitute commission of offence punishable under Section 376 IPC.

8. In *Alok Kumar vs.State* 2015(7) LRC 13 (Del), this Court held as under:-

“.....there was no misconception of facts i.e. promise to marry because when the complainant started live in relationship with the petitioner, petitioner had not divorced his previous wife, even complainant was not divorced at that time. As such, complainant could not have been induced into physical relationship based on assurance of marriage. Undisputedly, complainant was major at that time as such consensual physical relationship would not constitute offence under Section 376/420 IPC.”

9. In *Deepak Gulati vs.State of Haryana* (2013) 7 SCC 677, the Supreme Court held as under:-

“21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep

a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 Indian Penal Code cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

22. The instant case is factually very similar to the case of Uday (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her.

IV. There was no evidence to prove conclusively, that the Appellant had never intended to marry the prosecutrix.

23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the Appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the Appellant. According to the version of events provided by her, the prosecutrix had called the Appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for

him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the Appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the Appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the Appellant at the Birla Mandir. Thereafter, she even proceeded with the Appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police.

24. If the prosecutrix was in fact going to Ambala to marry the Appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be leveled against the Appellant, in light of the afore-mentioned fact situation."

10. I find no irregularity or material infirmity in the impugned order. At the stage of framing of charge, the court has no jurisdiction to go into the merits of the allegations, and is only required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all ingredients constituting the alleged offence. The Trial Court is not required to weigh the evidence as if it is for conviction or acquittal.

11. Discussing the law on consideration of charge, this Court in the case of '*Prashant Bhaskar vs.State (Govt.of NCT of Delhi)*' in CrI.Rev.P.385/2009 decided on 22.09.2009 held:

It needs no elaboration that at the stage of framing of charge, the court is required to evaluate the materials and documents which have been placed on record by the prosecution and taken at the face value, whether existence of the ingredients constituting the alleged offence or offences are disclosed. It is for this limited purpose alone that the court is permitted to sift the evidence. In para 7 of the judgment in (1990) 4 SCC 76 Niranjana Singh Karam Singh Punjabi & Ors. Vs. Jitendra Bhimraj Bijja & Ors. the Apex Court defined the parameters of the scope and consideration thus:

“7. The next question is what is the scope and ambit of the 'consideration' by the trial court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exist sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh 1977 CriLJ 1606 this Court observed that at the initial stage of the framing of a charge, if there is a strong suspicion-evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-

examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal and Anr.1979 CriLJ 154 , this Court after considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post-office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts - 9 - emerging therefrom taken at their face-value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under: (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the 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. (2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial. (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. (4) That in exercising his jurisdiction under Section 227 of the Code of judge which under the present Code is a senior and experienced judge cannot act merely as a Post office or a mouth-piece of the

prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. xxxx From the above discussion it seems well settled that at the Sections 227-228 stage the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at - 10 - their face value disclose the existence of all the ingredients constituting the alleged offence. The court may for this limited purpose sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.”

12. In the light of the above discussion, the impugned order discharging the respondent of the offences under Section 376/417 IPC cannot be faulted. The revision petitions lack in merits and are dismissed.

13. Copy of the order be transmitted to the Trial Court for information.

**S.P.GARG
(JUDGE)**

AUGUST 16, 2017/sa