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

% Date of Decision: September 18, 2017

+ **CRL.REV.P. 594/2017**

STATE

..... Petitioner

Through: Ms.Kusum Dhalla, APP for the
State with Insp.Meena Yadav,
PS Palam Village.

Versus

MAHESH CHAND & ANR.

...Respondents

Through : Mr.Ajit Kumar, Advocate.

PRATIBHA RANI, J. (Oral)

1. Feeling aggrieved by the order dated 29th March, 2017 whereby respondents/accused persons have been discharged in case FIR No.249/2016, PS Palam Village for the offence punishable under Section 376 and 376/511 IPC, which are triable by the Court of Session, the State has invoked the revisional jurisdiction of this Court with a prayer to set aside the order whereby both the accused/respondents have been discharged for the aforesaid offences..
2. Vide impugned order dated 29th March, 2017, the learned Addl Sessions Judge has discharged the accused persons/respondents No.1 and 2 for the following reasons:

‘11. It is the settled law that order framing the charges does substantially affect the persons and the Court must not automatically frame the charge merely because the prosecution authorities, by relying on the documents referred to in Section 173 Cr.PC, consider it proper to institute the case.

12. Though not referred to or relied upon, it has been observed by Madhya Pradesh High Court in judgment – *Sunder Singh v. State of M.P.*, Cr.R No.607/2013 decided on 3.9.2013 as under :

“42. The prosecution, having regard to the right of an accused to have a fair investigation, fair inquiry and fair trial as adumbrated under Article 21 of the Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself have placed on record. If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken favouring the accused, the court shall not put the accused to harassment by asking him to face a trial. Please see: *State of Maharashtra v. Som Nath* (1996) 4 SCC 659. In the case at hand, if the Court allowed to asking applicant face the trial on above discussed evidence, definitely it will amount to put the applicant for harassment.”

13. Though not referred to or relied upon, in judgment *Jayanti Rani Panda v. State of W.B.*, 1984 CrL. Law Journal 1535 it has been held that if a grown up girl has consented to sexual intercourse with a person who held out false promise to marry her it would not amount to consenting under any misconception of fact under Section 90 IPC and sexual intercourse by the man

under these circumstance would not be an offence of rape as defined in Section 375 IPC. Though not referred to or relied upon, in similar circumstances, in judgment - decided on 3.1.2017, our High Court of Delhi speaking through Hon'ble Mr. Justice Vipin Sanghi has upheld the order of the trial court discharging the accused in a rape case.

14. Considering the facts and circumstances of this case, after sifting and weighing the evidence for the limited purpose of finding out whether or not a prima facie case is made out against the accused, I am of the opinion that the materials placed before the Court do not disclose the grave suspicion against the accused Mahesh Chand and Sanjay for framing charge against them for committing offences punishable under Sections 376 and 376/511 IPC respectively. Accordingly, they are discharged for the said offences. All other offences are triable by the court of Ld. M.M. Accused are directed to appear before Ld. M.M. today at 12.30 pm. Ld. M.M. shall proceed further in the matter in accordance with law.'

3. I have heard learned APP for the State as well as learned counsel for the respondents and carefully gone through the record.

4. As per the FIR which was recorded on the basis of complaint made by prosecutrix 'P' (name withheld to conceal her identity), she became friendly with the respondent No.1 Mahesh Chand through her friend and her consent to have physical relations with Mahesh was on his promise to marry her. It is also mentioned in the complaint forming basis of FIR No.249/2016, PS Palam Village and in her statement under Section 164 CrPC that the respondent No.1 Mahesh Chand secretly prepared a video film of their physical relations and

used to threaten her to show it to her family members and defame her and used that video film to force her to enter into physical relationship thereafter also. When it continued for a long time, she refused to have further physical relations with him till they get married.

5. Thereafter, after due deliberations, the respondent No.1 married her at Arya Samaj Mandir, Qutub Vihar, Dwarka and said that the factum of marriage will be disclosed to her family later and she was asked to live with her parents telling her that even his parents were not happy with this marriage and were annoyed with him. Thereafter on 21st June, 2013 the respondent No.1 Mahesh and his cousin Sanjay i.e. respondent no.2 met her in the *gali* near her house and took her to Manesar and kept her in a rented room saying that they will have their honeymoon there. She was kept in the rented accommodation for nine days and she was also not allowed to talk to her parents. During said period, Mahesh had physical relations with her daily. Respondent No.2 Sanjay also tried to have physical relations with her and when she resisted, she was given beatings by Sanjay who also disclosed that Mahesh was already married to Rekha and having a son as well and her statu was that of a 'Keep' (*Rakhail*). Thereafter police recovered her on 29th June, 2013 as her parents had lodged a missing report. Mahesh had also threatened to kill her and her family if she disclose anything to the police. After one-and-a-half month she came to know that she was pregnant and when she informed about her pregnancy to respondent No.1 Mahesh, he gave her a tablet saying that it was a Vitamin tablet. When she consumed the tablet, it induced abortion. In the complaint, she has stated that on 25th January, 2016

Mahesh came to their house and abused her and her family. Thereafter, she reported the matter to the police and FIR No.249/2016 under Section 493/495/376/377/506/34 IPC was registered at PS Palam Village.

6. The report under Section 173 CrPC records that during investigation Mahesh's mother and his brother Sunil were also interrogated and Sunil produced the photographs of marriage of Mahesh and told that Mahesh got married according to Hindu customs on 12th December, 2010 with Rekha and they are also having a child from the said wedlock.

7. The prosecution has placed on record the copy of marriage certificate of respondent No.1 Mahesh with the prosecutrix issued by Arya Samaj Mandir, Qutub Vihar, Dwarka. **As per this certificate, the respondent No.1 Mahesh married the prosecutrix on 10th June, 2013 wherein his status has been mentioned as 'unmarried'.**

8. The learned Additional Sessions Judge while passing the impugned order on charge has discussed the statement of the complainant/prosecutrix as well as the medical evidence as if he was conducting a trial and is extracted hereunder:-

'9. In her complaint on which present FIR was lodged it is alleged that in March 2009 accused Mahesh Chand committed rape upon the prosecutrix on the pretext of marriage. No specific dates and time have been mentioned by the prosecutrix in the said complaint from March 2009 till 21.06.2013 when the accused Mahesh Chand committed rape upon her. This relationship continued for sufficient duration and at no stage she raised alarm/hue and cry or lodged report with the police against alleged rape. Even

after the initial incident in March 2009 she continued to have sexual relations with him on several occasions without demur and at no stage prosecutrix lodged report about his conduct and behaviour. The family members of the prosecutrix had lodged a missing report regarding her on 21.06.2013. At that time prosecutrix made a statement to the SHO PS Palam Village stating therein that she went with accused Mahesh of her own free will. Accused Mahesh married the prosecutrix on 10.06.2013 according to Hindu rites and ceremonies at Arya Samaj Mandir, Delhi (address withheld). As per statement under section 164 Cr. P.C., prosecutrix came to know that accused Mahesh Chand was already married when she stayed with him at Manesar, Gurgaon. However, she kept mum and she did not lodge any complaint against him. Rather she stated to police that she went with him of her own free will. Prosecutrix concealed the factum of her marriage with accused Mahesh Chand on 10.06.2013 from her parents/relatives and did not make it public. She was the mature enough to fully understand as to what was happening between the two. In the facts and circumstances of this case, it was an act of promiscuity on the part of the prosecutrix and not an act induced by misconception of fact. Though not referred to or relied upon, in similar circumstances, in judgment – Gaurav Maggo Crl. A. No.369/2014, decided by High Court of Delhi on 29.5.2015, it has been held as under :

“There is nothing in her evidence to demonstrate that she was incapable of understanding the nature and implications of the act which she consented to. Her consent for physical relations (if any) was an act of conscious reason. If a fully grown up lady consents to the act of sexual intercourse on a promise to marry and continues to indulge in such activity for long, it is an act of promiscuity

on her part and not an act induced by misconception of fact.”

10. Prosecutrix was medically examined on 16.06.2016. Doctor has written on the MLC that she did not find any external injury mark on the person of the prosecutrix at the time of the examination. There is no medical evidence to support the version of the prosecutrix that she was raped as she was taken to the hospital after considerable delay. Accused Mahesh Chand was also medically examined by doctor on 30.09.2016 at DDU Hospital, New Delhi which was a sheer formality.’

9. The issue before this Court is whether on the basis of the complaint/FIR and the subsequent statements recorded under Section 161 CrPC and under Section 164 CrPC of the complainant/prosecutrix, the learned Trial Court could have discharged respondents observing that it was an act of promiscuity on the part of the prosecutrix and not an act induced by misconception of fact.

10. It is trite law that at the stage of charge, the Court is required to peruse the entire material placed by the prosecution. For the purpose of considering whether the charge can be framed against the accused persons, the Court can sift the material placed before it.

11. In the decision reported as Union of India vs. Union of India v. Prafulla Kumar Samal and Anr. (1979) 3 SCC 4, where the Supreme Court while examining a similar question in the context of Section 227 of the Code of Criminal Procedure, the legal position was summed up as under:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(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 produced 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 the 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.”

12. In the report *Sheoraj Singh Ahlawat & Ors. vs. State of U.P. & Anr.* 2013 CrI.L.J. 331 the Apex Court had an occasion to deliberate upon the scope of the power of the Court at the stage of charge in

warrant trial cases and also in the context of sessions trial cases.

While declining the prayer for discharge, it was observed as under:-

“Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the Court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs to be curbed, the Court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge.”

13. The marriage certificate placed on record by the prosecution prima facie shows that the respondent No.1 was having sexual relationship with the prosecutrix on promise to marry her and when she refused to have physical relations till they get married, despite being already married, he solemnized marriage with the prosecutrix at Arya Samaj Mandir, Qutub Vihar, Dwarka wherein he gave his marital status as ‘unmarried’ despite the fact that he was already married to Rekha on 12.12.2010 and is having a son.

14. In my considered view, the entire approach of the learned Trial Court is erroneous. The learned Trial Court was only required to consider whether a prima facie case for framing a charge for the offences complained of is made out and not to appreciate the evidence

as if arriving at the conclusion as to whether the material placed was sufficient to base the conviction.

15. As the impugned order dated 29th March, 2017 has been passed against the settled legal position, the same is set aside to the extent of discharging the respondents/accused persons for committing the offence punishable under Section 376 and 376/511 IPC. The respondents/accused persons shall face trial for all the offences complained of.

16. A copy of this order be sent to the learned Sessions Judge, Dwarka Court as well as the concerned Court of Magistrate.

17. Learned Sessions Judge, Dwarka Court is directed to withdraw the case FIR No.249/2016 under Sections 493/495/376/377/506/34 IPC, PS Palam Village from the Court of Magistrate and try the same himself or assign the same to Addl. Sessions Judge having jurisdiction to try the same.

18. Parties are directed to appear before the Court of learned Sessions Judge, Dwarka Court on 10th October, 2017.

19. Revision petition is allowed in above terms.

As prayed, copy of the order be given *dasti* to learned counsel for the parties.

PRATIBHA RANI, J.

SEPTEMBET 18, 2017

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