

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M No.20007 of 2020
Date of Decision:-10/11/2020**

Manish Kumar

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present:- Mr. Ashwani Nagra, Advocate
for the petitioner.

Mr. Naveen K. Sheoran, DAG, Haryana.

Through Video Conferencing

JASGURPREET SINGH PURI J.

The present petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner pending trial in case FIR No.50 dated 10.08.2018, under Sections 201, 313, 366, 376, 506 and 509 IPC, registered at Police Station Panchkula, District Panchkula.

The allegations as contained in the aforesaid FIR are that on the basis of complaint by the prosecutrix the present FIR was registered. In the complaint, the prosecutrix stated that she is 23 years old and making the complaint against the petitioner, namely, Manish Kumar s/o Raj Kumar with regard to making physical relations by promising to marry, forcibly getting conduct abortion, lowering reputation by claiming to have spent lacs

of rupees in the name of providing educational course, lowering reputation by raising questions on character, getting implicate parents and relatives etc. in a false police case, threatening to commit suicide and threatening to kill her and her family members, making physical relations by promising to marry. It is alleged that the petitioner played drama with her of being harassed by his wife and allured her in the sweet talks and made false promise with her for giving divorce to his wife soon and made physical relations with her many times. Giving details in the contents of FIR, the prosecutrix further alleged that as far as she remember the date of hotel at Kala Amb, it was 15th February, 2017 where entry was also made while taking room and after making physical relations by the petitioner she got pregnant twice but the petitioner refused to marry her and lingered on the matter in the name of providing few days. During this period, he also administered medicine for abortion fraudulently and her abortion took place. Further the petitioner allegedly started demanding money from her on the pretext that he had given money to her father for her admission and used to make physical relations forcibly. During that period allegedly the petitioner also obtained many signatures on many blank papers and on the basis of the same he now tells that their marriage had taken place in the Court on the basis of those papers whereas he has not performed any marriage with her. The petitioner is also claiming an amount of 60-70 lac and threatening to implicate her entire family in a false case besides threatening to commit suicide. Furthermore allegedly Aadhar Card and other necessary documents are in his custody and he has lowered her reputation to a great extent in the village and in the vicinity.

Learned counsel for the petitioner has submitted that the petitioner has been falsely implicated in the present case on the basis of false statement made by the prosecutrix. He has submitted that in fact vide Annexure P-2 the petitioner as well as his wife, namely, Seema Rani had entered into an agreement/divorce document, dated 26.6.2015 and that in view of the said divorce document the marriage between the petitioner and his wife was dissolved in the year 2015 by way of the aforesaid documents. Learned counsel for the petitioner has further referred to Annexure P-3 which is dated 23.2.2016 which is purported to be a marriage certificate between the petitioner and the prosecutrix performed at Prachin Shiv Mandir, Nada Sahib road, Panchkula. The argument raised by learned counsel for the petitioner is that the physical relations between the petitioner and the prosecutrix were voluntary and with consent and therefore the offence of rape is not made out against the petitioner. He has further submitted that the prosecutrix was well aware of the earlier marriage of the petitioner and still she had developed physical relations with him and therefore, it cannot be termed as an offence under Section 376 IPC because it was a result of consent given by her. He has further submitted that it is only because the prosecutrix had taken a 'U' turn and in order to blackmail the petitioner, she has got the present FIR lodged against the petitioner. Learned counsel for the petitioner has further submitted that the petitioner is in custody since 02.10.2018 and after framing of the charges, three witnesses have already been examined out of 23 cited witnesses and that there is no case made out against the petitioner and therefore, the petitioner may be considered for grant of regular bail.

On 10th of August, 2020 this Court had directed that the presence of the prosecutrix was essential for the just and proper decision of the petition and therefore, the prosecutrix was ordered to be impleaded as respondent No.2 in the array of respondents in the present petition and notice was issued to her. The said summons were although duly served upon respondent No.2/prosecutrix on 15.09.2020 but nobody appeared on her behalf on the date fixed for hearing i.e. 16.09.2020. It was directed by this Court that since the proceedings are being taken up through video conferencing, it would be in the interest of justice to adjourn the case as there is likelihood that respondent No.2 could not have caused appearance through video conferencing and therefore time was granted to her for causing appearance and matter was adjourned to 01.10.2020. On this date the matter was taken up through video conferencing but the same could not proceed in view of the fact that the internet connection was not properly established and thereafter the matter was adjourned to 14.10.2020. Still on this date nobody appeared on behalf of respondent No.2.

Learned State counsel appearing for respondent No.1-State has submitted that the reply has been filed by way of affidavit of Satish Kumar, Assistant Commissioner of Police, Kalka, District Panchkula. He has submitted that there are serious allegations of physical relations, promise to marry, forcibly abortion, threat to commit suicide and other threat to complainant and that the allegations with regard to commission of rape many times by the petitioner would disentitle the petitioner for grant of bail. During the investigation, statement of complainant under Section 164 Cr.P.C. was recorded and her medical examination was also conducted in

General Hospital, Sector 6, Panchkula. From the investigation and evidence, co-accused Sahil and Seema Rani were found innocent and their involvement was not found in the crime and on 02.10.2018 the petitioner Manish was arrested. After completion of the investigation, report under Section 173 Cr.P.C. was submitted on 18.12.2018 against the petitioner. The charges were framed on 12.3.2019 and out of 23 total, 03 prosecution witnesses were examined before the learned trial Court. He has further submitted that as per reply the petitioner has committed grave offence and there are serious allegations of physical relations with a promise to marry with the complainant and when she was pregnant, the petitioner got forcible abortion and gave threat to commit suicide and also gave threat to kill the complainant besides lowering reputation of family members of complainant and demand of money by the accused. Furthermore, keeping in view the gravity of offence, the petitioner is not entitled for grant of concession of bail and if bail is granted to the petitioner, he can abscond from the criminal proceedings and threaten the witnesses.

Learned State counsel has further submitted that it is a case where even if there is consent of the prosecutrix then the same would not absolve him from the offence committed under Section 376 IPC because such a consent is insignificant in view of facts and circumstances of the present case. He has further referred to Clause 4 of Section 375 IPC and the same is reproduced as under :-

“375. Rape-A man is said to commit 'rape' if he-

xxxx

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.

xxxx”

Learned State counsel has further submitted that the present case comes within the ambit of the aforesaid 4th Clause, which says that even if the physical relationship and sexual intercourse is done with the consent of the prosecutrix but when the man knows that he is not her husband and that her consent was given because she believes that he is another man to whom she is or otherwise believes herself to be lawfully married and the offence of rape is said to be committed. Learned State counsel has further submitted that there is every likelihood that in case the petitioner is enlarged on bail then there is large possibility that he may influence the witnesses and temper the record and therefore opposed the grant of bail to the petitioner.

I have heard learned counsel for the parties.

A perusal of the documents as being placed on record and on the basis of submissions made by learned counsel for the parties, it can be seen that as per the allegations which are contained in the FIR, it has been stated by the prosecutrix that in the year 2017 she was taken to hotel at Kala Amb and thereafter also a hotel at Plasra (Morni) where physical relations were made out of which the prosecutrix got pregnant twice. The allegations as contained in the FIR would show that the petitioner had taken signatures on some blank papers on which it is shown that some marriage had taken place. Vide Annexure P-2, which is dated 26.6.2015 some kind of agreement/divorce document has been shown to have taken place between

the petitioner and his wife and thereafter on 23.2.2016 there is marriage between the petitioner and the prosecutrix as per Annexure P-3 certificate. Going by these documents itself, it can be seen that the agreement/divorce document (Annexure P-2) is a kind of agreement made privately between petitioner and his wife and therefore such kind of document can certainly have no sanctity in law. It cannot be said that the marriage has been dissolved by way of this document. While adverting to Annexure P-3, which is marriage certificate between the petitioner and the prosecutrix, the same document is a certificate of marriage, which even if taken to be correct, the said marriage would not be a valid marriage in the eyes of law as the earlier marriage of the petitioner was still subsisting. The allegations, which are contained in the FIR are pertaining to the year 2017 and therefore the submissions made by learned State counsel that the present case would be covered under 4th Clause of Section 375 IPC thus carry weight.

Apart from this, even going by the contents of the present petition itself, it shows that the petitioner had himself taken a stand that so-called divorce vide Annexure P-2 was at panchayati level and the petitioner has himself admitted in the petition that it was a panchayati divorce and therefore it can certainly be said that such kind of divorces are having no sanctity of law. Furthermore, the act of sexual intercourse by the petitioner with the prosecutrix has also been admitted in the petition itself, although it is stated that it was by way of consent. Para 7 and 9 of the present petition are reproduced as under :-

“7. That the petitioner was too influenced by the complainant that he even took divorce from his first wife

namely Seema at panchayat level on 26.06.2015. Thereafter petitioner and the complainant had also performed marriage in a Mandir on 23.02.2016 and marriage certificate was also issued by the priest, wherein the petitioner and the complainant had put their respective signatures beneath their photographs. The copies of the agreement of divorce between the petitioner and his earlier wife namely Seema and marriage certificate of petitioner with complainant are attached as Annexures P/2 & P/3 respectively.

9. That the above said circumstances lead to the conclusion that the complainant freely, voluntarily and consciously consented to having sexual intercourse with the petitioner and her consent was not in consequences of any misconception of fact, especially when the petitioner has already performed marriage with her. Thus the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.”

The facts, which comes out from the present petition, therefore, suggest that in the year 2015 the petitioner made an agreement with his wife for divorce, which had no sanctity of law. In the year 2016 he got married with the prosecutrix as per marriage certificate (Annexure P-3). In the FIR the prosecutrix/complainant has alleged rape in the year 2017. In the petition itself the petitioner has admitted the act of sexual intercourse with the complainant/prosecutrix although with consent and there is nothing on the record to show that the petitioner and his wife got divorced in accordance with law by any decree of Court.

Therefore, from the above facts and circumstances of the case,

the arguments raised by learned counsel for the petitioner that since the sexual intercourse was by way of consent and thus no offence is made out, would not carry any weight. Section 375 Clause 4thly provides as an exception, which provides that even if the physical relationship and sexual intercourse is with consent of the prosecutrix but 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 then notwithstanding such consent it will be an offence under Section 375 IPC. The Hon'ble Supreme Court in **Bhupinder Singh vs. Union Territory of Chandigarh** (2008) 8 Supreme Court Cases 531 while discussing the aforesaid Clause fourthly of Section 375 IPC observed even though the complainant claim to have married the accused, which fact is established from several documents, that does not improve the situation so far as the appellant-accused is concerned and since he was already married, the subsequent marriage, if any has no sanctity in law and is void ab-initio. In any event the appellant-accused could not have lawfully married the complainant and a bare reading of Clause fourthly of Section 375 IPC made the position clear and therefore the appeal filed by the accused in that case was dismissed by the Hon'ble Supreme Court. Para 14, 15 and 16 of the aforesaid judgment are reproduced as under :-

“14. Learned counsel for the State submitted that it is a clear case where Clause “Fourthly” of Section 375 IPC is applicable. Learned counsel for the complainant submitted that this was a case where no reduction in sentence was uncalled for. The High Court proceeded on an erroneous impression that the complainant knew that

the accused was a married man. It was also submitted that the compensation as awarded, is on the lower side.

15. Clause “Fourthly” of Section 375 IPC reads as follows:

“375 Rape – A man is said to commit “rape”, who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

xxx xxx xxx

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.

xxx xxx xxx”

16. Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause “Fourthly” of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause “Fourthly” of Section 375 IPC makes this position clear.”

In the facts and circumstances of the present case, the earlier marriage was not dissolved as the panchayati divorce vide Annexure P-2 had no sanctity of law as there was no decree of divorce between the parties

and still the petitioner got married with the prosecutrix in the year 2016 during the subsistence of earlier marriage. Furthermore the petitioner himself admitted in the petition regarding sexual intercourse between him and the prosecutrix and therefore consent, if any, would be of no significance in view of provision of Section 376 IPC. Furthermore, the State has taken up categorical stand that in case the petitioner is released on bail then he may abscond from the proceedings and threaten the witnesses.

Therefore, considering the totality and circumstances of the present case, I do not deem it a fit case to interfere and grant bail to the petitioner. Consequently, the present bail application is dismissed.

However, anything observed hereinabove shall not be treated as an expression of opinion on merits of the case and is meant for the purpose of deciding the present petition only.

10/11/2020

Vijay Asija

**(JASGURPREET SINGH PURI)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No