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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 07.01.2020

Pronounced on: 13.02.2020

+ CRL.REV.P. 716/2017 & CrI.M.A. 15747/2017

CHANDAN SAWHNEY

..... Petitioner

Through Mrs.Rebecca M. John, Sr. Adv. with
Mr.B.Badrinath & Ms.Megha Bahl,
Adv.

versus

STATE

..... Respondent

Through Mr. Hirein Sharma, APP for State.
Mr.Maninder Singh, Adv. with
Ms.Aekta Vats, Mr.Vikram Kalra,
Mr.Sankalp Kolhi, Mr.Aahil Arora &
Mr.Dinhar Takiar, Adv. for R-2.
W/SI Mukesh Kumari PS Ambedkar
Nagar.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Present petition is preferred under section 397 read with section 401 Cr.P.C. against order on charge dated 14.02.2017 and order framing charge dated 22.02.2017 passed by learned ASJ, FTC, Patiala House Courts, New Delhi in SC 9416/2016 arising from FIR No.305/2016 registered at Police

Station Vasant Vihar for offences punishable under sections 376/377/420 IPC.

2. It is stated in present petition that above FIR came to be registered on a complaint dated 08.04.2014 for an incident which purportedly took place on 12.08.2013. Entire substance of accusation is based on the allegation that having entered into a settlement dated 13.02.2012 and promising to pay a sum of Rs.9 Crore towards permanent alimony, petitioner induced complainant to execute settlement deed dated 31.08.2012 and obtained divorce by making a payment of Rs.5 Crores (Rs.2.5 Crore in favour of their daughter and Rs.2.5 crore in favour of the complainant). It has been alleged that after obtaining divorce on 04.09.2012, the petitioner did not pay any money to complainant in terms of agreement dated 13.02.2012 thereby cheated the complainant. It has further been alleged that despite verbally demanding for an amount payable under agreement dated 13.02.2012, the petitioner refused to make any payment. In order to avoid payment to complainant, petitioner induced her with a false promise of marriage (re-marriage) stating that upon marriage, the question of payment of such amounts would not arise. By making false promise of marriage, petitioner indulged in a physical relation with complainant on 12.08.2013.

3. Ms. Rebeeca M. John, learned senior counsel appearing on behalf of the petitioner submits that Ld. Trial Court discharged the petitioner for the offence punishable u/s 420 IPC and proceeded to frame charge u/s 376 (2)(n) IPC. Background of the case is that on 21.11.1992, complainant and petitioner got married in New Delhi. The couple got two children from the wedlock, son (presently aged about 19 years) and daughter (presently aged about 15 years). In 2010, due to relationship of the complainant with one Sumit Walia, petitioner and complainant decided to withdraw their matrimonial company from each other after 18 years of marriage. On 06.02.2012, petitioner and complainant presented first motion application under section 13B of the Hindu Marriage Act for dissolution of their marriage. Therein, petitioner paid a sum of Rs.5 lacs out of Rs.1 crore towards permanent alimony and maintenance which was mutually agreed between the parties. From 15.02.2012 to 30.08.2012, petitioner and complainant held various meetings and prepared various agreements to decide the terms of settlement, including matters pertaining to custody and permanent maintenance. However, due to various differences, same could not be finalized. On 31.08.2012, petitioner and complainant executed Settlement Agreement enumerating various terms of settlement between the

parties. The said Settlement Agreement was made part and parcel of the second motion petition and acknowledged by complainant in her statement made before the court. The parties inter-alia agreed that complainant would receive a sum of Rs.2.5 Crores and their daughter would receive Rs.2.5 Crores towards maintenance. Consequently, on 04.09.2012, marriage between the parties was dissolved by a decree of divorce and all monies payable under the agreement dated 31.08.2012 were tendered and accepted by complainant.

4. Learned senior counsel further submitted that on 08.09.2012, petitioner preferred a complaint against above named Sumit Walia which was registered as FIR No.294/12 with PS Vasant Vihar, New Delhi, u/s 384/506/509 IPC and 66(1)/67 of the Information Technology Act 2000, on the allegations that Sumit Walia demanded Rs.40 lacs from complainant and threatened to circulate nude pictures and video of complainant to malign her image. Said case is presently under investigation and is pending before Cyber Cell of EOW, Delhi Police.

5. Also submitted that on 26.07.2013, complainant preferred a complaint against said Sumit Walia alleging rape and criminal misappropriation of Rs.4 Crores. Consequently, FIR no.280/13 was registered u/s 376/406/506

IPC with PS Vasant Vihar, New Delhi. On 27.07.2013, statement of the complainant was recorded under section 164 Cr.P.C. wherein she stated that Sumit Walia was the sole reason for divorce with petitioner. However, despite being in relation with Sumit Walia, complainant levelled allegation of rape for recovering Rs.4 crores from him.

6. Ms.Rebecca, learned senior counsel submits that in July 2013, since complainant had lost all her money to Sumit Walia, she requested petitioner to pay school fee of their daughter. Looking at the financial condition of complainant, petitioner paid school fee, which was in arrears. In September 2013, since complainant was facing financial difficulties, she requested petitioner to provide financial assistance. Accordingly, petitioner gave his credit card to the daughter for purchasing articles for daily use. However, complainant used that credit card to purchase expensive articles and spent about Rs.9 Lacs. On 15.11.2013, due to the spendthrift habits of complainant, petitioner blocked the credit card given to daughter. On getting such information, complainant and her daughter started sending SMSs to petitioner and demanded money. On 18.11.2013, petitioner preferred a complaint with PS Vasant Vihar, New Delhi against complainant with regard to various threats given by her. On 12.12.2013, 28.01.2014 &

29.01.2014, complainant filed a reply to the complaint dated 18.11.2013. In addition to reply, she also preferred two complaints on 28.01.2014 and 29.01.2014 seeking action against petitioner. However, all the complaints were closed after thorough enquiry, stating that the complaints pertain to matrimonial dispute and no cognizable offence was made out.

7. However, on 09.04.2014, complainant lodged FIR no.305/2014 u/s 376B/377/420 IPC with PS Vasant Vihar, New Delhi alleging cheating and rape. Therein, complainant states that allegations made by the petitioner in FIR 294/2012 were correct and she was pressurized by Sumit Walia to support him. She also stated that Sumit Walia misappropriated the alimony amount given to her by petitioner. On 22.05.2014, petitioner was granted pre-arrest bail by Ld. ASJ, Patiala House Courts. Thereafter, in December, 2014, complainant preferred civil suit bearing no.04/2014 before Ld. Family Courts, New Delhi seeking declaration of divorce decree dated 04.09.2012 as null and void. In February 2015, after concluding investigation, the Investigating Officer filed a final report against petitioner, under section 376/377/420 IPC. On 04.03.2015, the petitioner was summoned by the court of Ld.MM, Patiala House Court, New Delhi. On 07.04.2015, petitioner was admitted to bail by the said court. On 20.04.2015, upon service of summons

in Civil Suit no.04/2014, petitioner filed Cont. Cas. No.315/2015 before this Court seeking initiation of contempt proceedings against complainant for violation of the terms of settlement dated 31.08.2012 and the undertaking dated 01.09.2012. After hearing complainant on 09.10.2015, this Court was pleased to record the undertaking of complainant that she would withdraw Civil Suit no.04/2014 and consequently, disposed of the contempt petition. On 12.10.2015, in compliance with the order of this Court dated 09.10.2015, statement of complainant was recorded by Id. Family Court and on 04.11.2015, Civil Suit bearing no.04/2014 was dismissed as withdrawn. Thereafter, on 19.08.2016, petitioner preferred an application under section 91 Cr.P.C. seeking summoning of documents necessary for determination on the point of charge. In October 2016, Id. ASJ, FTC, Patiala House Courts, New Delhi permitted petitioner to place certified copies of the following documents:

- Record of this Court in Cont. Case (C) 315/2015.
- Record of CS 4/2014 of the Ld. Family Court, New Delhi.

8. Consequently, said documents were placed on record of Ld. Trial Court. On 14.02.2017, after hearing petitioner, the Prosecutor and complainant, Ld. ASJ, FTC, Patiala House Courts, New Delhi was pleased

to pass a detailed order on charge directing charge to be framed under section 367 IPC. However, Ld. ASJ observed that the prosecution has failed to make out any prima facie case against the accused for cheating. On 22.02.2017 framed charge against petitioner under section 376(2)(n) of IPC.

9. Learned senior counsel has informed this Court which is not disputed that on 10.04.2017, Ld. ASJ, FTC, Patiala House Courts, New Delhi was pleased to acquit Sumit Walia in FIR 280/2013 registered with PS Vasant Vihar, u/s 376/406/506 IPC.

10. Mrs.Rebecca M. John, learned senior counsel submitted that FIR itself reveals that complainant preferred a complaint only on 08.04.2014 for the alleged incident which took place on 12.08.2013 i.e. after a delay of about 8 months (240 Days). The said delay has not been explained anywhere. Even as per the complainant after 12.12.2013, she did not communicate with petitioner. The complainant herself states in her complaint that she had made representations to police on 12.12.2013 vide DD No. 79b, she again filed an application dated 28.01.2014 vide DD No. 47b and to DCP on 29.01.2014 vide DD No. 292 yet no complaint was made regarding the allegations of rape dated 12.08.2013 or non-payment of monies under agreement dated 13.02.2012 or the fact that petitioner had resumed relation with the

complainant on the pretext of marriage to avoid payment of Rs.9 Crores. Moreover, from September, 2012 till April, 2014, complainant was in contact with various police officials and lawyers in connection with various complaint preferred by her, yet no complaint was made regarding alleged incident dated 12.08.2013 or non-payment of monies under agreement dated 13.02.2012.

11. Further submitted that case of prosecution is not corroborated with sufficient evidence and the case is riddled with gaps. The prosecution has not placed any evidence on record to prove the presence of petitioner and complainant in hotel Oodles on the date of incident i.e. 12.08.2013. No eye-witness has been made to prove presence of petitioner in the hotel.

12. Moreover, CDR reveals that on 12.08.2013, there was a telephonic conversation between complainant and petitioner for 324 Seconds at 17:05:24. Had complainant and petitioner been together at the same place, there would not have been any telephonic conversation for almost 5 ½ minutes (324 seconds). In her supplementary statement dated 20.05.2014, complainant stated that on 12.08.2013, she reached hotel Oodles at 4 PM and remained there till 7:30 PM.

13. Learned counsel submits that the said statement is ex-facie unbelievable and is belied by the telephonic conversation between complainant and petitioner for 324 Seconds at 17:05:24. It is unbelievable that two persons sitting together at the same place would talk to each other over telephone for 5 ½ minutes. As per the record maintained by hotel only one person stayed in the room and no other person visited over there.

14. To strengthen her arguments, learned counsel for the petitioner has relied upon the case of ***Dilawar Babu Krane vs. State of Maharashtra: (2002) 2 SCC 135*** whereby the Hon'ble Supreme Court has held as under:

“12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section 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; 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; by and large 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 justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece

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 but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see Union of India v. Prafulla Kumar Samal).”

15. She also placed reliance upon the case of ***Shashidharan Kollery & Ors. vs. State & Anr.: 2019 SCC Online Del 8969*** whereby the Hon’ble Supreme Court has held as under:

“25. At the time of framing a charge, it is the duty of the Trial Court to assess the entire material collected by the prosecution during investigation and not to frame a charge merely because an allegation is made by the complainant. It is the duty of the Trial Court to assess whether there is material on record to raise grave suspicion of the accused having committed the said offence. The material both against or in favour of the accused has to be assessed by the Trial Court to come to a conclusion as to whether grave suspicion arises or not.

26. The Trial Court in the impugned order has proceeded solely on the basis of the statement recorded under Section 164 Cr.P.C. and completely ignored the contemporaneous e-mails which were available on record. Trial Court completely lost sight of the fact that the statement under Section 164 Cr.P.C. was recorded after one year of the complainant having been removed from office. The contemporaneous material in the form of e-mails written by the complainant from September till February 2013 as also the complaint lodged with the Delhi Commission for Women (DCW) on 13.02.2013 completely contradicted and belied the statement given under Section 164 Cr.P.C. It may be noticed that in the statement under Section 164 Cr.P.C. there are

substantive improvements in the version by the prosecutrix and she has even leveled allegations of physical sexual assault by petitioner Nos.1 and 2, with regard to which she was completely silent in her complaints and grievances raised for over a year.”

16. Learned senior counsel submits that complainant has improved her case in her supplementary statement dated 20.05.2014 and alleged further incidents of physical intercourse with petitioner, at various places. However, she has not disclosed said incidents either in her complaint dated 09.04.2014 or her statement recorded under section 164 Cr.P.C.

17. Further submitted that FIR came to be registered on a complaint dated 08.04.2014 for an incident which purportedly took place on 12.08.2013. The entire substance of accusation is based on the allegation that having entered into a settlement dated 13.02.2012 and promising to pay a sum of Rs. 9 crore towards permanent alimony, petitioner induced complainant to execute a settlement deed dated 31.08.2012 and obtained divorce by making a payment of Rs. 5 Crores. However, after obtaining divorce on 04.09.2012, petitioner did not pay any amount in terms of agreement dated 13.02.2012 thereby cheated the complainant. Further alleged that despite verbally demanding for the monies payable under agreement dated 13.02.2012, petitioner refused to make any payment. In order to avoid making any

payment, petitioner induced her with a false promise of marriage (re-marriage) stating that upon marriage, the question of payment of such amounts would not arise. Thus, by making false promise of marriage, the petitioner indulged in a physical relation with complainant on 12.08.2013.

18. On the other hand, Mr. Maninder Singh, learned counsel appearing on behalf of the complainant/prosecutrix has relied upon the case of ***State of Orissa vs. Debendra Nath Padhi: 2005 (1) SCC 568***, wherein the Constitutional Bench of Hon'ble Supreme Court made following observations and held:

"5. ... It was contended that on true construction of Section 227 of the Code only the material sent by prosecution along with the record of the case and the documents sent along with it can be considered by the trial court at the time of framing of the charge. The accused at that stage has no right to place before the court any material.

6. At the stage of framing charge, the trial court is required to consider whether there are sufficient grounds to proceed against the accused. Section 227 of the Code provides for the eventuality when the accused shall be discharged. If not discharged, the charge against the accused is required to be framed under Section 228.

These two sections read as under:

"Section 227 of Cr.PC. Discharge- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the

accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for the proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Section 228 of Cr.P.C.

Framing of charge(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall, try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused. Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence or claims to be tried."

7. Similarly, in respect of warrant cases triable by Magistrates, instituted on a police report. Sections 239 and 240 of the Code are the relevant statutory provisions. Section 239 requires the Magistrate to consider 'the police report and the documents sent with it under Section 173' and, if necessary, examine the accused and after giving accused an. opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, the accused is liable to be discharged by recording reasons thereof.

8. What is to the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the

word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by 'it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209.

That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.

9. Further, the scheme of the Code when examined in the light of the provisions of the old code of 1898, makes the position more clear. In the old code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207 (A) was fairly lengthy. Section 207, inter alia, provided that the Magistrate, where the case is exclusively triable by a Court of Session in any proceedings instituted on a police report, shall follow the procedure specified in Section 207 (A). Under Section

207 (A) in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under sub-section (1), to take evidence as provided in sub-section (4), the accused could cross-examine and the prosecution could re-examine the witnesses as provided in sub-section (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in sub-section (6) and to commit the accused for trial after framing of charge as provided in sub-section (7), summon the witnesses of the accused to appear before the court to which he has been committed as provided in sub-section (11), and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session as provided in sub-section (14). The aforesaid Sections 207 and 207(A) have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained in its 41st Report. It was realised that the commitment inquiry under the old Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of committal Magistrate framing the charge, it is now to be framed by Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge.

11. In *State of Bihar v. Ramesh Singh* [(1977) 4 SCC 39] considering the scope of Sections 227 and 228 of the Code, it was held that at the stage of framing of charge, it is not obligatory for the Judge to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At that stage, the court is not to see whether there is sufficient ground for conviction of the

accused or whether the trial is sure to end in his conviction, Strong suspicion, at the initial stage of framing of charge, is sufficient to frame the charge and in that event it is not open to say that there is no sufficient ground for proceedings against the accused.

12. In Superintendent and Remembrancer of legal Affairs, West Bengal v. Anil Kumar Bhunja and Others [(1980) 1 SCR 323] a three-judge Bench held that the Magistrate at the stage of framing charges had to see whether the facts alleged and sought to be proved by the prosecution prima facie disclose the commission of offence on general consideration of the materials placed before him by the investigating police officer (emphasis supplied). Though in this case the specific question whether an accused at the stage of framing of charge has a right to produce any material was not considered as such, but that seems implicit when it was held that the Magistrate had to consider material placed before it by the investigating police officer.

13. In State of Delhi v. Gyan Devi and Others [(2000) 8 SCC 239] this Court reiterated that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the court to consider the sufficiency of the materials to establish the offence alleged against the accused persons.

16. All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter

aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition. This aspect, however, has been adverted to in State Anti-Corruption Bureau, Hyderabad and Another v. P. Suryaprakasam [1999 SCO (Crl.) 373] where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it.

The only right the accused has at that stage is of being heard and nothing beyond that (emphasis supplied). The judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by this Court. It may be noticed here that learned counsel for the parties addressed the arguments on the basic that the principles applicable would be same - whether the case be under Sections 227 and 228 or under Sections 239 and 240 of the Code.

17. As opposed to the aforesaid legal position, the learned counsel appearing for the accused contended that the procedure which deprives the accused to seek discharge at the initial stage by filing unimpeachable and unassailable material of sterling quality would be illegal and violative of Article 21 of the Constitution since that would result in the accused having to face the trial for long number of years despite the fact that he is liable to be discharged if granted an opportunity to produce the material and on perusal thereof by the court. The contention is that such an interpretation of Sections 227 and 239 of the Code would run the risk of those provisions being declared ultra vires of Articles 14 and 21 of the Constitution and to save the said provisions from being declared ultra vires, the reasonable

interpretation to be placed thereupon is the one which gives a right, howsoever, limited that right may be, to the accused to produce unimpeachable and unassailable material to show his innocence at the stage of framing charge.

18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207 (A) omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby

changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

19. He further submitted that the Hon'ble Supreme Court has upheld these observations in recent Judgement dated 07.01.2020, in the case of, "***M.E Shivalingamurthy vs. Central Bureau of Investigation, Bengaluru***", Criminal Appeal No. 957/2017 whereby held that there is a difference between "*suspicion*" and "*grave suspicion*" and the accused is only entitled to discharge when there is no grave suspicion. However, this is not true in the present case. A bare perusal of the Charge-Sheet along with the list of Documents placed on record by the Prosecution, it is evident that grave suspicion arises against the Petitioner to show that he had repeatedly raped Respondent No. 2 on the false promise of marriage. Even though the Petitioner could have explained/interpreted the documents that the Prosecution had placed on record in the Charge-Sheet, he chose not to and on the contrary, placed on record documents of his own, which is impermissible at the stage of Charge. Instead of explaining the documents with the Charge-Sheet, the Petitioner himself raised disputed question of fact which have to be decided during Trial and cannot be adjudicated at this stage of charge. Undoubtedly, the Complaint, Photographs, content of Text Messages exchanged between the Petitioner and prosecutrix, Complaints

filed by complainant against the investigating agency for not performing their duty, the presence of the Petitioner vide the Hotel Entry Register, etc, clearly prima facie raise a grave and strong suspicion against Petitioner for having committed the offence u/s 376(2)(n) of IPC.

20. Learned counsel submits that Petitioner has acted dishonestly and fraudulently and has induced and allured prosecutrix to sign the divorce documents with the intention of cheating her to the tune of Rs. 9 Crores causing wrongful loss to the prosecutrix. After obtaining the Divorce Decree, when prosecutrix asked the Petitioner to fulfil his commitments towards her by paying Rs. 9 Crores as 'per the agreement dated 13.02.2012, Petitioner coaxed her into believing him that he wanted to re-marry her and on that pretext, repeatedly raped her on various occasions. Thus, the consent of prosecutrix was thus obtained by the Petitioner fraudulently and under the misconception of fact that he would in fact marry her. The messages placed on record in the Charge-Sheet evidently show as to how the Petitioner had been coaxing prosecutrix to believe that he had the intentions to marry her.

21. To strengthen his arguments, learned counsel has relied upon the case of *State of U.P vs. Naushad: (2013) 16 SCC 651*, the Hon'ble Apex Court made the following observations: -

“15. We have heard the rival legal contentions and perused the evidence on record. The following issues arise for our consideration:

15.1 (i) Whether the High Court has rightly reversed the conviction and sentence of the accused for the offence of rape punishable under Section 376 of the IPC?

15.2 (ii) Whether the trial court was correct in convicting the accused for the offence of rape punishable under Section 376 of the IPC by holding that the victim did not give her free consent to the act of sexual intercourse but it was consent given under misconception of fact?

15.3 (iii) Whether the trial court was right in holding that the crime was of a very grave nature and was thus justified in sentencing the accused to the maximum punishment of, life imprisonment as provided for under Section 376 of the IPC?

16. We will answer point nos. 1 and 2 together as they are related to each other.

17. Section 376 of IPC prescribes the punishment for the offence of rape. Section 375 of the IPC defines the offence of rape, and enumerates six descriptions of the offence. The description secondly speaks of rape without her consent. Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix against her consent. The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of bad character.

18. How is consent defined? Section 90 of the I^APC defines consent known to be given under fear or misconception which reads as under :

"90. Consent known to be given under fear or misconception A consent is not such consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception "

22. Learned counsel submits that if consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the present case, the petitioner had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and broken her consent only for the reason of having consensual relations with her, which act of petitioner false squarely under the definition of rape as he had sexual intercourse with her consent which was obtained under a misconception of fact as defined under section 90 of the IPC. Thus, the alleged consent said to have obtained by petitioner was not voluntarily consent and this court is of the view that the petitioner indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions.

23. Mr.Maninder further submits that it is apparent from the evidence that petitioner only wanted to indulge in sexual intercourse with her and was under no intention of actually marry the prosecutrix.

24. Learned counsel has relied upon the case of ***Yedla Srinivas Rao vs. State of A.P.*** with reference to similar facts, the court in para 10 held as under:

"10. It appears that the intention of the accused as per the testimony of PW1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent."

Further, in para 17 of the said judgment, this Court held that:-

"In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law.

Thus, this Court held that the accused in that case was guilty of the offence of rape as. he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact."

25. Further submits that all the grounds relied upon by the petitioner are clearly disputed questions of fact. The genuineness of the same can only be tested at the stage of trial and not at the stage of charge. Regarding the

consensual or under misconception of fact, this Court in ***Ashok Chawla vs. State (NCT of Delhi): 2015 SCC OnLine Del 8973***, has refused to discharge petitioner therein since disputed questions of facts will have to stand the test of trial. It is held in Para 6 of the Judgment that: -

"6. ... It is settled law that at the time of framing of charge, the Trial Court is required to examine the evidence brought before it only for the limited purpose of deciding as to whether a prima facie case has been made out against the accused or not. Based on said evidence, if the Judge is satisfied that a sufficient case is made out then he ought to proceed to direct the framing of charges and conduct the trial based thereon. However, at that stage, the Judge is not required to shift the entire evidence and discuss the relative merits and demerits of the case to arrive at conclusive decision. The only requirement is that if the Judge is satisfied that the evidence produced before him gives rise to suspicion, enough-for him to discharge the accused, then he ought to be discharged but if that is not the case and the material on record is sufficient to make a conviction reasonably possible, then the Court should proceed to frame the charges. The learned Trial Court was right in observing that the factum of intercourse being consensual is required to be ascertained during the course of trial. In her complaint as well as her statement under Section 164 Cr.P.C the complainant has alleged that she was raped by the accused after she fell unconscious as she was offered some coffee after which she lost her consciousness. The main thrust of learned counsel for the petitioner is on CCTV footage however complainant has to be confronted with CCTV footage during the course of her examination and her identity is required to be ascertained. The observations made while granting bail to the accused cannot be made a ground for discharge of

the accused. In Prashant Bharti's case the complainant herself had filed a limit petition before High Court seeking quashing of the FIR lodged by her. Further, presence of the complainant as well as of the accused at the alleged place of occurrence on the fateful day at the relevant time was negated by the call details of the parties. The allegations made by the complainant could not be verified by the police from any direct or scientific evidence. The material relied upon by the accused was not refuted by the complainant rather she herself approached the High Court for quashing of the FIR. Even the Investigating Officer had acknowledged in the chargesheet that he could not find any proof to substantiate the charges and that the chargesheet was filed only on the basis of the statement of the prosecutrix under Section 164 Cr.P.C. Taking note of all these circumstances appearing in the case, the order of framing charge was quashed. However, things are different in the instant case. Truthfulness or falsity of the allegations cannot be prejudice at this initial stage. Complainant has to be afforded an opportunity regarding the CCTV footage. The complaints and counter complaints made by parties against each other will also required to be considered at the appropriate stage. In view of the aforesaid facts and circumstances and upon perusing the impugned order, this Court is of the opinion that no such illegality, arbitrariness or perversity has been pointed out in the conclusion arrived at by learned Additional Sessions Judge while framing the charges against the petitioner for this Court to interfere therein. As a result, the present petition is dismissed."

26. Further submitted that in the present case, the documentary /scientific/ forensic evidence like the medical of prosecutrix, Call Detail Records, Hotel Entry Register, Whatsapp Messages and Photographs have to be proved at

the stage of trial, therefore, the Petitioner cannot be discharged when “*there are disputed questions of facts*”.

27. Similarly, recently, on 08.03.2019, this Court, in the case of ***Gurpreet Singh Rakhi vs. State (NCT of Delhi) & Anr.: 2019 SCC OnLine Del 7830***, refused to discharge the Petitioner therein. The relevant Paras are reproduced as follows: -

“10. In view of the submissions made before the trial court at the time of consideration of charge, as noted in the order dated 23.05.2018 and the contentions raised before this Court in these proceedings, it not being disputed that the petitioner and the prosecutrix had had sexual intimacy, the core issue which would require adjudication is as to whether such sexual relationship was consensual as is the defence plea or under duress which is the case alleged by the prosecution.

11. It does appear that the petitioner seeks to place reliance on certain material including social media chat in support of his claim of consent for sexual relationship. But then, that is a matter of defence, the material or documents requiring to be authenticated or proved in accordance with law. The statement of the prosecutrix alleging criminal intimidation of various kinds at different points of time cannot be disbelieved at this stage. When the case is for consideration of charge, it is not proper to ask for a scrutiny of the evidence in the manner it would require to be done at the stage of final analysis.

12. It does appear that in the first head of charge on the allegations concerning the offence under Section 316

IPC, no' specific dates have been indicated. But it has to be remembered that the version of the prosecutrix is that she had been raped multiple times over the period which, given the plea of the petitioner himself, might run into more than two years, may be for almost five years. If the prosecutrix has not remembered the specific dates on which she was raped, the charge cannot mention the specific dates. It will be for the petitioner to bring out necessary facts, if possible, during the cross-examination.

There is, thus, no error or defect or deficiency in the charge which has been framed for the said offence on 23.05.2016.

14. For the foregoing reasons, this court finds no ground to order discharge. The prayer for quashing of the criminal case is, thus, declined."

28. Learned counsel submits that the Call Detail Record and the Hotel Entry Register clearly show, prima facie, Petitioner had called prosecutrix around 5 pm and they spoke for around 5 minutes, whereafter, he managed to convince her to meet him at the Cafe in Hotel Oodles. At the cafe, photographs were taken on the phone of the prosecutrix, the same show that it was taken on 12.08.2013 at 5.30pm. The Petitioner then proceeded to book a room in the Hotel at 5.45pm. All the said documents form part of the Charge-Sheet. The prosecutrix had her reservation about submitting her phone with the Investigating Agency due to the biased nature of the investigation, she therefore, moved an application to send the same on 13.10.2016 and thereafter, during her, examination-in-chief. Therefore, the

petitioner's argument that the photograph does not bears any time and date, is incorrect. The presence on the date of incident .i.e. 12.08.2013, is not disputed and also, establishes prima facie, that he did in fact rape her at Hotel Oodles on 12.08.2013 by obtaining consent under misconception of fact.

29. He submits that there is no delay in lodging the Complaint against the Petitioner. The Petitioner had repeatedly raped her to avoid the fulfilment of paying her an additional Rs. 9 Crore which he was contractually bound to pay but to avoid the same, had been coaxing her to believe that he would in fact marry her, over the next few months. The WhatsApp messages placed on record in the Charge-Sheet, evidently show the same.

30. Even otherwise, in the case of ***Bhupinder Kumar vs. State: 2015 SCC OnLine Del 9457***, this Court has observed that delay in lodging of the FIR by a Prosecutrix is not fatal to the Prosecution case. Relevant paras are reproduced as under:

"12. One of the major contention of learned counsel for the appellant is that there is delay of 16 days in lodging the FIR therefore, the delay in lodging the FIR is fatal. The submission is devoid of any merit inasmuch case in Karnel Singh v. State of M.P, (1995) 5 SCC 518, it was held by Apex Court that merely because the complaint

was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. In Gurmit Singh (supra), it was observed that that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

13. In the case of Tulshidas Kanolkarv. The State of Goa: (2003) 8 SCC 590, the Hon'ble Supreme Court has observed as under:

"... ... The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstances for the accused when accusation of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so the mere delay in lodging of first

information report does not in any way render prosecution version brittle.”

31. Regarding the issue of extortion of money from the petitioner is concerned, learned counsel for the prosecutrix submitted that story of the petitioner is highly concocted and even otherwise the same, only for the sake of argument, if presumed to be true, can only be tested during Trial .i.e. by examining Respondent No. 2. During examination-in-chief of the prosecutrix, she not only submitted her phone, but also placed on record her Certificate u/s 65-B of the Indian Evidence Act, 1872. Therefore, the argument of the Petitioner is unsustainable.

32. While concluding his argument, counsel for the prosecutrix submits that acquittal of one Sumit Walia with whom prosecutrix was in a relationship after her divorce with Petitioner, by trying to portray her as a habitual complainant or of bad character. Firstly, prosecutrix reserves her right to challenge his acquittal and has not done the same due to her obligations towards educating her daughter and also due to financial limitations. Moreover, the acquittal of Sumit Walia has no effect on the present case. This benefit cannot be given to Petitioner at the stage of Charge and if the same is remotely beneficial to Petitioner, same can only be demonstrated at the stage of evidence.

33. Lastly, learned counsel for the prosecutrix submits that raising fingers at the character of the victim has been deprecated and been made impermissible in Law. Section 146 of the Indian Evidence Act, 1872 is relevant which reads as under:

“146. Questions lawful in cross-examination.—When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture:

Provided that in a prosecution for an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.”

34. In view of above, it is argued that the intention of legislature is absolutely clear that even during trial such question regarding immoral character or previous sexual experience are not permissible. Therefore, at the stage of charge such arguments are completely bizarre, illegal and untenable in the eyes of law. Thus, present petition deserves to be dismissed.

35. I have heard learned counsel for the parties at length and perused the material available on record.

36. It is not in dispute that complainant and petitioner got married on 21.11.1992 and divorced on 04.09.2012. The complainant is an educated lady (Graduate in English (Hons.) hailing from an affluent family. She has travelled across the world and is well known in social circles of Delhi. She operates her own business. She is capable of understanding the consequences of her acts. Moreover, complainant voluntarily entered into agreement 31.08.2012 and obtained divorce on the basis of said agreement. Statement of the complainant, on oath, was also recorded by Ld. Family Court to the effect that she shall abide by the terms and conditions of agreement dated 31.08.2012. Having novated agreement dated 13.02.2012 with the agreement dated 31.08.2012, agreement dated 13.02.2012 was rendered unenforceable. However, complainant has not initiated any civil

suit to seek declaration regarding subsistence of agreement dated 13.02.2012 or enforcement of her right to money under said agreement.

37. Section 62 of the Contract Act reads as under:

“62. Effect of novation, rescission, and alteration of contract.— If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. —If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

38. It is not in dispute that prosecution has not placed any material on record to show any communication between complainant and petitioner between 13.02.2012 and 31.08.2012 i.e. after petitioner purportedly agreed to pay Rs. 9 crores to complainant, till execution of the second agreement dated 31.08.2012 seeking additional payment of Rs.9 crores as per agreement dated 13.02.2012. Furthermore, even after the divorce on 04.09.2012, prosecution has not placed any documents/communication on record to show that complainant ever demanded payment of money due to her under agreement dated 13.02.2012.

39. It is also not in dispute that complainant has not placed any material on record to show that petitioner had agreed to purchase a house for her in

addition to giving alimony for an amount of ₹5 crore. Moreover, prosecution has not cited any witness to prove the said fact. To the contrary, in Clause 2 of agreement dated 31.08.2012, complainant has agreed to purchase a residential house for herself out of Rs.2.45 crores paid by petitioner as alimony.

40. It seems that after consciously agreeing to all the conditions of agreement dated 31.08.2012, complainant has falsely alleged fraud only to extort money from petitioner. However, no evidence has been placed on record to show any demand being made by complainant to petitioner with regard to payment of Rs.9 crores.

41. It is apparent from the material on record that communication between complainant and petitioner were initiated by the complainant only in June, 2013 (i.e. after about 10 months of divorce), when complainant lodged an FIR against one Sumit Walia (FIR 280/2013 PS Vasant Vihar u/s 376/406/506 IPC) after having lost all her money to him. It is admitted case of complainant that she herself contacted petitioner to seek financial assistance because of having lost all her money to Sumit Walia.

42. It is apparent to mention here that complainant was initially defending

Sumit Walia in FIR 294/12 with PS Vasant Vihar, New Delhi, u/s 384/506/509 IPC and was in touch with various police officials and lawyers. However, no complaint or demand was made vis-a-vis money purportedly payable under agreement dated 13.02.2012. The said agreement appears to have been attested only in December 2012 and not in March 2012. Upon perusal of the document, alteration of the date of attestation is evident.

43. It is also pertinent to mention here that decree of divorce dated 04.09.2012 has not been set aside and has attained finality. Complainant preferred a civil suit bearing no. 04/2014 before Ld. Family Courts, New Delhi seeking declaration of decree dated 04.09.2012 as null and void. Upon service of summons in the said suit, petitioner filed Cont. Cas. No. 315/2015 before this court seeking initiation of contempt proceedings against complainant for violation of the terms of settlement dated 31.08.2012 and undertaking dated 01.09.2012. This Court was pleased to record the undertaking of complainant that she would withdraw said civil suit and disposed of the abovementioned petition. On 12.10.2015, statement of complainant was recorded by the Ld. Court and on 04.11.2015, the said suit was dismissed as withdrawn. Hence the terms of settlement dated 31.08.2012 is binding on both parties.

44. Undisputed facts are that on 26.07.2013, complainant preferred a complaint against one Sumit Walia and same was culminated into FIR 280/2013 at PS Vasant Vihar u/s 376/406/506 IPC. In said FIR, complainant had alleged that Sumit Walia had engaged in sexual intercourse with her after giving false promise of marriage. In the present case also, complainant states that on 12.08.2013, i.e. after about 3 weeks of preferring a complaint against Sumit Walia, she was assured by petitioner that he would remarry her, on the basis of which, she agreed to have sexual relation with him. Thus, conduct of complainant is unnatural in as much as she being an educated lady and having known to petitioner for about 20 years. It is unbelievable that such an educated person who having been a victim of crime, gets falsely induced by none other than her ex-husband of 20 years, that too on false assurance of re-marriage.

45. It is settled law that due weightage to the age, educational qualifications, family and societal background of the victim to ascertain whether her consent could have been obtained by fraud in such like cases. The law on consent based on '*misconception of fact*' has been succinctly laid down in various judgments of the Hon'ble Supreme Court.

46. In the case of ***Vinod Kumar vs. State of Kerala: (2014) 5 SCC 678***

the Hon'ble Supreme Court observed that *“the prosecutrix therein was a graduate and even otherwise was not a gullible women of feeble intellect as is evident from her conduct in completing her examination successfully even on the eventful day. In fact she had displayed mental maturity of an advanced and unusual scale. She was aware that a legal marriage could not be performed and, therefore, was content for the time being that an agreement for marriage be executed.*

47. In the above case, further observed that the Court is duty bound when assessing presence or absence of consent, to satisfy itself that both parties are *ad idem* on essential features; in that case prosecutrix was lead to believe that her marriage to appellant therein had been duly and legally performed. The Hon'ble Supreme Court opined that it is not sufficient that she convinced herself of existence of this factual matrix, without appellant inducing or persuading her to arrive at that conclusion. It is not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who presented a false scenario which had the consequence of inducing the other party into commission of an act. There may be cases where one party may, owing to his or her own hallucinations, believe in existence of a scenario which is a mirage and in creation of which

other party has made no contribution. If other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable.

48. In case of ***Dilip Kumar vs. State of Bihar: (2005) 1 SCC 88*** thereby the Hon'ble Supreme Court has observed that *the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the conclusion to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.*

49. In the case of ***Ram Das vs. State of Maharashtra: (2007) 2 SCC 170***, the Hon'ble Supreme Court observed in para 23 that *the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity.*

50. Whereas, *Vijayan vs. State of Kerala: (2008) 14 SCC 763* was a case where the complaint was made by the prosecutrix after the alleged commission of rape on her by the accused. At the time of making the case, the prosecutrix was pregnant for about seven months. The Hon'ble Supreme Court did not place reliance on the sole testimony of the prosecutrix. The Court noticed the flaw that no DNA test was conducted to find out whether the child was born out of the said incident and the accused was responsible for the said child.

51. In the case of *K. P. Thimmappa Gowda vs. State of Karnataka: (2011) 14 SCC 475*, the accused therein had assured prosecutrix that he would marry her and had sexual affair, which was repeated on several occasions as well. But he did not marry and she became pregnant. That was a case where there was delay of eight months in filing the complaint. The accused was given the benefit of doubt holding that it would not be possible to conclude that alleged sexual act was committed without consent of the prosecutrix.

52. In case of *Deepak Gulati vs. State of Haryana: (2013) 7 SCC 675*, undisputed facts of the case were that the prosecutrix was 19 years of age at the time of incident. She had inclination towards appellant and appellant had

been giving her assurance that he would get married to her. The prosecutrix, therefore, left her home at Karnal in the State of Haryana voluntarily, of her own free will to get married to appellant. She had called 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 that stage and made no complaints to anyone. Thereafter, she also went to Kurukshetra with the appellant where she lived with his relatives. Here to, prosecutrix voluntarily became intimate with 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 Birla Mandir. Thereafter, she even proceeded with appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that two of them could get married in court at Ambala. However, at the bus stand, appellant was arrested by police and he was convicted under section 365/376 IPC. Consequently, he was before the Hon'ble Supreme Court in a special leave petition and in para 15 of the said judgment, it was observed as under:

“.....the facts of the instant case do not warrant that the provisions of Section 114-A of the Evidence Act 1872 be

pressed into service. Hence, the sole question involved herein is whether prosecutrix's consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Evidence Act, 1872. Section 90 of the Evidence Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape."

53. However, it was observed by the court in above cited case that consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. An accused can be convicted for rape only if the court reaches to a conclusion that the intention

of the accused was mala fide, and that he had clandestine motives. There is a distinction between the breach of a promise, and not fulfilling a false promise. 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 be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. 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.

54. In above discussed case, 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. The physical relationship between parties had clearly developed with the consent of prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living

with the appellant for several days, and had travelled with him from one place to another. She was conscious of the complications and issues surrounding her marriage to the appellant. It was difficult to impute to the accused, knowledge of fact that prosecutrix had consented as a consequence of a misconception of fact that had arisen from his promise to marry her. There was no evidence to prove conclusively that appellant had never intended to marry the prosecutrix. Even after leaving the hostel of Kurukshetra University, she agreed and proceeded to go with appellant to Ambala, to get married to him there. If this fact stands fully established from the evidence on record, it is not clear as to on what basis the allegation of “*false promise of marriage*” has been raised by the prosecutrix. It is not possible to comprehend the circumstances in which a charge of deceit/rape can be levelled against the appellant, in the light of afore-mentioned fact situation. Accordingly, the Hon’ble Supreme Court granted benefit of doubt to the accused.

55. In the case of ***Pradeep Kumar @ Pradeep Kumar Verma vs. State of Bihar & Anr.: (2007) 7 SCC 413***, wherein prosecutrix lodged First Information Report alleging that with an assurance that the accused-appellant therein would marry her, he had sexual relationship with her.

When this went on for some time, the informant had been taken to a temple where in the presence of deity he accepted her to be his wife and there was an agreement of marriage entered into. Alleging that the accused was likely to get married with some other lady, an FIR was lodged. Investigation was undertaken and statement of the informant was recorded under Section 164 of the Cr.P.C. wherein it was accepted that first, with a promise of marriage, the accused had physical relationship with the informant and then, had married her. Since the accused disowned having ever married the informant and much less having ever had any physical relationship with her, she was forced to file the FIR. After investigation, charge sheet was filed wherein it was indicated that an offence punishable under Sections 376 and 406 of IPC was made out. An application was filed by the accused before the Trial Court for discharge in terms of Section 227 of Cr.P.C. By order dated 21.07.2005, the same was rejected. It was inter alia noted as follows:

“As a matter of fact the poor victim Binita Kumari was put under misconception of fact as promise to marry her by the accused and in this light the accused has done sexual intercourse with her. The accused had done such act with other girls also and further the accused has made a Akrarnama for marriage with the victim. The love letters and Akrarnama photocopy are also with the case diary and the same are on the record. From the case diary it is also clear that the accused has taken consent of the victim girl on a false promise of marriage and further

a Akarnama is also made here. Hence the consent is not with free will or voluntary act. Hence there are sufficient grounds for framing charge against the accused person ”

56. Accordingly, charges were framed for offences punishable under sections 376/406 IPC. The order was challenged before the High Court which rejected the application in summary manner holding as follows:

“The learned Judge finding sufficient material showing petitioner’s complicity in the crime rejected his prayer for discharge. I do not find any error in the same. Application stands dismissed.”

57. However, in the case of **Pradeep Kumar (supra)**, the Hon’ble Supreme Court has held as under:

8. As rightly submitted by learned counsel for the State, Sections 376 and 406 prima facie do not appear to have any application. It would have been appropriate for the High Court to deal with various submissions and consider their acceptability. That apparently has not been done. This is not a case where the application should have been dismissed in a summary manner.

9. The crucial expression in Section 375 defines “rape” as “against her will”. It seems to connote that the offending act was done despite resistance and opposition of the woman.

10. “17. The Penal Code does not define ‘consent’ in positive terms, but what cannot be regarded as ‘consent’ ... is explained by Section 90 which reads as follows:

'90. Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;'

18. Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is [explained in] first part of Section 90. [There are two grounds specified in Section 90 which] are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.

19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender,

is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”

As observed by this Court in Deelip Singh v. State of Bihar [(2005) 1 SCC 88] , SCC p. 99, paras 17-19. Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC. The normal connotation and concept of consent is not intended to be excluded.

11. “21. In most of the decisions in which the meaning of the expression ‘consent’ under the Penal Code was discussed, reference was made to the passages occurring in Stroud's Judicial Dictionary, Jowitt's Dictionary on English Law, Words and Phrases, Permanent Edn. and other legal dictionaries. Stroud defines consent as ‘an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side’. Jowitt, while employing the same language added the following:

‘Consent supposes three things—a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.’

22. In Words and Phrases, Permanent Edn., Vol. 8-A, the following passages culled out from certain old decisions of the American courts are found:

‘... adult female's understanding of nature and consequences of sexual act must be

intelligent understanding to constitute “consent”.

Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent....’

23. It was observed ... in Uday v. State of Karnataka [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] : (SCC p. 53, para 12)

‘12. The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent.’

24. There is a good analysis of the expression ‘consent’ in the context of Section 375 IPC by Tekchand, J. in Rao Harnarain Singh Sheoji Singh v. State [AIR 1958 Punj 123 : 1958 Cri LJ 563] . The learned Judge had evidently drawn inspiration from the above passages in the law dictionaries. The observation of the learned Judge (at AIR p. 126, para 7) that ‘there is a difference between consent and submission [and] every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent’, is quite apposite. The said proposition is virtually a repetition of what was said by Coleridge, J. in R. v. Day [(1841) 9 C&P 722 : 173 ER 1026] in 1841 as quoted in Words and Phrases (Permanent Edn.) at p. 205. The following remarks in Harnarain case [AIR 1958 Punj 123 : 1958 Cri LJ 563] are also pertinent: (AIR p. 126, para 7)

Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent.

25. *The passages occurring in the above decision were either verbatim quoted with approval or in condensed form in the subsequent decisions: vide Anthony, In re [AIR 1960 Mad 308 : 1960 Cri LJ 927] , Gopi Shanker v. State of Rajasthan [AIR 1967 Raj 159 : 1967 Cri LJ 922] , Bhimrao Harnooji Wanjari v. State of Maharashtra [1975 Mah LJ 660] and Vijayan Pillai v. State of Kerala [(1989) 2 Ker LJ 234] . All these decisions have been considered in ... Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] . The enunciation of law on the meaning and content of the expression 'consent' in the context of penal law as elucidated by Tekchand, J. in Harnarain case [AIR 1958 Punj 123 : 1958 Cri LJ 563] (which in turn was based on the above extracts from law dictionaries) has found its echo in the three-Judge Bench decision of this Court in State of H.P. v. Mango Ram [(2000) 7 SCC 224 : 2000 SCC (Cri) 1331] . It was observed as follows: (SCC pp. 230-31, para 13)*

'Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance

and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.'

On the facts, it was held that there was resistance by the prosecutrix and there was no voluntary participation in the sexual act. That case would therefore fall more appropriately within clause First of Section 375.

26. [It would be appropriate to deal] with the specific phraseology of Section 90 IPC. We have an illuminating decision of the Madras High Court rendered in 1913 in N. Jaladu, Re [ILR (1913) 36 Mad 453 : 15 Cri LJ 24] in which a Division Bench of that Court considered the scope and amplitude of the expression 'misconception of fact' occurring in Section 90 in the context of the offence of kidnapping under Section 361 IPC. The second accused in that case obtained the consent of the girl's guardian by falsely representing that the object of taking her was for participating in a festival. However, after the festival was over, the second accused took her to a temple in another village and married her to the first accused against her will. The question arose whether the guardian gave consent under a misconception of fact. While holding that there was no consent, Sundara Ayyar, J. speaking for the Bench observed thus: (ILR pp. 456-57)

'We are of opinion that the expression "under a misconception of fact" is broad

enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in R. v. Hopkins [1842 Car & M 254] that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, Vol. 9, p. 623. In Stephen's Digest of the Criminal Law of England (6th Edn., p. 217) the learned author says with reference to the law relating to "abduction of girls under sixteen" "thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person". ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.'

This decision is an authority for the proposition that a misrepresentation as regards the intention of the person seeking consent i.e. the accused, could give rise to the misconception of fact. This view of the Madras High Court was accepted by a

Division Bench of the Bombay High Court in Parshottam Mahadev v. State [AIR 1963 Bom 74 : (1963) 1 Cri LJ 573] . Applying that principle to a case arising under Section 375, consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact.

27. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, [was dealt with by a] Division Bench of the Calcutta High Court in Jayanti Rani Panda v. State of W.B. [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7: (Cri LJ pp. 1537-38)

'Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is ... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when

the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged.'

The discussion that follows the above passage is important and is extracted hereunder: (Cri LJ p. 1538, para 7)

'The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the court can be assured that from the very inception the accused never really intended to marry her.'
(emphasis in original)

The learned Judges referred to the decision of the Chancery Court in Edgington v. Fitzmaurice [(1885) 29 Ch D 459 : 53 LT 369 (CA)] and observed thus: (Jayanti Rani Panda case [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] , Cri LJ p. 1538, para 8)

‘This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: “There must be a misstatement of an existing fact.” Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Section 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact.’

After referring to the case law on the subject, it was observed in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] : (SCC pp. 56-57, para 21)

‘21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that

there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.'

28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375

clause Secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in Jayanti Rani Panda case [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] which was approvingly referred to in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] . The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1538, para 7)—‘unless the court can be assured that from the very inception the accused never really intended to marry her’. (emphasis in original) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case [ILR (1913) 36 Mad 453 : 15 Cri LJ 24] (vide passage quoted supra). By making the solitary observation that ‘a false promise is not a fact within the meaning of the Code’, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775] as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact.

That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out.”

58. It is pertinent to mention here some important facts which are inter alia that on 08.09.2012, petitioner preferred a complaint against above-named Sumit Walia which was registered as FIR No.294/12 with PS Vasant Vihar, New Delhi, for the offences punishable u/s 384/506/509 IPC and 66(1)/67 of Information Technology Act, 2000. On the allegations that Sumit Walia demanded Rs.40 lacs from complainant and threatened to circulate nude pictures and video of complainant to malign her image. Said case is presently under investigation and is pending before Cyber Cell of EOW, Delhi Police. On 26.07.2013, complainant preferred a complaint against above-named Sumit Walia alleging rape and criminal misappropriation of Rs.4 Crores. Consequently, FIR no.280/13 was registered u/s 376/406/506 IPC with PS Vasant Vihar, New Delhi. On 27.07.2013, statement of the complainant was recorded under section 164 Cr.P.C. wherein she stated that Sumit Walia was the sole reason for divorce with petitioner. However, despite being in relation with Sumit Walia, complainant levelled allegation of rape for recovering Rs.4 crores from him.

59. It is further important to mention here that in July 2013, since complainant had lost all her money to Sumit Walia, she requested petitioner to pay school fee of their daughter. Accordingly, petitioner paid school fee, which was in arrears. In September 2013, since complainant was facing financial difficulties, she requested petitioner to provide financial assistance. Accordingly, petitioner gave his credit card to the daughter for purchasing articles for daily use. However, complainant used that credit card to purchase expensive articles and spent about Rs.9 Lacs. On 15.11.2013, due to the spendthrift habits of complainant, petitioner blocked the credit card which was given to daughter. On getting such information, complainant and her daughter started sending SMSs to petitioner and demanded money which are on record. Consequently, on 18.11.2013, petitioner preferred a complaint with PS Vasant Vihar, New Delhi against complainant with regard to various threats given by her. On 12.12.2013, 28.01.2014 & 29.01.2014, complainant filed a reply to the complaint dated 18.11.2013. In addition to reply to the complaint, she also preferred two complaints on 28.01.2014 and 29.01.2014 seeking action against petitioner. However, all the complaints were closed after thorough enquiry, stating that the complaints pertaining to matrimonial dispute and no cognizable offence was made out. However, on

09.04.2014, the complainant lodged FIR no.305/2014 u/s 376B/377/420 IPC with PS Vasant Vihar, New Delhi alleging cheating and rape. Therein, she stated that allegations made by the petitioner in FIR 294/2012 were correct and she was pressurized by Sumit Walia to support him. She has also stated that Sumit Walia misappropriated the alimony amount given to her by petitioner. On 22.05.2014, petitioner was granted pre-arrest bail by Ld. ASJ, Patiala House Courts. Thereafter, in December, 2014, complainant preferred civil suit bearing no.04/2014 before Ld. Family Courts, New Delhi seeking declaration of divorce decree dated 04.09.2012 as null and void. In February 2015, after concluding investigation, the Investigating Officer filed a final report against petitioner, under section 376/377/420 IPC. Consequently, on 04.03.2015, the petitioner was summoned by the court of Ld.MM, Patiala House Court, New Delhi. On 07.04.2015, petitioner was admitted to bail by the said court. On 20.04.2015, upon service of summons in Civil Suit no.04/2014, petitioner filed Cont. Cas. No.315/2015 before this Court seeking initiation of contempt proceedings against complainant for violation of the terms of settlement dated 31.08.2012 and the undertaking dated 01.09.2012. After hearing complainant on 09.10.2015, this Court was pleased to record the undertaking of complainant that she would withdraw

Civil Suit mentioned above and consequently, disposed of the contempt petition. On 12.10.2015, in compliance with the order of this Court dated 09.10.2015, statement of complainant was recorded by Id. Family Court and on 04.11.2015, Civil Suit bearing no.04/2014 was dismissed as withdrawn. Thereafter, on 19.08.2016, the petitioner preferred an application under section 91 Cr.P.C. seeking summoning of documents necessary for determination on the point of charge. In October 2016, Id. ASJ, FTC, Patiala House Courts, New Delhi permitted the petitioner to place certified copies of the following documents:

- Record of this Court in Cont. Case (C) 315/2015.
- Record of CS 4/2014 of the Ld. Family Court, New Delhi.

60. Consequently, certified copies of the said documents were placed on record of Trial Court. On 14.02.2017, after hearing petitioner, the Prosecutor and complainant, Ld. ASJ, FTC, Patiala House Courts, New Delhi was pleased to pass a detailed order and observed that the prosecution has failed to make out any prima facie case against the petitioner for cheating. However, on 22.02.2017 framed charge against petitioner under section 376(2)(n) of IPC.

61. It is pertinent to mention here that on 10.04.2017, Ld. ASJ, was

pleased to acquit Sumit Walia in FIR 280/2013 registered with PS Vasant Vihar, u/s 376/406/506 IPC.

62. The present FIR itself reveals that complainant preferred a complaint only on 08.04.2014 for the alleged incident which took place on 12.08.2013 i.e. after a delay of about 8 months (240 Days). The said delay has not been explained anywhere. Even as per the complainant, after 12.12.2013, she did not communicate with petitioner. The complainant herself states in her complaint that she had made representations to police on 12.12.2013 vide DD No. 79b, she again filed an application dated 28.01.2014 vide DD No. 47b and to DCP on 29.01.2014 vide DD No. 292 yet no complaint was made regarding the allegations of rape dated 12.08.2013 or non-payment of monies under agreement dated 13.02.2012 or the fact that petitioner had resumed relation with the complainant on the pretext of marriage to avoid payment of Rs.9 Crores. Moreover, from September, 2012 till April, 2014, complainant was in contact with various police officials and lawyers in connection with various complaint preferred by her, yet no complaint was made regarding alleged incident dated 12.08.2013 or non-payment of monies under agreement dated 13.02.2012.

63. On perusal of chargesheet, case of prosecution is not corroborated with sufficient evidence and the case is riddled with gaps. The prosecution has not placed any evidence on record to prove the presence of petitioner and complainant in hotel Oodles on the date of incident i.e. 12.08.2013. Moreover, no eye-witness has been made to prove presence of petitioner in the hotel. However, CDR reveals that on 12.08.2013, there was a telephonic conversation between complainant and petitioner for 324 Seconds at 17:05:24. If, they were together at the same place, there would not have been any telephonic conversation for almost 5 ½ minutes (324 seconds). In her supplementary statement dated 20.05.2014, complainant has stated that on 12.08.2013, she reached hotel Oodles at 4 PM and remained there till 7:30 PM. The said statement is ex-facie unbelievable and is belied by the telephonic conversation between complainant and petitioner for 324 Seconds at 17:05:24. Thus, it is unbelievable that two persons sitting together at the same place would talk to each other over telephone for 5 ½ minutes. As per the guest register maintained by hotel, only one person stayed at the room and no other person visited over there.

64. Thus as per settled law, if the evidence on record as per the prosecution case is accepted in toto, still conviction cannot be awarded to the

accused. Therefore, the accused could not be directed to face trial and at the end, he will see acquittal.

65. In the present case, if this Court considers all the evidence of the prosecution on record as it is , however, without any rebuttal or cross examination, still conviction cannot be awarded in favour of the petitioner. Therefore, there will be no purpose to ask the petitioner to face trial and take the benefits of the material on record during trial in his favour. It will be great injustice in favour of the petitioner.

66. I am conscious that the court should not comment upon the character of the prosecutrix/complainant. The admitted facts are that due to elicit relation of the complainant with Sumit Walia, petitioner and complainant got divorced by mutual consent. Regarding relation, it is evident that on 08.09.2012, petitioner preferred a complaint against Sumit Walia which was registered as FIR No.294/12 with PS Vasant Vihar, New Delhi, for the offences punishable u/s 384/506/509 IPC and 66(1)/67 of Information Technology Act, 2000. In the said FIR, allegations were that Sumit Walia demanded Rs.40 lacs from complainant and threatened to circulate nude pictures and video of complainant to malign her image. Said case is presently under investigation and is pending before Cyber Cell of EOW,

Delhi Police. In addition to above, on 26.07.2013, complainant preferred a complaint against said Sumit Walia alleging rape and criminal misappropriation of Rs.4 Crores. Consequently, FIR no.280/13 was registered u/s 376/406/506 IPC with PS Vasant Vihar, New Delhi. On 27.07.2013, complainant stated in her statement recorded under section 164 Cr.P.C. that Sumit Walia was the sole reason for divorce with petitioner. Thus, present FIR is nothing but arm twisting for extorting money from petitioner, which can not be allowed such misuse of judicial system as happened in the present case.

67. In view of above facts and circumstances and the legal position discussed, I am of the view that the petitioner cannot be charged for any offence based upon the complaint filed by the complainant.

68. Therefore, I hereby set aside order dated 14.02.2017 and order on charge dated 14.02.2017 and order framing charge dated 22.02.2017 passed by learned ASJ, FTC, Patiala House Courts, New Delhi in SC No.9416/16 arising from FIR No.305/2016 registered at Police Station Vasant Vihar, New Delhi.

69. The petition is allowed accordingly.

CM APPL. No. 15747/2017

70. In view of the order passed in the present petition, the application has been rendered infructuous and is, accordingly, disposed of.

**(SURESH KUMAR KAIT)
JUDGE**

**FEBRUARY 13, 2020
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