
(2010) 08 P&H CK 0133
In the Punjab And Haryana At Chandigarh

Ashwani Bhatia

APPELLANT

Vs

State of Haryana and Another

RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Penal Code, 1860 (IPC) — Section 198, 198(4), 375, 376, 376(2)

Citation : (2011) 3 DMC 182 : (2010) 4 RCR(Criminal) 253

Hon'ble Judges : Nirmaljit Kaur, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Nirmaljit Kaur, J.—This is a petition u/s 482 Cr.P.C for quashing the FIR No. 160 dated 13.09.2009 under Sections 376, 494 and 506 IPC registered at Police Station Mahesh Nagar, District Ambala.

2. The facts, in short, as stated, are that the petitioner was a draftsman and was running a firm by the name of Ashwani Bhatia & Associates. Respondent No. 2, on the other hand, was having a diploma of architect. She had done her graduation from S.D. College, Ambala Cantt. and, thereafter, completed three years diploma in Architect from Government Polytechnic, Sirsa. She also established her own consultancy under the name and style of "Architect Den". Subsequently, the petitioner came in contact with respondent No. 2 in connection with job which was supposed to have been assigned to respondent No. 2. The petitioner continued to visit at her shop in view of the business interest. Thereafter, the respondent No. 2 closed her business establishment and started working with the petitioner. Admittedly, an intimacy developed between the petitioner and respondent No. 2 and the petitioner even invited respondent No. 2 on the marriages of his brothers Rinku and Kishan. Admittedly, the respondent No. 2 accompanied the petitioner to various guest houses at Chandigarh, Kurukshetra, Jammu and Srinagar. It is also admitted that the marriage was solemnized between the petitioner and respondent No. 2 as per Hindu Marriage

Rites and Ceremonies on 05.09.2005 in the presence of all the relatives and friends. They even went to Goa for their Honeymoon. They visited Nander, Vaishno Devi and Kalahasti Chennai. Thereafter, on things having turned sour, on account of one reason or the other, the present FIR was registered by respondent No. 2 against the petitioner under Sections 376, 494 and 506 IPC.

3. Learned Counsel for the petitioner, while praying for quashing of the said FIR, submitted that the petitioner was running a firm under the name of Ashwani Bhatia and associates and having office at his home which is House No. 545, Old Housing Board, Sector 13, Karnal and the respondent No. 2/complainant was admittedly working with him in his Office. Thus, it cannot be said that the respondent/complainant was not aware of his earlier marriage. Secondly, now she is running her own firm with the name and style of "Creative Arch" and she is a proprietor of this firm. She is now in professional rivalry with the petitioner. Moreover, admittedly, the petitioner and respondent No. 2 were married and, therefore, Section 376 IPC was not made out against the petitioner and Section 494 IPC can be pleaded only by the first wife.

4. Reply on behalf of respondent No. 2/complainant has been filed, stating therein, that the petitioner had kept her in dark and only when she received threatening calls from his first wife that she came to know about his first wife. Hence, she has been cheated. Therefore, the petitioner was guilty of rape.

5. Learned Counsel for the parties have been heard. The admitted facts in the present case are that;

(a) Both the petitioner and the respondent are educated. The respondent studied her graduation and thereafter three years diploma in Architect. She is an Architect by profession. The respondent/complainant started working with the petitioner in his Office/Shop after closing her own business establishment. Presently, she is running her own business under the name and style of "Architect Den."

(b) The respondent/complainant went willingly with the petitioner to various places and stayed in various guest houses and accompanied him as husband and wife to Chandigarh, Kurukshetra, Jammu and Srinagar. They developed intimacy.

(c) She was invited by the petitioner for the wedding of his brothers which she attended.

(d) The marriage between the petitioner and respondent No. 2 was solemnized on 05.09.2005 in the presence of all relatives and friends. She went for honeymoon to Goa, Nander and Vaishno Devi. She also visited at Golden Temple after her marriage.

(e) The present FIR has been lodged after a gap of almost four years.

(f) The respondent No. 2 is a major i.e. more than 21 years of age.

6. It is obvious from the above facts that the respondent/complainant is a grown

up educated and professional woman. The respondent had never resisted the advances made by the petitioner. She is a consenting party. She willingly accompanied the petitioner, wherever, he took her. She happily stayed with him in various guest houses. Moreover, she even entered into a marriage with him and continued to stay with him as his wife. It is admitted by her in her reply that the petitioner even took her to meet his family and she also attended the wedding of his brothers before his marriage to the complainant. It is, therefore, difficult to believe that the respondent/complainant was not aware of his marriage, especially when, the firm in which, he was working, was in his name and his wife Seema Bhatia.

7. Section 376 of the IPC reads as under:

376. Punishment for rape.-(1) Whoever, except in the cases provided for by Sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

8. In the case of Uday v. State of Karnataka reported in (2003) 1 CCrLR (SC) 555, it has been held 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.

9. The Calcutta High Court, in the case of Shyamapada Tewari v. The State of West Bengal and Anr. Reported as 2008 (1) F.J.C.C. 169, while relying on the judgment of Hon'ble the Supreme Court in the case of Uday (supra) also held in para 15 as under:

15. To the contrary, the principles laid down in the case of Uday v. State of Karnataka and Jayanti Rani Panda are applicable in this case. The case u/s 376 IPC does not lie. There is nothing to show that the accused had no intention to marry the prosecutrix from the very beginning and the representation made by the accused was false to the knowledge of the accused at the time it was made. The case u/s 417 IPC is also not made out.

10. Aurangabad Bench of Bombay High Court in the case of Sunil Vishnu Salve and Another Vs. State of Maharashtra, , while holding that breach of promise does not amount to an offence u/s 375 of the IPC held in para 9 as under:

9. On perusal of the provision contained in clause Fourthly of Section 375 of the India Penal Code, it would be seen that the provisions do not apply in the present situation. Clause Fourthly of Section 375 of the Indian Penal Code applies when a man induces a married woman to have sexual intercourse with him by

impersonating her husband. When consent by a woman to a man under misconception of fact that he was her husband, it amounts to rape by a person to whom the woman believes to be her husband. In the present case, Vandana and accused No. 1 were residing in the neighbourhood. Prosecutrix Vandana was major and there was consent to the sexual intercourse by her. It is a case of the prosecutrix that she consented to sexual intercourse believing that the accused would marry her. Under such circumstances, the act of sexual intercourse in January 1992 and repeated sexual intercourse between the two subsequently cannot be said to be illegal. The sexual intercourse which is not illegal would not become illegal by refusal by accused No. 1 to marry. It would be at the most breach of promise. But the act of sexual intercourse with consent of a major girl cannot be termed as rape as a consequences of breach of promise even if it is assumed that there was breach of promise.

11. Similarly, in the facts of the present case, it would be at the most a breach of trust or cheating but having lived together in a relationship after performing marriage with the consent of the girl who is a grown up lady, cannot be termed as rape.

12. Coming to the offence u/s 494 of the IPC as to whether the same would be maintainable or not, Section 198, which deals with the prosecution for offences against marriage, is as under:

198. Prosecution for offences against marriage.-(1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that -

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of Sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable u/s 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption.

13. The man is guilty of an offence u/s 494 of the IPC when he marries second time during the lifetime of his first wife. In the second marriage, the woman he marries, is a party. The second marriage is not possible without her connivance. Moreover, the second marriage being void, she does not fall under the definition of "Wife" as expressed or define in Section 198 above.

14. The respondent/complainant is admittedly not the first wife in lieu of Section 198 and, therefore, offence u/s 494 IPC cannot be invoked by her.

15. In view of the above discussion and even if the FIR is taken at its face value, offence under Sections 376 IPC is not made out.

16. Accordingly, the present petition is allowed and the FIR No. 160 dated 13.09.2009 under Sections 376, 494 and 506 IPC registered at Police Station Mahesh Nagar, District Ambala is quashed.