

(2016) 11 DEL CK 0061
In the Delhi High Court
Case No : Crl. A. 210 of 2015

Jagdish Nautiyal

APPELLANT

Vs

State of NCT (Delhi)

RESPONDENT

Date of Decision : 09-11-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 375, Section 376

Citation : (2017) 2 ADDelhi 744 : (2017) 1 CriCC 400 : (2016) 235 DLT 191 : (2016) 4 JCC 2728

Hon'ble Judges : Ms. Mukta Gupta, J.

Bench : Single Bench

Advocate : Ms. Rajni Gupta, APP, for the State; Ms. Anjana Prakash, Senior Advocate with Mr. Anwesh Madhukar, Mr. Anuj Prakash and Mr. S.C. Nautiyal, Advocates, for the Appellant

Final Decision : Dismissed

Judgement

Mukta Gupta, J. - Convicted for offences punishable under Sections 376/493 IPC Jagdish Nautiyal challenges the impugned judgment dated January 07, 2015 and the order on sentence dated January 12, 2015 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.75,000/- each for offences punishable under Sections 493 IPC and 376 IPC.

2. Assailing the conviction, learned senior counsel for the appellant submits that Section 375 clause fourthly is not applicable to the facts of the case. Firstly, for the reason the prosecutrix knew that the appellant was already married, hence, there was no misconception of fact and secondly, even if it is believed that the prosecutrix did not know about the previous marriage of the appellant, the marriage between the appellant and the prosecutrix was not as per Hindu rites and rituals, thus, not a valid marriage in the eyes of law. Therefore, there could not be any misconception to the prosecutrix that she was the legally wedded wife of the appellant.

3. Learned APP for the State on the other hand contends that the appellant had

the knowledge that the prosecutrix believed that she was legally married to the appellant and this fact is supported by the certificate of marriage which was issued upon registration of marriage between the appellant and the prosecutrix. The prosecutrix having been deceived both Sections 493 and 376 IPC were attracted.

4. Process of law was set into motion on September 15, 2010 when a written complaint Ex. PW-6/A was filed by the prosecutrix PW-6 to the Assistant Commissioner of Police, Crime against Women Cell stating that Jagdish Nautiyal fraudulently married her by concealing the material fact that he was already married. On the basis of the aforesaid complaint, FIR No. 67/2011 was registered under Sections 376/420 IPC at PS CWC Nanakpura.

5. PW-6 the prosecutrix, resident of Dehradun, deposed in the Court that she got married to Sushil Kumar on December 12, 1994 and her husband passed away in March, 2010. Jagdish Nautiyal was a friend of her husband who had visited their house once or twice. Whenever she used to participate in the programme at Sahej Yoga Kendra, Noida along with her husband, they used to meet Jagdish Nautiyal. In April, 2010 Jagdish Nautiyal visited her house and proposed her for marriage. Jagdish Nautiyal told her that he was unmarried, doing business and assured her that he would take care of her and her daughter. The prosecutrix, who was in a disturbed state of mind and not in a position to take any decision, sought some time to ponder over the proposal. However, Jagdish Nautiyal insisted her to accept the proposal, accordingly, she accepted it. Jagdish Nautiyal asked her to reach Delhi on May 11, 2010 where the marriage was to be solemnized in a temple. Accordingly, the prosecutrix along with Mala Chopra PW-9, Meera Sharma and Trilochan Singh, PW-10 came to Delhi. Thereafter, she went to the Birla Mandir along with the aforesaid persons. Jagdish Nautiyal also joined them and the marriage was solemnized in Bodh temple adjacent to Birla Mandir. After the marriage Jagdish Nautiyal returned home and the prosecutrix went back to Dehradun. On May 17, 2010, Jagdish Nautiyal came to Dehradun for registration of marriage. The marriage was registered and certificate of registration of marriage issued, copy whereof was exhibited as Ex. PW-2/E. Jagdish Nautiyal stayed at Dehradun for one or two days and had sexual relations with the prosecutrix. Thereafter, he visited the prosecutrix on every Saturday and Sunday. This continued for about one and a half month. Whenever the prosecutrix used to call him, he used to tell her that he was going out of Delhi and did not talk to her properly. In between, she got a call from a lady asking the prosecutrix about her identity. However, the prosecutrix asked her to disclose her identity first because she was the one calling her. Before, she could answer, somebody snatched the phone and it got disconnected. The prosecutrix apprised about this phone call to Jagdish Nautiyal. In June, 2010, the prosecutrix went to Delhi and stayed with Jagdish Nautiyal in a hotel for 4-5 days and had sexual relations as between husband and wife. When she returned to Dehradun, she received a call from the same lady around 1:30 A.M. but she did not answer. Thereafter, that lady sent a text message asking her to take the call. That lady

informed her that Jagdish Nautiyal was already married and had children. The prosecutrix apprised Jagdish Nautiyal about this conversation; however he convinced her that the call was baseless and false. In July 2010, she came to Delhi and he took her to his office of National Human Rights Commission where she came to know that Jagdish Nautiyal had several girlfriends. When the prosecutrix asked Jagdish Nautiyal about Sunita Nautiyal, DW-2, he replied that she was the wife of driver Dayanand. When Jagdish Nautiyal was dropping the prosecutrix at the railway station in his car, she clandestinely took two or three CDs from his car. When she viewed those CDs in Dehradun, it was pertaining to the marriage of Jagdish Nautiyal with Sunita. The prosecutrix called him up. There was a quarrel between the two. She came to Delhi where Jagdish Nautiyal asked for apology and told her that he would maintain both Sunita and her. Thereafter, the prosecutrix returned to Dehradun. Jagdish Nautiyal sent a complaint to police at Dehradun stating that the prosecutrix was harassing and demanding money from him. He filed another complaint in PS Tilak Nagar alleging that the prosecutrix was threatening him. Thereafter, the prosecutrix filed a complaint in CAW Cell. During her cross-examination, she stated that the mobile phone number which was being used by her at that time was 9837590876 and she was aware of the mobile numbers 9971100102 and 9971159477 and the landline number 3385069 as she was receiving calls from Jagdish Nautiyal from these numbers. She denied the suggestion that she was talking on phone to Sunita, DW-2 also.

6. PW-2, B. S. Rawat, Chief Assistant in the office of Sub Registrar-I, Dehradun stated that as per the records, on May 17, 2010, Jagdish Nautiyal and the prosecutrix had come to their office for registration of their marriage for which they had filled a form, the photocopy whereof was Ex. PW-2/A. The marriage was registered in their office and registration certificate was issued, photocopy whereof was Ex. PW-2/E.

7. PW-8, Ms. Bindu Manchanda stated that when she had gone to Court to prepare the domicile certificate for her daughter on May 17, 2010, she met Mrs. Mala Chopra, PW-9 who requested her to be a witness to the marriage of the prosecutrix with Jagdish Nautiyal. She signed the application form for registration of marriage as a witness. Mala Chopra, Jagdish Nautiyal and the prosecutrix had also signed in her presence.

8. PW-9, Smt. Mala Chopra stated that she knew the prosecutrix for last five years and both of them were members of Sahej Yoga. She corroborated the version of the prosecutrix that the marriage of the prosecutrix was performed with Jagdish Nautiyal in Bodh Temple on May 11, 2010. She and Bindu signed the application for registration of marriage as witnesses. During her cross examination, she stated that the prosecutrix and Jagdish Nautiyal had not taken rounds (Saptpadi) around the sacred fire in the temple and no other ceremony relating to Hindu marriage was performed at temple. Jagdish Nautiyal and the prosecutrix had exchanged garlands with each other and Jagdish Nautiyal applied

vermilion on the forehead of the prosecutrix.

9. PW-10, Trilochan Singh who was a tenant of Meera Singh stated that he accompanied Meera, Mala and the prosecutrix to Delhi. At Bodh Temple, a Babaji told them that they do not perform marriage in the temple but they would bless the couple. Jagdish Nautiyal applied vermilion upon the forehead of the prosecutrix. During his cross-examination, he denied the suggestion that he demanded money from Jagdish Nautiyal. He voluntarily stated that Jagdish Nautiyal had offered Rs.1 lac each to them for giving statement in his favour.

10. PW-12, Vinay who is a photographer deposed that a person had come to his shop and took him to nearby Bodh Temple to take photographs of a marriage ceremony. He took the photographs of the couple while putting "Jaimala" around each other's neck. He identified the photographs Ex. PW-6/B (Colly).

11. The first limb of argument on behalf of the learned senior counsel for the appellant is that since the prosecutrix was aware of the previous marriage of the prosecutrix, there can be no misconception of fact. In the decision reported as Bhupinder Singh v. UT of Chandigarh, (2008) 8 SCC 531 where the appellant married the complainant during the subsistence of his first marriage and was cohabiting with her for about four years, the plea taken by the appellant therein was that since the complainant knew about the marital status, hence clause "fourthly" to Section 375 IPC would have no application. The Supreme Court rejecting the contention held that even though the complainant claimed to have married the appellant, which fact is established from several documents, does not improve the situation so far as the appellant is concerned. Since he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab initio. The conviction under clause "Fourthly" of Section 375 IPC was upheld.

12. The present case is squarely covered by the aforesaid decision. Thus, even if it is assumed that the prosecutrix knew that the appellant was already married, the provision of clause fourthly to Section 375 IPC shall still be attracted.

13. The second limb of argument advanced on behalf of the learned senior counsel for the appellant that since the marriage was not performed as per the Hindu rites and ceremonies, thus, was not a valid marriage and there could be no misconception in the mind of the prosecutrix that her consent was taken on the pretext of marriage also deserves to be rejected. Even though the marriage was not performed as per the Hindu rites and rituals, however, the registration of marriage was sufficient for the prosecutrix to believe that she was the legally wedded wife of the appellant, thereby, creating a misconception in her mind.

14. The Calcutta High Court in the decision reported as 2013 SCC OnLine Cal 4644 describing "misconception of fact" observed:

"In my opinion, promise to marry is something different from miscarriage of fact. In this case, the appellant is said to have promised to marry. Thus, promise has

not been acted upon. Promise does not necessarily mean that it is a fact. The fact constitutes promise sometimes whereas promise itself is not a fact. The misconception of fact is an aspect which has already taken place i.e a past incident, for example, if a man keeps his hand on the head of an idol and promise to a girl by saying that "I have married you". Then it is a fact. Further, if the girl acts on such fact that she is married to the man and ultimately, it appears that the man takes a volte face, that can be treated as a misconception of fact. But promise to marry cannot be equated with a misconception of fact."

15. Referring to the decision of this Court in CrI.Rev.P.720/2007 titled as "Vinod Sharma v. State" decided on 11th July, 2011 learned senior counsel contends that on similar allegations this Court held that Section 493 IPC was not applicable. Section 493 IPC reads as under:

"493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage-Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

16. In Vinod Sharma (supra) this Court on the facts therein noted that the parties were well aware of the fact that the wedding performed at a room in a hotel in Nainital was not a legal wedding and thus the case fell within the ambit of Section 375 thirdly IPC where the consent of woman had been sought by putting her in fear. In the present case even if the parties knew that the marriage at Bodh temple was not a legal wedding, however by registration of marriage with the Registrar the belief of the prosecutrix that she was the legally wedded wife of Jagdish Nautiyal was well established whereas for Jagdish Nautiyal it was not a legal wedding being void ab initio as he was already a married man. Thus the appellant cannot take recourse to the decision of this Court in Vinod Sharma (supra) contending that Section 493 IPC was not attracted.

17. The contention of learned senior counsel for the appellant that there was no deceit in the mind of the prosecutrix because in her affidavit along with the application seeking compassionate appointment, she stated that she was a widow hence Section 493 and 376 IPC were not attracted, also deserves to be rejected. The prosecutrix in her cross-examination clarified that on 9th September, 2010 she had filed an application for compassionate appointment wherein she mentioned that she was a widow as she had already filed the complaint against the appellant. Though the application of the prosecutrix seeking compassionate appointment was dated 9th September, 2010 and her complaint was dated 15th September, 2010, however in her complaint she clearly stated that she had come to know in June and thereafter in July, 2010 that the petitioner had cheated her and was already married. Thus, a declaration of the prosecutrix in the application seeking compassionate appointment that she was widow of late Sushil Kumar was after she came to know the fact that her

marriage to the appellant was a deceit.

18. Though through the defence Jagdish Nautiyal has sought to prove that prosecutrix was aware of his first marriage, however the evidence led does not probabalize the defence of Jagdish Nautiyal for the reason even from the telephone records it cannot be inferred that the prosecutrix was talking to the wife of Jagdish Nautiyal. Further even though not married as per the Hindu rites and ceremonies, the registration of marriage where Jagdish Nautiyal declared himself to be a bachelor was sufficient for the prosecutrix to believe that wedding between the two was a lawful marriage and she cohabited with him under the belief of a lawful marriage.

19. In view of the evidence on record, I find no merit in the appeal. The judgment of conviction and the order on sentence are upheld. Appeal is dismissed. The appellant will undergo the remaining sentence.

20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

21. TCR be returned.