A.F.R.

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In Chamber

Case :- CRIMINAL REVISION No. - 2618 of 2019

Revisionist :- Sanjeev Gupta
Opposite Party :- State Of U.P. And Anr.
Counsel for Revisionist :- Arvind Kumar Singh,Arvind Kumar Singh,Jitendra Singh,Kirti Singh
Counsel for Opposite Party :- G.A.,Nitin Gupta

Hon'ble Ram Manohar Narayan Mishra,J.

1. By means of instant criminal revision, the revisionist/ accused has assailed the judgement of learned A.C.J.M., court no. 8, Ghaziabad in Criminal Case No. 75 of 2016 arising out of Case Crime no. 331 of 2013 under Sections 498-A, 323, 377 IPC and Section 4 of D.P. Act, P.S. Link Road, District Ghaziabad, the revisionist has been convicted of charge under section 498-A, 323, 377 IPC and Section 4 of D.P. Act and sentenced him to two years rigorous imprisonment and Rs. 30,000/- fine for charge under Section 498-A IPC and five years rigorous imprisonment and Rs. 20,000/- fine for charge under Section 377 IPC, six months simple imprisonment and Rs. 500/- for charge under Section 323 IPC and one year simple imprisonment and Rs. 1,500/- fine for charge under section 4 D.P. Act and sentence and fine are coupled with default stipulation; all the sentences were directed to run concurrently. 50% fine is directed to be paid as compensation to the victim/ informant.

2. The revisionist has assailed judgement of trial court in criminal appeal no. 129 of 2018 (Sanjeev Gupta vs. State of UP) whereby criminal appeal is partly allowed to the extent that conviction for charge under section 498-A, 323, 377 IPC has been affirmed but his conviction and sentence for charge under section 4 of D.P. Act has been set aside. The sentence awarded by the trial court for charge under section 377 IPC has been modified to the extent that five years rigorous imprisonment for charge under section 377 IPC is reduced to four years keeping in view quantum of fine intact. The revisionist has impugned both the orders passed by the courts below in present revision which has been preferred under section 397/401 Cr.P.C.

3. Heard learned counsel for the revisionist, learned AGA for the State and learned counsel for respondent no. 2.

4. The factual matrix of the case in brief are that prosecutrix/ informant, who is respondent no. 2 in present revision lodged an F.I.R. on 9.8.2013 at 9:05 hours on the basis of written report vide Crime no. 331 of 2013 at PS Link Road, Ghaziabad under section 498-A, 323, 504, 377 IPC and section ¾ D.P. Act against the revisionist/ accused with averment that her marriage with accused Sanjeev Gupta was solemnized on 1.7.2012 according to Hindu rites and rituals in which her father had spent around five and half lakhs. She stayed with her husband at Country Inn Hotel for two days after the marriage. Her husband subjected her to cruelty just after the marriage in said hotel and demanded a Fortuner car and Rs. 40 lakhs cash and asked her to bring the dowry from her parents. On 3.7.2012 her husband brought her to her parental place where she told her ordeal to her parents, brother and sister-in-law. Her family members tried to convince her that things will get right in future and also expressed their inability to fulfil demand of dowry made by her husband. On 23.7.2012 her husband again visited her parental place and asked her to go with him but he made demand of dowry to which her parents expressed their inability to fulfil. Her husband abused her and took her at his parental place at A-229, Suryanagar, Ghaziabad where he behaved with her in cruel and inhuman manner. He would engage with her in marpeet and abusing. He subjected her to unnatural intercourse (sodomy) on many times due to which she suffered damages to her private parts. She suffered her ordeal keeping in view her future but behaviour of her husband did not change. On 14.8.2012 her parents brought her to her parental place where she told her plight to her maternal uncle Sunil Suri, Sanjay Suri and others, they also tied to make her husband understand but he did not pay any heed to their request and they came back being disappointed. On 9.8.2013 at around 2:30 pm when she was in her parental place and her parents had gone to market, her husband rang the bell of the house and when she opened the door, he barged into the house, dragged her forcefully inside the room, abused her and forcefully established unnatural physical relation with her against her consent. Her parents appeared at the place of incident in the meanwhile and accused was caught with help of passer-by in the street and brought to police station. Police investigated the case and submitted the charge-sheet against the accused for aforesaid offences.

5. Learned trial court framed charge under section 498-A, 323, 504, 377 IPC and ¾ DP Act against the accused who denied the charge and claimed for defence. During trial, prosecution examined PW-1 prosecutrix/ informant, who proved her written report as Ex. K-1, PW-2 Ashok Kumar and PW-3 Smt. Shashi Sabbarwal were examined as parents of the victim, PW-4 Smt. Neha Sabbarwal, sister-in-law (Bhabhi) of the victim, PW-5 constable Omakar Singh proved Chik FIR as Ex.k-2 and extract of GD paper 7A as Ex.k-3, PW-6 Dr. Rajbala, consultant of district joint hospital, Sanjaynagar Ghaziabad, proved medical report of the victim dated 15.12.2015 as Ex. K-3 and supplementary medical report as Ex. k-4, PW-7 S.I. Bhoop Singh and S.I. Balbir are investigating officer of the case, PW-8 proved cite plan of the place of the incident as Ex.k-5 and charge-sheet as Ex. k-6. CW-1 Dr. A.K. Dua proved pathological examination report dated 4.6.2018 as Ex. k-5.

6. Statement of the accused was recorded under Section 313 Cr.P.C., wherein, he denied the charges levelled against him and stated that witnesses have stated falsely against him as they are close relatives of the prosecutrix. The investigating officer has carried out shoddy investigation and deposed falsely acting under influence of prosecution side. Accused examined DW-1 Ramhari Singh in his defence, who proved CDR of mobile no. 9868124452 dated 9.8.2013 as Ex. kh-1, DW-2 Dr. Sunil Kumar Tyagi, Senior Consultant proved injury report dated 10.8.2013 at 8:20 hours of accused Sanjeev Gupta and medical report dated 12.8.2013 as Ex. Kh-2. Accused himself appeared as defence witness as DW-3, who proved various documents relating to marriage/ income affidavit, school fee of the children of prosecutrix, which is paid by the accused and R.T.I. information received regarding complaint filed by the prosecutrix against the accused, another papers as Ex.Kh-3 to Ex.kh-24. Accused himself appeared as DW-3 before the trial court and got himself examined as defence witness.

7. Learned trial court after considering the submissions of learned counsel for the parties and perusing the documentary and oral evidence adduced during trial and citing certain judgement of Hon’ble Apex court in Suraj Singh alias Sonu Suraj Singh (2017) 4 Supreme 375, Vijay alias Chinee vs. State of MP (2010) 8 SCC 191, Namdev vs. State of Maharashtra (2007) 14 SCC 150, Harbans Kaur vs. State of Haryana, (2005) 9 SCC 195, Bheerulal and another vs. State of Rajasthan (2009) 66 ACC 997 (SC), Dhanj Singh vs. State of Punjab

(2004) 3 SCC 654, Khem Ram vs. State of Himanchal Pradesh, (2018) 1 SCC 202, Rahul Mishra vs. State of Uttrakhand, AIR (2015) SC 3043, Gannath Patnayak vs. State of Orissa (2002) 2 SCC 619, and Fiona Shrikhande vs. State of Maharastra (2013) 14 SCC 44, convicted the accused for charge under section 498A, 323, 377 IPC and section 4 of D.P. Act and sentenced him as aforesaid. Feeling aggrieved by the judgement of conviction and sentence recorded by the court below, accused filed criminal appeal before the court of sessions, which was decided by the impugned judgement and order dated 30.5.2019 passed by learned Sessions Judge, Ghaziabad in which conviction and sentence recorded by the court below for charge under section 498-A, 323, 377 IPC was affirmed and conviction and sentence for charge under section 4 of D.P. Act was set aside. However, sentence awarded for charge under section 377 IPC has been reduced to four years rigorous imprisonment from five years as awarded by the trial court.

8. Learned counsel for the revisionist submitted that learned appellate court has given contradictory findings in appellate judgement as on one hand learned appellate court has set aside the conviction and sentence passed by trial court for charge under section 4 of D.P. Act but on the other hand, affirmed the conviction under section 498-A, 323, 377 IPC as recorded by the trial court. Learned courts below has failed to appreciate the fact that the prosecutrix has been changing her stand on different stages. The present F.I.R. is infact counterblast of a criminal case lodged at the instance of revisionist against the prosecutrix, her maternal uncle and family members of prosecutrix under sections 406, 323, 420, 504, 506, 120-B IPC, which is registered as Criminal Case no. 1469 of 2013 in which summons were issued by the ACJM-8, Ghaziabad against the maternal uncle and family members of prosecutrix. The revisionist had gone to locate the accused persons in that complaint but he was caught, roughed up and beaten by them on 9.8.2013 and lodged at police station at the behest of prosecutrix and her family members and on same day false F.I.R. in present case was lodged against him with concocted and false version. The prosecutrix had never made physical relation with revisionist after the marriage. She remained with him for a short period after the marriage and parted her ways with the revisionist and resided separately with her parents since 14.8.2012 thus, she left the company of revisionist just within one and half month of her marriage. Learned appellate court has disbelieved the

incident dated 9.8.2013 as narrated in the F.I.R. as well as in version of prosecution witness for present case. However, it wrongly placed reliance on version of prosecutrix that she was slapped by her husband in the first night of her marriage and she was subjected to unnatural sex like sodomy and oral sex during the period she resided with her husband at rented accommodation, A-229 Suryangar Ghaziabad from 23.7.2012 to 17.8.2012. The revisionist is a qualified chartered accountant who was working as Deputy General Manager, (Finance) in Bharat Sanchar Nigam. He got himself transferred from Chandigarh to Ghaziabad after the marriage. She remained with him for 12 days only as per her own admission in other proceeding and also stated that physical relationship could not be established between them as she was suffering from kidney stone problem.

9. Learned counsel further submitted that this is admitted position that this is second marriage of the prosecutrix alongwith revisionist, she was earlier married with Omkar Chawla. On 13/14.8.2011 she was driving a car in which her brother, husband and her brother-in-law were sitting, an accident occurred on that date i.e. on 14.8.2011 in which her husband and brother-in-law both died. Thereafter, marriage of prosecutrix was solemnized with revisionist on 1.7.2012 and the sister Preeti was solemnized next day. Both marriages were solemnized at Arya Samaj. An F.I.R. was lodged in that accidental matter vide crime no. 253 of 2011, under sections 379, 304-A IPC at P.S. Sahadara, New Delhi at the instance of brother of the prosecutrix. There was no question of any demand of dowry as it was second marriage and marriage of necessity, even the appellate court acquitted the revisionist for charge under section 4 of D.P. Act. The Delhi court dismissed the complaint of the prosecutrix under section 12 of Protection of Women from Domestic Violence Act being misuse of process of law.

10. There is no injury report in support of the allegation of any marpeet with the prosecutrix on record. The revisionist himself victim of torture and high-handedness at the hand of prosecutrix and her family members. He has filed injury report dated 9.8.2013 which was prepared by Jail doctor in which he has suffered substantial injuries, in contradictory distinction to this, any medical report of the prosecutrix does not support any sexual violence for unnatural sex with her. The appellate court recorded fresh finding of fact that the victim was subjected to unnatural sex during period 23.7.2012 to 14.8.2012 after disbelieving incident of 9.8.2013 whereas there is no specific finding

of trial court that she was subjected to unnatural sex by the revisionist between 23.7.2012 to 14.8.2012, thus approach of appellate court is contrary to law of appeal.

11. Learned counsel finally submitted that both the courts below misappreciated the evidence on record and judgment of conviction and sentence awarded against the appellant by the court below is not sustainable and deserved to be set aside and submitted that learned appellate court on one hand disbelieved the occurrence of committing physical assault and subjecting the prosecutrix to unnatural sex by the revisionist but on the other hand has convicted and sentenced him for charge under section 377 IPC on the basis of statement of prosecutrix that she was subjected to non consensual unnatural sex during short period when she stayed between 23.7.2012 to 14.8.2012. This is the case of the prosecutrix that she was staying separately from her husband since 14.8.2012. Revisionist himself took house no. A-229 Suryanangar on rent on 23.7.2012 which is nearby to the house of mother of prosecutrix on her insistence, in which she was residing. The evidence of prosecutrix with regard to slapping of her by the revisionist in the first night of marriage subjected her for committing sodomy and oral sex with her, does not inspire confidence keeping in view sequence of events and for want of medical and scientific evidence in support of this case. The revisionist himself appeared as DW-3 as defence witness and had proved all documents produced and recorded by him during trial which suggests his innocence and exculpate him from criminal liability wrongly imposed on him in the impugned judgement by the courts below. The courts below have wrongly convicted him taking hyper technical approach and against established principles of criminal jurisprudence. Infact, prosecutrix was cross examined on her version that she was slapped by the accused in the very first night of marriage. There is no such version in F.I.R. that the revisionist slapped her on very first night of marriage.

12. Per contra, learned counsel for respondent no. 2 submitted that there is no illegality, irregularity or misappreciation of evidence in the impugned judgement passed by learned courts below whereby the revisionist has been convicted and sentenced for charge under sections 377, 323, 498-A IPC. The revisionist has failed to provide any justifiable reasons which would warrant interference of this Court in present criminal revision. There is concurrent finding of guilt recorded by both the courts below which need not be interfered.

13. From perusal of ordersheet of present revision, it appears that revisionist was sent to jail custody after judgement of appellate court dated 30.5.2019 whereby his conviction and sentence for charge under sections 498-A, 377, 323 IPC was affirmed with some modification. The revisionist was released on bail by order of this Court dated 9.7.2019 in present revision. However, the revisionist used to appear in person before this Court and moved several applications on one or other grounds. Several adjournments were taken by the revisionist as he was not inclined to previously to argue the case before this Court, even he moved an application with prayer to transfer the case to Hon'ble Apex Court or any other court which was unfounded and ultimately rejected.

14. Sri V.P. Srivastava, advocate, was appointed as Amicus Curiae but the revisionist declined to take his assistance. Thereafter, Sri Arvind Kumar Singh was appointed as Amicus curiae vide order dated 19.11.2022. This Court observed in previous orders that conduct of the petitioner in the Court during course of arguments was wholly uncalled for and ultimately due to his non cooperation in the proceedings of the case, this Court taking strong exceptions to his conduct, cancelled the bail granted to him by this Court vide order dated 19.11.2022 and the revisionist was directed to be taken in custody and sent to Central Jail, Naini, Prayagraj and thereafter shifted to Central Jail, Ghaziabad in due process and it appears that the revisionist is presently held in jail custody in Ghaziabad. The F.I.R. in present case was lodged at the instance of respondent no. 2 on 9.8.2013 at 19:05 hours vide Crime No. 331 of 2013 under Sections 498-A, 323, 504, 377 IPC and ¾ D.P. Act and the investigating officer submitted charge-sheet after investigation with prayer to prosecute him in said charges. The trial court acquitted the accused of charge under Section 504 IPC and convicted him for charge under Sections 498-A, 377 IPC and Section 4 of D.P. Act. The first appellate court while deciding the criminal appeal preferred by the accused convict by the impugned judgement, acquitted him of charge under section 4 of D.P. Act but affirmed his conviction for charge under Section 498-A, 323, 377 IPC and further reduced his sentence awarded under Section 377 IPC from five years to four years. However, fine awarded in the judgement of trial court for said offence was kept intact.

15. The prosecution examined prosecutrix/ victim as PW-1, Ashok Kumar as PW-2 and PW-3 Smt. Shashi Sabbarwal, PW-4 Smt. Neha

Sabbarwal and other witnesses of fact in support of prosecution version. However, two witnesses of fact, who have been examined during investigation, the maternal uncle and brother of prosecutrix were discharged from evidence on her application before the trial court. However, it was not stated in application for discharge that they have become hostile or were not forthcoming to support prosecution case. The prosecutrix filed divorce case after lodging of present F.I.R. before the family court which was decreed on 29.3.2018 on the ground of cruelty and allegations of committing unnatural non consensual sex against her by her husband were found to be established and said divorce decree was affirmed by High Court in appeal vide order dated 20.5.2019.

16. Learned counsel for respondent no. 2 submitted that this was second marriage of revisionist with victim, marriage with first wife Priyamvada was also dissolved by decree of divorce in which similar ground was taken by his first wife whereas revisionist who appeared as DW-3 before the trial court has stated that the complainant (PW-1) admitted in her statement dated 18.11.2012 at Mahila Thana that physical relations could not establish between him and respondent no. 2. She stayed with him for a short time during which she was suffering from Gallbladder stone which was operated and treated in the Apolo hospital and Excort hospital at Delhi for which revisionist had borne all expenses and he has filed copies of bank statement as Ex. kh-18 during his evidence as DW-3. The courts below have also accepted the contention of revisionist that he had taken insurance policy for ten years in the name of son and daughter of prosecutrix, who had born out of the wedlock with her previous husband and paid its premium. He planned for investment of 12 lakhs for her children. He also paid Rs. 81,300/- as school fee of her children and got admitted him in prestigious British school, Chandigarh and on these factual situation learned appellate court did not believe allegation and testimony of prosecutrix with regard to demand of dowry levelled against the revisionist. PW-1 the prosecutrix has stated in her examination in chief that accused husband slapped her once in first night of marriage and behaved with her in cruel manner. However, she stated in cross examination that she made a complaint at Mahila Thana, Ghaziabad in which her statement was recorded on 18.11.2012. She has not openly levelled allegations of commission of unnatural sex and marpeet against her husband in expectation that things will get right as compromise was on card between spouse.

Learned appellate court has observed on this count in the impugned Judgement that in absence cross examination on point of allegation of slapping levelled against the accused in the first night of marriage, the statement of PW-1 on this score is unrefuted therefore, commission of marpeet with the victim is proved. Learned appellate court has also observed that commission of unnatural sex like sodomy and oral sex with wife is marital wrong and cruelty committed by husband against wife therefore, slapping in the first night of marriage and commission of sodomy and oral sex by accused against the prosecutrix amounts to matrimonial cruelty and on that basis, charges under sections 323, 498-A, 377 IPC are proved against the accused.

17. Learned appellate court has also observed that although no injury was found in anal region of the prosecutrix at the time of her examination on 9.8.2013 at 8:30 pm by PW-6 Dr. Rajbala and non presence of spermatozoa in vaginal smear of the prosecutrix in pathological examination report. This fact is not proved that she was subjected to unnatural sex by accused on 9.8.2013 but on perusal of evidence on record, this fact is established that an attempt was made to commit unnatural sex with her on 9.8.2013. Five simple injuries were recorded by doctor on 10.8.2013 on the person of accused Sanjeev when he was arrested on 9.8.2013 and sent to jail custody, however, no mark of injury was found on examination of his male private part nor between his thigh. Even in absence of proof of sexual violence against the prosecutrix on 9.8.2013, this fact is proved that she was subjected to unnatural sex and oral sex between 23.7.2012 to 14.8.2012 by the accused upon the prosecutrix against her will at two places where they lived together after the marriage as testimony of PW-1 on this point is not subjected to cross examination by accused during her evidence before the court, even no suggestion has been given to her that accused had not inserted her male organ in her mouth.

18. The appellate court has also observed that after lapse of one year, the presence of any anal injury or absence of spermatozoa in vaginal smear of prosecutrix is a natural phenomena and on this reason, her testimony for charge under section 377 IPC cannot be disbelieved. Therefore, this fact is proved that accused had committed unnatural offence such as sodomy and oral sex against the prosecutrix without her consent and therefore, he is liable to be convicted and sentenced for that offence.

19. In the opinion of the trial court, fact is also proved by prosecution evidence that accused slapped the victim, his wife in the first night of marriage and caused simple injury to her, which is punishable under Section 323 IPC and accordingly sentenced him for that offence for six months simple imprisonment with fine of Rs. 500/-. Learned appellate court has also affirmed the conviction of revisionist for charge under section 498-A IPC with regard to causing matrimonial cruelty against the defacto complainant on the ground that he acted in cruel manner with his wife (PW-1) just after the marriage and committed unnatural sex like sodomy and oral sex (fellatio) with her without her consent and that amounts to marital wrong and matrimonial cruelty.

20. From perusal of record it also appears that complainant filed a divorce suit against the revisionist husband as divorce case under section 13(1) of Hindu Marriage Act on the ground of cruelty and decree of divorce was passed by learned Additional Sessions Judge/FTC, court no. 2, Ghaziabad in said divorce case on 29.3.2018 and the revisionist preferred first appeal against the said judgement and decree before this Court and it was dismissed by the Division Bench of this Court in First Appeal No. 296 of 2018 on 24.5.2019 and observed that;

> "we are in agreement with the view taken by the Karnataka High Court as referred in Grace Jayamani vs E.P. Peter, AIR 1982 Kant. 46 and Bini T. John vs Saji Kuruvila, AIR 1997 Ker. 217. Unnatural sex, sodomy, oral sex and sex against the order of the nature, against the wishes of a women or wife or anybody is not only a criminal offence but also a marital wrong and amounts to cruelty which is a good ground for dissolution of marriage. Any such thing which brings the wife to indignity and causes physical and mental agony and pain is cruelty. Forcible sex, unnatural or natural, is an illegal intrusion in the privacy of the wife and amounts to cruelty against her. It has been specifically stated by the respondent wife in her petition as well as in her affidavit filed in evidence that the appellant-husband was earlier married with one Priyamvada who for similar reasons divorced her. On this point, the appellant-husband has been cross-examined, but he has given evasive reply and has not clarified the facts. He could have filed judgment of that divorce case, which must have been in his knowledge, but the same was not filed by him. This fact also supports the respondent-wife, so far as allegations of unnatural sex is concerned."

21. In present case, the respondent no. 2 has taken consistent stand in her evidence that the revisionist committed non consensual

unnatural sex with her during her stay in private house between the period 23.7.2012 to 14.8.2012, therefore, learned appellate court took stand that inspite the fact that incident of committing unnatural sex and marpeet with victim on 9.8.2013 at her parental place by the accused is not proved, the evidence of prosecutrix with regard to commission of unnatural sex with her by accused prior to that date and after the marriage cannot be disbelieved. Decree of divorce has been granted to the respondent no. 2 on ground of matrimonial cruelty by husband and same has been affirmed by the appellate court also on the ground that revisionist was involved in commission of Marpeet (beating) and non consensual and unnatural sex with her which amounts to marital wrong and matrimonial cruelty.

22. Learned appellate court has addressed every factual and legal issues raised by accused side in appellate judgement and considered sympathetic and generous attitude of the revisionist towards situation of the complainant disbelieved the charge levelled against him regarding demand of dowry and acquitted him of that charge. Section 397/401 Cr.P.C. confers power of revision upon the High Court or Sessions Judge, which may call for and examine the records of any proceedings before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, object of the revisional jurisdiction unlike appellate jurisdiction is to confer a sort of supervisory power. The purpose is to rectify miscarriage of justice whether the substantial justice has been done is a main consideration. Revisional power is to be exercised in appropriate cases. Discretion in exercise of revisional jurisdiction should be exercised within four corners of Section 397 Cr.P.C., wherever there has been miscarriage of justice in any manner whatsoever. This revisional jurisdiction should not be invoked as a right. Revision is not a right but is only procedural facility given to a party whereas appeal is continuation of the proceedings. While considering the legality, propriety or correctness of a findings or a conclusion, normally the revising court does not dwell at length upon the facts and evidence of the case. A court in revision considers the material only to satisfy itself about the legality and propriety of the findings, sentence and order and refrains from substituting its own conclusion on an elaborate consideration of the evidence.

23. Hon'ble Supreme Court in **K. Chinnaswami Reddy vs. State of Andhar Pradesh, AIR 1962 SC 1788** observed that High Court has entered into the domain of reappraisal of evidence, which it was not authorized to do in exercise of revisional power. This is settled law that High Court in exercise of revisional jurisdiction against concurrent finding of conclusion on acquittal of an accused recorded by two courts below need not disturb the findings of fact recorded and affirmed by the courts below unless perversity is found therein.

24. Hon'ble Supreme Court in **Vinay Tyagi vs. Irshad (2013) 5 SCC 762** relying upon its earlier judgement in the case of Amit Kapoor vs. Ramesh Chander (2012) 9 SCC 329 held that normally, a revisional jurisdiction should not be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

25. In present case, prior to lodging of present F.I.R. by the complainant against the revisionist on 9.8.2013, a complaint case was filed by the accused against the present complainant and her relatives under Sections 406, 323, 420, 504, 506, 120-B IPC in which summoning order was passed against the complainant and her relatives prior to lodging of present F.I.R. and the revisionist was arrested in present F.I.R. on the day of its registration dated 9.8.2013 and on 10.8.2013 his medical examination was conducted in which visible injuries were found on his person. The complainant resided with him for a brief total period of 23 days after marriage and even during that period too she had undergoing treatment and operation for her kidney stone ailment in reputed hospitals and expenses thereof were borne by the revisionist husband. There is no medical evidence of the prosecutrix in support of charge under section 323, 377 IPC.

26. By these facts revisionist has tried to establish that he himself is a victim of high-handedness of complainant side and present F.I.R. is counterblast of said complaint case lodged by the accused against the complainant side. Much emphasis has also been taken by the accused on fact that in medical examination of victim, no internal or external injury was found on the person which falsifies the allegation of commission of unnatural sex with her by the revisionist.

27. Hon’ble Supreme Court in **Sucha Singh vs. State of Punjab, (2003) 7 SCC 643** held that even if major portion of evidence is found to be deficient, in case, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Falsity of particular material witness on material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. In the case this maxim is applied in all cases, it is to be feared that investigation of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

28. Therefore, I find no factual or legal error in finding of guilt recorded by the learned appellate court as regards charge under section 323, 498-A IPC is concerned in which impugned judgement of the trial court has been affirmed with some modification. However, this fact cannot be lost sight that Madhya Pradesh High Court has recently delivered an important judgement on maintainability of charge under Section 377 IPC against wife in the light of amendment made under section 375 IPC in the year 2013, Criminal Law (Amendment) Act, 2013 w.e.f. 3.2.2013 whereby definition of rape has been largely extended in the light of enactment of POCSO Act, 2012. In **Umang Singhar vs. State of MP and another,** M.Cr.C. No. 59600 of 2022 on 21.9.2023, wherein, respondent no. 2, petitioner, was charged for offence punishable under sections 294, 323, 376(2)(n), 377, 498-A, 506 IPC at the instance of his wife, respondent no. 2. Petition filed by the accused before the High Court under section 482 Cr.P.C. for quashing the F.I.R. on multiple grounds. The petition was challenged by the respondent on the ground that the act of the petitioner was not less than transgression of law and he deserves no interference by the High Court in the matter. The petitioner was a member of M.P. State Legislative Assembly and various allegation regarding matrimonial cruelty and commission of unnatural sex etc. were levelled by his wife against him in the F.I.R. and after

considering the submissions of both side in detailed, the High Court observed as under:-

> 12. Indeed, the primary argument of the learned counsel for the petitioner was that when Section 375 IPC defines 'rape' and also by way of amendment in 2013, Exception-2 has been provided which bespeaks that sexual intercourse or sexual acts by a man with his own wife is not a rape and therefore if any unnatural sex as defined under section 377 is committed by the husband with his wife, then it can also not be treated to be an offence. Secondarily, as per the learned counsel for the 12 petitioner, the impugned FIR is nothing but a malicious prosecution inasmuch as it has been lodged with intent to get ill-gotten gains by extorting money/property due to matrimonial discord between husband and wife; without disclosing any date, time and place of committing offence and also runs short of any explanation about the tardy complaint. Neither the allegations made against the petitioner are specific but are general and omnibus in nature, nor has it been succoured by any encouraging evidence. Thus, the petitioner's prosecution is apparently an abuse of process of law, which to secure the ends of justice, is liable to be annulled at the threshold. Tertiary, Shri Khandelwal argued that in the facts and circumstances of the case, vis-a-vis the existing legal position when Section 375 defines 'rape' specifying the offender and victim, and also the body parts which can be used for committing an offence, but repealing the said provision with regard to relation of husband and wife then doctrine of 'implied repeal' would also be applicable considering the unnatural offence.
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> 13. To fathom the depth of submissions made by the learned counsel for the petitioner, it is imperative to go-through the definition of 'rape', in that, for committing rape, as per Section 375(a), an offender is a 'man' who uses the part of the body - (a) Penis, as per Section 375(b) body-parts other than penis and 375(c) any other object. Simultaneously, the said definition describes - at the receiving end the body parts are (a) Vagina, (b) Urethra, (c) Anus, (d) Mouth and (e) other body parts. Considering the offence of Section 377 i.e. unnatural, although it is not well-equipped and offender is not defined therein but body parts are well defined, which are also included in Section 375 i.e. carnal intercourse against the order of nature. At this juncture, it is indispensable to see what is unnatural. The Supreme Court in a petition challenging the constitutionality of Section 377 IPC criminalizes 'carnal intercourse against the order of nature' which among other things has been interpreted to include oral and anal sex. Obviously, I find that Section 377 of IPC is not well-equipped. Unnatural offence has also not been defined anywhere. The five-judge bench of the Supreme Court in re **Navtej Singh Johar (supra)** testing the constitutionality of said provision although held that some parts of Section 377 are unconstitutional and finally held if unnatural offence is done with consent then offence of Section 377 IPC is not made out. The view of the Supreme Court if considered in the light of amended definition of Section 375 and the relationship for which exception provided for not taking consent i.e. between husband & wife and not making

offence of Section 376, the definition of rape as provided under Section 375 includes penetration of penis in the parts of the body i.e. vagina, urethra or anus of a woman, even though, the consent is not required then as to how between husband and wife any unnatural offence is made out. Apparently, there is repugnancy in these two situations in the light of definition of Section 375 and unnatural offence of Section 377. It is a settled principle of law that if the provisions of latter enactment are so inconsistent or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the latter. The Supreme Court in re **Dharangadhra Chemical Works** (supra) has observed as under:-

"10. It is true that repeal by implication is not ordinarily favoured by the courts but the principle on which the rule of implied repeal rests has been stated in Maxewell on Interpretation of Statutes (Twelfth Edition) at p.193 thus "If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the later (vide Kutner v. Phillips)."

In **Zaverbhai Amaldas v. State of Bombay [AIR 1954 SC 752]** this Cout has approved the above principle in the context of two pieces of legislation, namely, The Essential Supplies (Temporary Powers) Act, 1946 as attended by Act LTI of 1950 (a Central Act) and Bombay Act XXXVI of 1947 the provisions whereof in the context of enhanced punishment were repugnant to each other. The Court held that the question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under the Bombay Act and the Central Act constituted a single subject matter and in view of Article 254(1) of the Constitution Act LTI of 1950 (Central enactment) must prevail.,,,,"

14. Over and above, in re T. Barai (supra), the Supreme Court has observed as under:-

"25. It is settled both on authority and principle that when a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication. In Michell v. Brown Lord Campbell put the matter thus :

"It is well settled rule of construction that, if a later statute again describes an offence created by a former statute and affixes a different punishment, varying the procedure, the earlier statute is repealed by the later statute; see also Smith v. Benabo.

In Regina v. Youle, Martin, B. said in the oft-quoted passage :

"If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act."

The rule is however subject to the limitation contained in Art. 20(1) against ex post facto law providing for a greater punishment and has also no application where the offence described in the

later Act is not the same as in the earlier Act i.e. when the essential ingredients of the two offences are different."

15. The view taken by the Constitutional Bench of the Supreme Court in re **Navtej Singh Johar** (supra) observing that due to legislative changes, some of the offences of Section 377 have become redundant and held as under:-

"423 At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile– vaginal penetrative. It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment. Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14."

16. At this point, if the amended definition of Section 375 is seen, it is clear that two things are common in the offence of Section 375 and Section 377 firstly the relationship between whom offence is committed i.e. husband and wife and secondly consent between the offender and victim. As per the amended definition, if offender and victim are husband and wife then consent is immaterial and no offence under Section 375 is made out and as such there is no punishment under Section 376 of IPC. For offence of 377, as has been laid down by the Supreme Court in re **Navtej Singh Johar** (supra), if consent is there offence of Section 377 is not made out. At the same time, as per the definition of Section 375, the offender is classified as a 'man'. here in the present case is a 'husband' and victim is a 'woman' and here she is a 'wife' and parts of the body which are used for carnal intercourse are also common. The offence between husband and wife is not made out under Section 375 as per the repeal made by way of amendment and there is repugnancy in the situation when everything is repealed under Section 375 then how offence under Section 377 would be attracted if it is committed between husband and wife.

> 17. In other way, the unnatural offence has not been defined anywhere, but as has been considered by the Supreme Court in the case of **Navtej Singh Johar** (supra) that any intercourse, not for the purpose of procreation, is unnatural. But respectfully I find that when same act as per the definition of Section 375 is not an offence, then how it can be treated to be an offence under Section 377 IPC. In my opinion, the relationship between the husband and wife cannot be confined to their sexual relationship only for the purpose of procreation, but if anything is done between them apart from the deemed natural sexual intercourse should not be defined as 'unnatural'. Normally, sexual relationship between the husband and wife is the key to a happy connubial life and that cannot be restricted to the extent of sheer procreation. If anything raises their longing towards each other giving them pleasure and ascends their pleasure then it is nothing uncustomary and it can also not be considered to be unnatural that too when Section 375 IPC includes all possible parts of penetration of penis by a husband to his wife.
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> 18. ***Exempli gratia*** - if sexual intercourse for procreation via penile-vaginal penetrative intercourse is considered to be natural sex and sexual relations of husband and wife is confined to that extent then in case if any husband or wife is not capable of procreation, then seemingly their relationship would become useless, but it does not happen. The conjugal relationship between husband wife includes love that has intimacy, compassion and sacrifice, although it is difficult to understand the emotions of husband and wife who share intimate bond, but sexual pleasure is integral part of their relentless bonding with each other. Ergo, in my opinion, no barrier can be put in alpha and omega of sexual relationship between the husband and his wife. Thus, I find feasible that in view of amended definition of Section 375, offence of 18 377 between husband and wife has no place and as such it is not made out.

29. With above observation and giving due consideration to the various judgement of Hon'ble Supreme Court and recent judgement of High Court of Madhya Pradesh (supra) allowing the petition under section 482 Cr.P.C. and quashing the F.I.R. lodged against the petitioner for alleged offences including section 377 IPC which are relevant in present revision also, it can be observed that marital rape has not been criminalized in this country as yet. However, same petitions are pending for consideration before the Supreme Court for criminalizing marital rape, as currently there is no criminal penalty for marital rape when the wife is of or above 18 years of age. In those petitions exception -2 of section 375 IPC is challenged which provides that "sexual intercourse or sexual acts by a man with his own wife, not being under fifteen years of age is not a rape" (will now be read as eighteen years in the light of judgement of Supreme Court in Independent Thought.

30. The Hon'ble Apex Court in **Independent thought vs. Union of India (2017) 10 SCC 800 (decided on October 17, 2017)** held that a child is a person who is below 18 years of age under Section 3 of POCSO Act when a person forced in sexual activity which degrades the dignity of the girl child then that person would be liable for penetrative sexual assault but when a person is doing any sexual activity or sexual intercourse with a girl child who is below 18 years or his wife by that person, then that person would be liable for punishable to penetrative sexual assault under section 5 of POCSO Act.

31. The Apex Court in this case partially struck down exception 2 of Section 375 IPC with finding that a husband, who rapes his minor wife cannot be exempted from prosecution while exception 2 was challenged in that case in its entirety in the main petition. The scope of issue was subsequently limited to girl children aged between 15 to 18 years. The proviso is inconsistent with the provision of POCSO Act, which itself prevailed, therefore, according to Apex Court, exception 2 of section 375 IPC will be read as follows:-

> **"sexual intercourse or sexual acts by a man with his own wife not being under 18 years of age is not rape."**

32. It is further made clear that this judgement will have prospective effect. It is also clarified that Section 198(6) will apply to cases of rape, wives below 18 years and cognizance can be taken only in accordance with provision 198(6) of the Code. Hon'ble Court further held that exception 2 of Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down being arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India. Sexual intercourse between a man and his wife aged between 15 to 18 years is rape.

33. In present matter, case of commission of unnatural sex in the first night is not taken in the FIR and same is taken afterwards in divorce petition and in proceedings under the Domestic Violence Act. Medical evidence is not supportive of allegations of commission of unnatural sex. No medical examination of victim carried out with regard to allegations of commission of unnatural sex prior to 9.8.2013 whereas she has stated in her evidence that she was subjected to sodomy and oral sex during period 23.7.2012 to 14.8.2012 by her husband.

34. Thus, on perusal of aforesaid judgement also it appears that protection of a person from marital rape still continues in the case where wife is of 18 years of age or more than that. Ingredients of unnatural sex, comprised under Section 377 IPC are included in Section 375 (a) IPC as observed by the High Court of Madhya Pradesh in above case. In proposed Bhartiya Nyay Sanhita which is likely to replace I.P.C., no provision like Section 377 IPC is included therein. The charge of committing matrimonial cruelty against the revisionist is proved in this case and same is corroborated by findings of family court while decreeing the divorce petition and this court in appeal while affirming decree of divorce against the revisionist.

35. On the basis of foregoing discussion, totality of facts and circumstances of the case, evidence on record and judgement of Madhya Pradesh High Court, revisionist is liable to be acquitted of charge under section 377 IPC. However, his conviction and sentence for charge under section 498-A, 323 IPC as recorded by the courts below is affirmed. Consequently, his conviction and sentence as recorded by the courts below for charge under section 377 IPC is set aside. He is acquitted of charge under section 377 IPC.

36. Keeping in view totality of facts and circumstances of the case, situation of accused appellant, some allegations made by the complainant being not proved as stated in appellate judgement, sentence under sections 498-A, 323 IPC is reduced to period already undergone. Revisionist has already undergone sentence awarded for charge under section 323 IPC, therefore, he is liable to be released from jail after depositing amount of fine for charge under sections 498-A, 323 IPC or suffering default sentence, as the case may be. In case of failure to deposit the amount he will serve default sentence for these offence in accordance with law.

37. The instant revision is partly **allowed** accordingly.

38. The revisionist will be released from jail custody in accordance with law in terms of this judgement, if he is not wanted in any other case.

39. Let a copy of this order be forwarded to C.J.M., Ghaziabad for intimation to jail authority for compliance.

Order Date :- 06.12.2023
Dhirendra/