

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 24.04.2007

+ **CRL.REV.P.311/2005**

PANKAJ MALHOTRA ... Petitioner

- versus -

**THE STATE OF NCT OF DELHI
& ANOTHER.** ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr R.N. Mittal Sr Advocate with Mr Puneet Mittal and Mr
Dharmendra Arya .
For the Respondent/State : Mr V.K.Malik.
For the Complainant : Mr K.K.Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed
to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. This Revision Petition is directed against the order of charge dated 21.3.2005 and charge framed on that date itself by the learned Additional Sessions Judge, New Delhi.

2. The charges framed against the petitioner are as under:-

- “1. That during the period 4.4.2002 till 31.3.2003, at L-78—B, Janta Flats, Saket, New Delhi, you committed rape upon Indu D/O Lt. Shri N.L.

Pasrija, to wit you had had sexual intercourse with Indu without her consent or with her consent obtained on misconception of fact that you were her legally wedded husband and you, thereby committed an offence u/s 376 IPC and within my cognizance.

2. Secondly, that during the period 4.4.2002 till 31.3.2003, at L-78 B, Janta Flats, Saket, New Delhi, you above named accused, deceitfully caused a woman named Indu D/o Lt. Shri N.L. Pasrija, who you accused Pankaj Malhotra had divorced, to believe that she was married to you accused and in that belief to cohabit with you accused Pankaj Malhora or have sexual intercourse with you accused Pankaj Malhotra and that you thereby committed an offence punishable under section 493 IPC and within my cognizance.
3. And I hereby direct you to be tried by this court of Session of the said charge.”

3. The prosecution case is that the petitioner married the complainant (Indu) on 4.10.1997 and they lived together till March, 2001. It is alleged that in March, 2001, the complainant Indu made a complaint against the petitioner in the Crime against Women Cell. Subsequently, they started living together till 31.3.2003. It is further alleged that the petitioner continued to stay with the complainant except whenever he used to go out for the purpose of his business and the complainant claimed that she continued to cohabit with the petitioner till 31.3.2003. It is alleged that in the morning of 31.3.2003, the

complainant (Indu) was shocked when 9-10 persons knocked at the door with a lady named Pooja who claimed that the petitioner had been illegally living with the complainant (Indu) because, according to them, on 9.12.2002 the said Pooja got married with the petitioner and that the petitioner had already divorced the complainant (Indu). Apparently, an ex parte divorce order had been obtained by the petitioner on 4.4.2002 in respect of the marriage with Indu. It is alleged that the complainant (Indu) was unaware of the ex parte proceedings and did not know of the alleged divorce. It is further alleged that the petitioner had sexual intercourse with the complainant (Indu) and she consented to the same being under the impression that she was lawfully married to the petitioner and that their marriage subsisted. It is the case of the prosecution that the petitioner obtained the ex parte divorce by subterfuge; he did not inform the complainant (Indu) of this divorce proceedings or the ex parte order passed on 4.4.2002 but continued to have sexual intercourse with her as she was under the misconception that their marriage subsisted. It is, therefore, alleged by the prosecution that the petitioner has committed rape. The second allegation is of having committed an offence under Section 493 IPC.

3. After the registration of the FIR No 363/2003 under Section 376/493 IPC at Police Station Malviya Nagar on 5.5.2003 on the basis of the statement made by the complainant (Indu), the petitioner was arrested by the police on that date itself. Subsequently, after about two months i.e. on 5.7.2003, the petitioner was ordered to be released on bail by the learned Additional Sessions Judge. After completion of investigation the Investigating Agency submitted the charge sheet. Thereafter, by the impugned order dated 21.3.2005 the learned Additional Sessions Judge framed the charges mentioned above.

4. It was submitted by Mr R.N. Mittal, the learned senior counsel appearing on behalf of the petitioner that the complainant was aware of the divorce proceedings and the process server had affected service of summons on her. Mr Mittal referred to the provisions of Section 375 and 376 IPC. He then submitted that Chapter XX of the Indian Penal Code refers to offences relating to marriage. Section 493 IPC falls under that Chapter and pertains to the offence of cohabitation caused by a man deceitfully inducing a belief of lawful marriage. He also referred to Section 198 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code”) to indicate that no Court can take

cognizance of an offence punishable under Chapter XX of the Indian Penal Code, 1860 except upon a complaint made by some persons aggrieved by the offence. He submitted that at best the petitioner could be charged with an offence under Section 493 IPC and the cognizance of the same can only be taken upon a complaint made by a person aggrieved and not on the basis of an FIR. Mr Mittal also referred to the provisions of Section 90 IPC to explain the concept of consent given under misconception. With reference to this provision, he submitted that a consent is not such a consent as is intended by any Section of the IPC, if the consent is given by a person, *inter alia*, under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consonance of such misconception. Mr Mittal submitted that the divorce proceedings were well known to the complainant (Indu) and, therefore, there was no misconception of fact on her part and, therefore, the case would not fall within the parameters of rape as indicated in Section 375 IPC and particularly, in the second description therein.

5. Mr Mittal then referred to the bail order passed by the learned Additional Sessions Judge on 5.7.2003. This order was referred to by

him to attempt to demonstrate that the summons in the divorce petition filed by the petitioner in the family court in Jaipur against the complainant (Indu) had been duly served upon her and that she had notice of the divorce petition but did not choose to appear before the said Court. In the said bail order, it is recorded that the process server, in his statement recorded before the Court had specifically stated that he personally went to the complainant (Indu) and delivered a copy of the summons to her. It is also noted that it was specifically mentioned in the summons itself that a copy of the divorce petition was enclosed with the summons. Based on this, the learned Additional Sessions Judge came to the conclusion that the prima facie inference that can be drawn is that the complainant had notice of the divorce petition filed against her at Jaipur. The learned Additional Sessions Judge noted that the divorce petition was filed on 25.9.2001 and the decree had been granted on 4.4.2002. The complainant had allegedly gone in for abortion on 31.12.2001 and that therefore, *prima facie*, at the time of the alleged pregnancy and termination thereof, the marriage between the petitioner and the complainant had not been dissolved. The learned Additional Sessions Judge considered the evidence of the process server that he had personally served the summons on the complainant as a vital

circumstance to indicate that the complainant had notice of the divorce proceedings but she did not choose to contest the same. It is also noted in the said bail order that no application for setting aside the ex parte decree had also been filed till date. Considering these circumstances, amongst others, bail was granted to the petitioner on 5.7.2003.

6. Mr Mittal also referred to the record of the proceedings made by the ACP at the Crime against Women Cell wherein it is indicated that the complainant was well aware of the decree of divorce given by the Jaipur Court but she had the hope that her husband would return to her. However, on 31.3.2003 when the fact was disclosed to her that the petitioner had already married another lady all her hopes disappeared.

7. Mr Mittal referred to a copy of the purported statement of the complainant recorded under Section 161 where, she, on being confronted with a notice for appearance in the divorce case which had been purportedly received by her and signed by her, has apparently admitted that the signatures and writing are hers. However, she concluded the statement by stating that she did not remember as to whether she ever received such a notice and that it is possible that the petitioner took her

in good faith and by showing her some other papers took her signatures and that, that is why she had not gone to the Court at Jaipur.

8. In this matter arguments were heard on 28.2.2006 and it had been listed for orders on 28.8.2006. In the meanwhile, however, the complainant filed an application being Crl. M.A. 8848/2006 for taking on record certain additional documents. On 28.8.2006 this Court noted that although the application had been filed after arguments have been heard and orders have been reserved, in the interest of justice, so that no papers which are necessary are overlooked, the application was entertained and, therefore, the matter was listed for further arguments thereafter.

9. According to Mr Mittal, the documents filed by the complainant, in fact, support his case. He referred to Annexure “B” which is a copy of the notice purportedly served on the complainant. The notice, according to Mr Mittal, showed that the same was received by Indu Malhotra. Her signatures are indicated on the said notice as also the date of 05-11-2001. So also the address “L-78B DDA Flat, Saket, ND”. Mr Mittal then referred to Annexure “K” (copy of Inquiry Report by the

Civil Judge Delhi) wherein the following was noted as under:-

“11. Charged Official has been unable to explain how this word Saket has been inserted or has found it is place on summons when it is neither on the plaint nor at any other place in the proceedings before Ld HMA Court the address with word “Saket” is not included in decree, hence, the possibility of word “Saket having been added in court at Jaipur is also ruled out. It is not the case of the charged official that summons have been issued with address containing the word Saket from Jaipur Court. The charged official has been unable to establish that he went to serve the summons on the given address and served it to the Mrs. Indu Malhotra, as claimed by him. He has claimed that there was a lady and a child but subsequently said that there was no child and he also could not recognize the lady. He has also admitted that he does not know who has marked the summons to him. It is clear from evidence of Mr. S.K. Jha Naib Nazir, that the summons were not marked as per rule to the charged official by any Nazir. In view of the evidence in the case it can be safely inferred that the charged official has marked the summons in his own name and has manipulated the service of summons received from the Jaipur Court with incomplete address and has prepared a false report.

In view of above discussion and in view of facts and circumstances, it is clear that charges against the charged official are proved by preponderance of probability. Let report be sent to Ld. District & Sessions Judge, Delhi, for appropriate action.”

Referring to the above paragraph Mr Mittal submitted that although the process server who had allegedly served the summons on the complainant, had been found guilty of the charge of having interpolated

the word “Saket” on the address portion of the summons, this did not detract from the position that the summons were actually served on the complainant (Indu). He submitted that the issue here is not so much with regard to the irregularity of the process server’s conduct but the question of receipt of the summons. The summons itself shows the signatures of the complainant as well as the address given as “Saket”.

10. Mr Mittal also referred to the ex parte order and decree dated 4.4.2002 passed by the Family Court in Jaipur. He pointed out the portion of the order where it is recorded that despite service the complainant was not present and, therefore, the matter was heard ex parte. He submitted that this is a finding recorded by a competent Court and it had not been challenged. Therefore, it is clear that the complainant had knowledge about the divorce proceedings as also of the ex parte decree.

11. The Complainant’s counsel was also heard. He submitted that the petitioner’s deceitful conduct is apparent from the fact that he did not want the complainant to know that the divorce petition had been filed in the Family Court at Jaipur. According to him, this would be clear from

examining the Cause Title and Memo of Parties of the application made before that Court. Annexure “A” of the documents is a copy of the said application and it is pointed out by the learned counsel for the complainant that the word “Saket” is not mentioned in the address given in the Cause Title.

12. The counsel for the complainant further submitted that on 25.9.2001 the petitioner filed a divorce petition but he did not disclose this fact to the complainant. The very next day on 26.9.2001 the petitioner and the complainant applied for admission of their son in School. Two days latter, on 28.9.2001 the petitioner applied for a ration card indicating his family as himself, his wife (Indu Malhotra) and the son and giving the Saket address as his address. In the divorce petition the petitioner had submitted that he lived with the complainant for six months in Jaipur whereas according to the learned counsel for the complainant, she could not have lived in Jaipur for six months as she was a Government Servant and there was no record of leave during that period. Annexure “T” to the said application purports to be a copy of the leave record of the complainant which does not indicate that she was on leave for six months.

13. The learned counsel for the complainant also submits that before the Family Court at Jaipur, the petitioner had stated that he had no physical relations with the complainant after the birth of their child. The son was born in 1998 and, therefore, according to the petitioner, he did not have any physical relations with the wife (Indu Malhotra) after 1998. The learned counsel for the complainant submits that this statement is a blatant lie because admittedly, the complainant (Indu Malhotra) underwent an abortion in the year 2001. The abortion was consented to by the petitioner by signing on the consent form, a copy whereof is also on record. It is to be noted that the address given by the petitioner is L-78B, Saket. The medical termination of pregnancy of the complainant was done on 31.12.2001. According to the learned counsel for the petitioner, this consent by the petitioner, as the husband of the complainant, was given after the alleged service of summons on 5.11.2001. All these circumstances, according to the counsel for the complainant, go to show that the petitioner never wanted the complainant to know about the divorce proceedings. The petitioner even went to the extent of correcting the address on the divorce proceedings from “LIC” to “LIG” but consciously did not mention “Saket”.

14. Mr Malik the learned counsel who appeared on behalf of the State supported the order on Charge entirely. He submitted that the petitioner came to know of the deceit of the petitioner only when the other lady, Puja informed her on 31.3.2003. He submitted that it would be interesting to note that the petitioner married Puja on 9.12.2002 and just two days latter, on 11.12.2002 Puja was also left by the petitioner. She, thereafter, informed the complainant of her marriage with the petitioner on 31.3.2003 and immediately, thereafter, the complaint was lodged by the complainant on 1.4.2003 and the FIR was registered on 4.4.2003. With regard to the question as to why the divorce decree had not been challenged, the counsel for the complainant as well as the counsel for the State submitted that it was not challenged because the complainant did not want to live with the petitioner at all because of his conduct. But the non-challenge of the divorce decree does not mean that the petitioner should go scot-free even though he committed the crime.

15. I have given my thoughtful consideration to the submissions made by the counsel for the parties. It was vehemently argued by Mr Mittal on behalf of the petitioner that the offence of rape under Section

375 IPC was not made out at all. However, to my mind, the entire issue hinges upon the question as to whether the complainant had knowledge of the divorce proceedings. That is a hotly contested issue. If it can be established that the complainant had knowledge of the divorce proceedings then, perhaps the defence would be in a position to demonstrate that the complainant had consented. However, if it is established that the complainant did not have any knowledge of the divorce proceedings and the divorce decree and that she continued to have relations with the petitioner in the belief that she was married to him, then, the prosecution may be in a position to show that her consent amounted to a consent under a misconception of fact and was, therefore, no consent at all.

16. I do not want to dwell any further on this issue as that may have a bearing on the trial of the case. At this stage, this Court is only concerned with the question of the charge that has been framed. It is apparent that evidence would be necessary to establish as to whether the complainant had or did not have the knowledge of the divorce proceedings and the divorce decree prior to 31.3.2003. In the absence of evidence and a finding which can only be returned in the course of the

trial, it would not be possible for this Court to discharge the petitioner from the charge of having committed an offence punishable under Section 376 IPC. As regards the second charge under Section 493 IPC, I am of the view that the same also does not call for any interference, in view of the provisions of Section 221 of the Code.

17. Accordingly, this revision petition is dismissed. All observations made in this order are only for the purpose of considering the question of charge and shall not be used to the prejudice of any party at the time of trial of the case.

April 24, 2007
J

BADAR DURREZ AHMED
(JUDGE)