

Delhi District Court

State vs . Pankaj Malhotra on 3 June, 2014

Author: Sh. Yogesh Khanna

IN THE COURT OF SHRI YOGESH KHANNA,
ADDITIONAL SESSIONS JUDGE - SPECIAL FAST TRACK
COURT : SAKET COURTS: NEW DELHI.

Unique ID No. 02403R0096062004
SC No. : 13/2013
FIR No. : 363/2003
U/s. : 376/493 IPC
PS : Malviya Nagar, New Delhi.

State
(Govt. of NCT of Delhi)

..... Complainant.

Versus

Pankaj Malhotra
S/o Shri Kishan Lal Malhotra
R/o House No. 52-B,
Vijay Mandal Enclave,
New Delhi.

.....Accused person.

Date of Institution : 05-01-2013
Judgment reserved for orders on : 19-5-2014
Date of pronouncement : 3-6-2014

JUDGMENT

1. This case is initiated by the prosecutrix, the wife of the accused, as she filed a complaint Ex.PW2/B to the SHO, Saket Chowki, Saket, New Delhi on 5-5-2003 stating, inter alia, that :

"I was married with Shri Pankaj Malhotra S/o Shri K.L Malhotra on 4-10-1997. I was SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

living a happy life with Shri Pankaj Malhotra at 52-B Vijay Mandal Enclave, Near Kalu Sarai, New Delhi. In March, 2001 there has been some undue demands by my in-laws which we could not meet, though met to small extent within our means, as is mentioned in my application to CAW Cell. After separation from his parents in March 2001 we have been living at L-78-B, Janta Flats, Saket till 31-3-2003. Pankaj continued to stay with me except for the period he was out of station for business purposes. He continued to cohabit / had intercourse with me even till 31-3-2003. In the morning of 31-3-2003 at about 6:30 am or so I had an unbearable shock when 9 to 10 person knocked at our door and a lady by the name Pooja came and alleged that I am living illegally with her husband Pankaj, with whom she had married on 9-12-2012, after my husband had obtained divorce from me.

Pankaj had obtained an ex-parte decree on 4-4-2002 from the court at Jaipur without my knowledge. The intercourse with Pankaj during the period he had filed the divorce case at Jaipur, was without my consent as SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

I was under impression that he is my lawfully married husband and it was during subsistence of my marriage. I humbly submit that the cohabitation / intercourse by Pankaj Malhotra was not legal as he was well aware of the fact that he is not my husband and that I had given the consent for such intercourse because I continue to believe that he is the man to whom I was lawfully married with and that the intercourse by accused amounts to rape on me and he is liable for criminal consequences in the eyes of law.

In view of this you are requested to register the case and take appropriate action as may deem fit."

2. On the basis of the above complaint and after seeking legal opinion, the case FIR No. 363/2003 at P.S Malviya Nagar was registered under sections 376/493 IPC. The accused was arrested during investigation of this case. Chargesheet was filed.

3. Since it was a Session's triable case, it was committed to this court. On 21-03-2005, a charge under SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

sections 376/493 IPC was framed against the accused. He pleaded not guilty and claimed trial.

4. The prosecution examined as many as 16 witnesses.

Before proceeding further, let me state in brief the depositions made by the prosecution witnesses.

PW1 Shri Anil Kumar Gulati, a neighbour of the complainant at Saket, deposed that on 31-3-2003 at about 6:45/7 AM while he was going to Gurudwara, Malviya Nagar, New Delhi he saw a lady along with some person standing outside the house of accused and a quarrel was going on between the accused and the prosecutrix on one hand and with above mentioned person on the other hand. The said lady was agitating that accused Pankaj had married with her and that PW1 then told the father of the said lady that accused is a married man. PW1 further deposed that accused had informed him earlier that he runs a business at Jaipur and visit there quite often.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

PW2, the prosecutrix, deposed that she was married to accused on 4-10-1997 and was leading a normal life with accused and his parents at house no. 52-B, Vijay Mandal Enclave, near Kalu Sarai, New Delhi. In the month of March, 2001 she had a dispute with the parents of the accused and she started living separately with her husband and son Rajat at House NO. L-78-B, Saket, New Delhi. Accused used to go for his business tours to Jaipur and to some other places.

On 31-3-2003 at about 6 AM / 6:30 AM two ladies knocked her door and as she opened the door many people entered her house. They inquired about accused and told her that accused has married with one Pooja who had also come with them. PW2 started weeping in disbelief. Those person called the parents of the prosecutrix and the police. Accused became aggressive and started threatening and abusing PW2 as well as Pooja. All the person alongwith parents of PW2 went to P.P Saket where the accused revealed that he had divorced SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

the prosecutrix and was having some dispute with Pooja. The accused had shown the Investigating Officer an exparte decree of divorce from PW2, he had obtained from the court of Jaipur. The prosecutrix was advised to move to the Women Cell.

On 1-4-2003 she went to Women Cell and filed there a complaint Ex.PW2/A. On 4-4-2003 she made a complaint Ex.PW2/B to PP Saket stating, inter alia, that accused resided with her till 31-3-2003 as her husband despite obtaining an exprate decree of divorce on dated 4-4-2002 and despite being married to Ms. Pooja on 7th or 9th December, 2002 and that she was never in the knowledge of the said exprate decree of divorce or of the marriage of accused with Ms. Pooja. PW2 rather deposed that accused cohabited with her and had lived with her as her husband between April, 2002 to 31-3-2003.

Since PW2 was deviating from her previous statement so she was cross examined by the Ld. Additional Public Prosecutor and she deposed that SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

accused Pankaj Malhotra was working as an Interior Designer and that on 31-12-2001 she was pregnant of seven weeks and four days but accused made her abort in Geetanjali Hospital in Geetanjali Enclave. She admitted that after 31-3-2003 accused had stopped residing with her and that she went to her parents house. She proved the certified copy of the decree of divorce, seized by the Investigating Officer vide memo Ex.PW2/C. She admitted her signatures at point A on the divorce papers Ex.PW2/D but deposed that she had not signed any paper in respect of any divorce case and she knew nothing about the decree of divorce till 31-3-2003 and that accused had betrayed her and had fraudulently obtained the ex-parte decree of divorce. She also admitted that on 20-6-2003 the Investigating Officer had shown her a notice issued by Family Court, Jaipur in a case "Pankaj Malhotra v. Indu Malhotra" for her appearance on 21-12-2001 and she admitted that the notice bear her signatures and handwriting but she did not remember SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

if she had received any notice or may be the accused had taken her signatures in a good faith telling her that the same are required for some other purpose. She never visited the Jaipur Court. She also handed over to the investigating offier, the admission form(s) of her son in "Amity International School", Saket, APJ School and "Tender Years School" bearing her and accused's signatures as parents. Photocopy of abovesaid forms were seized vide memo Ex.PW2/E and the said forms are collectively proved as Ex.PW2/F. She reiterated that accused had sexual intercourse with her till 31-3-2003 knowing fully well that he had obtained an exparte decree of divorce against her and that

he was no more her husband and whereas she was under the impression that accused was still her husband as she never knew about the exparte divorce decree. She had also collected the papers in respect of her abortion from Geetanjali Hospital and same are marked as Mark PW2/A.

During her cross examination SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

she deposed that she had filed this complaint Ex.PW2/B during the pendency of an inquiry before CAW Cell. She further deposed that the inquiry did not proceed at CAW Cell as the FIR has been registered. She denied that CAW Cell came to any prima facie conclusion that no case is made out or that she was aware of the divorce proceedings or despite she received a notice of divorce petition she was willingly to reside with her husband with a hope that her relationship may resume. She admitted the notice Ex.PW2/DB of the proceedings at Family Court at Jaipur, addressed to her, for dated 21-12-2001 bear her signature and endorsement of receipt of dated 5-11-2001 at point B but denied that she was ever served with a copy of the said notice or that she had ever gone to the Family Court at Jaipur or had unofficially tried to get the copies of the case or that on refusal of the staff she even quarreled with the staff.

PW2 further denied that she ever met Pooja prior to 31-3-2003 or that Pooja ever verified the factum of SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

divorce between accused and PW2, prior to her marriage to which she had answered in affirmative. She was not aware if any affidavit containing the above said averments was filed by Pooja in the Family Court at Jaipur. She deposed that she may have sent SMS to the accused on his mobile no.

9868128417 from her mobile number probably 9811612941 on 29-7-2002 at 21:54 hours "I hate you very much", which she do not remember but denied that she ever sent any message on 8-8-2002 at 6:25 hours saying "I know U r marrying again. I hate you, don't try to meet RAJAT u have no rights on him now" or another message on 5-9-2002 saying that "I am alone. I hate U".

She admitted that she never filed any petition challenging the exparte decree of divorce dated 4-4-2002 Ex.PW2/D which records that she has been served and was deliberately not appearing.

PW2 denied that she had called the accused to come to her house in the early morning of SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

31-3-2003 and she had also given this information to Ms. Pooja and her relatives and as the accused came to her house in a three wheeler scooter, she along with Ms. Pooja and her relatives created a scene.

PW2 denied that on 15-7-1999 she left her newly born child with the accused without informing the accused or that accused made a complaint at P.S Malviya Nagar, New Delhi and that due to intervention of the police and the relatives she returned to her matrimonial home. She denied that she ever suggested for a mutual divorce or that she had got drafted a petition under section 13-B(2)

H.M. Act in January, 2001 or that she and accused both had signed the same. She rather stated that accused used to take her signatures on blank papers on the pretext that these are for admission of child. She denied that on 31-12-2001 she had voluntarily got her pregnancy terminated, as she had received a notice on 05.11.2001 for divorce from the Family Court, Jaipur. She denied that accused was not living with her or SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

ever cohabited with her on or after 5-11-2001 or that the accused only used to pay the fee, maintenance of the child and the rent of the house where she was residing or that she willingly cohabited with him for hope of reconciliation.

PW3 Ms. Pooja deposed that on 9-12-2002 she was married to accused at Umang Palace, Janakpuri, Delhi, as per Hindu rites and customs and then she went to Jaipur, Rajasthan. On 11-12-2002 she was left by accused at her parents house and he told that he would take her to the matrimonial home after a week but did not turn up. She made inquiries and came to know that accused is still residing with his first wife and a child in Saket. She then with her mother and relatives came to the house of accused and saw him and the prosecutrix living together. On seeing her, the accused started abusing her and hence she lodged a police report at P.P Saket and also made a complaint at CAW Cell, Kirti Nagar, Delhi.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

She was confronted with her previous statement Ex.PW3/A wherein she had stated before police that she was married to accused on 9-12-2002 and that the accused had told her that he was married to the prosecutrix but as the prosecutrix was mentally disturbed, he had obtained divorce from her and that the said divorce document was shown to her by the accused.

Accused did not take her to his house after marriage and on inquiry she came to know that the prosecutrix, his first wife, was not mentally disturbed. PW3 was never told about the child of accused and that on 31-3-2002 she caught accused with the prosecutrix at his house no. L-78-B, Saket, New Delhi. She gave three photographs Ex.PW3/1 to Ex.PW3/3 of her marriage, seized vide memo Ex.PW3/B.

During her cross examination she deposed that she never met the prosecutrix to ever verify if the prosecutrix had got divorce from the accused. However, she admitted the document Ex.PW3/DA, an affidavit dated 10-1-2005, wherein in para no. 2 SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

she mentions that she had met the prosecutrix prior to her marriage for verifying if the prosecutrix has been divorced or that she had filed cases against the accused only at the instance of his first wife, the prosecutrix. PW3 admitted that she had not taken divorce from the competent court of law from her earlier husband and that she has been facing criminal complaint under section 495/120-B IPC at Jaipur, filed by accused.

PW4 Dr. Manju Khemani deposed that in the year 2003 she was working as a doctor in Geetanjali Hospital at MMTC Colony, New Delhi and that accused along with the prosecutrix, his wife, used to visit her clinic in respect of her pregnancy and that they also came to her clinic for abortion as they told her that they do not want second issue as their elder child was very small. She terminated the pregnancy of the prosecutrix. During investigation the police seized the documents of abortion vide memo SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

Ex.PW4/A and the documents are Ex.PW4/1 to Ex.PW4/8. She admitted that no date is mentioned in consent form Ex.PW4/8.

PW5 Shri Anil Tiwari knew the accused and the prosecutrix for the last about 5 years as they used to visit his house to leave their son Rajat Malhotra and they both were living as husband and wife. They used to attend functions at his house whenever they were invited and lastly in the month of February, 2003 the accused and the prosecutrix had attended a function in his house, as husband and wife.

During cross examination he deposed that his wife is running a crèche in their house and that he had visited the house of accused and the prosecutrix for about 30 to 40 times till 2003 and that sometime only the prosecutrix and sometime both were found present in the house and that sometimes the prosecutrix and sometime the accused used to bring their child to the crèche. He further deposed that accused and PW2 might SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

have attended about 10 to 15 functions in his house and they used to come together many times.

PW6 Shri Laxmanpuri Goswami, UDC, Family Court no. 1, Jaipur, Rajasthan had brought the summoned record viz., the original case file (judicial file) consisting of a copy of the petition of HMA No. 13-326/2001 captioned as "Pankaj Malhotra v. Smt Indu Malhotra" under section 13 of Hindu Marriage Act. The copy of the petition is Ex.PW6/A ; the affidavit attached to the petition is Ex.PW6/B. Further the judgment dated 4-4-2002 of the Ld. Family Court No. 1, Jaipur ; the statement of the accused and of the witness is duly signed by the judge and that the orders sheets w.e.f. 30-10-2001 to 4-4-2002 of the Judge, Family Court no. 1, Jaipur running into 22 pages, are collectively proved as Ex.PW6/A.

During his cross examination he admitted that the summons are always issued along with a copy of the petition and were sent to the Ld. District & Sessions Judge, Tis Hazari Courts, Delhi SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

as there is an endorsement in this regard. The summons in this case were received on 5-11-2001 by the prosecutrix as were issued in her name. The summons were issued for dated 21-12-2001 and due to the non-

appearance of the prosecutrix, she was proceeded exparte on the said date.

PW6 also proved the judgment Ex.PW2/D and the summons on the judicial file as Ex.PW2/DB.

PW7 Shri Manoj Kumar Chawla deposed that in the month of March, 2003, the accused along with prosecutrix used to reside in house no. L-78/B, Saket, New Delhi as a tenant. He further deposed that sometimes the accused used to go out of station and whenever he was late he used to telephone at the house of PW7 asking him to inform his wife, the prosecutrix. On 31-3-2003 he came to know that accused had another wife and she had come along with her family members in their colony.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

PW8 Shri Surjeet Singh Batra deposed that his mother-in-law is the GPA holder of his flat no. 78-B, L-Block, Janta Flats, Saket, New Delhi, but he looks after the maintenance of the said flat. The said flat was let out to the accused in April, 2001 and accused used to live there with his wife and a son and that he had met accused in this flat in April, 2001, He used to collect rent from the accused and that the accused came to his house in February, 2003 to pay rent amount but the flat was vacated in April, 2003. The rent due after February, 2003 was paid by the brother of the prosecutrix with the electricity charges. He came to know that accused had married someone else in Jaipur.

PW9 SI Sushil Kumar deposed that he was Incharge, Police Post Saket, P.S Malviya Nagar, New Delhi. He received a complaint Ex.PW2/B from the prosecutrix and he sought legal opinion vide endorsement Ex.PW9/A from the prosecution branch. He obtained opinion Ex.PW9/B. On SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

5-5-2003 the FIR was registered, carbon copy of which is Ex.PW9/C. He made endorsement Ex.PW9/D on the complaint Ex.PW2/B and went to the house of accused at Vijay Mandal Enclave, Malviya Nagar to make inquiries. Accused was brought to the P.S and was arrested vide memo Ex.PW9/E and his personal search was conducted vide memo Ex.PW9/F.

On 6-5-2003 the complainant, his wife along with her family members came to P.P Saket and she produced a certified copy of divorce petition Ex.PW9/G, seized vide memo Ex.PW2/C. The accused was also got medically examined vide MLC Ex.PW9/H and the casualty card is Ex.PW9/J. He also moved an application Ex.PW9/K for medical examination of the prosecutrix and her MLC is Ex.PW9/L. The casualty card of the prosecutrix is Ex.PW9/M.

On 12-5-2003 he went to Gitanjali Hospital, Gitanjali Enclave, Delhi and seized 8 papers viz., Ex.PW4/1 to Ex.PW4/8, regarding medical termination of pregnancy of the SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

prosecutrix,	seized	vide	memo
Ex.PW4/A.	On	18-5-2003	Pooja

Malhotra, the second wife of accused produced three photographs Ex.PW3/1 to Ex.PW3/3 of her marriage, seized vide memo Ex.PW3/B. On 26-5-2003 he went to Jaipur but on 3-6-2003 further investigation was handed over to SI Jatan Singh.

PW10 Ct. Raj Kumar on 5-5-2003 at about 9 PM had joined the investigation and that he along with Investigating Officer had gone to the house of accused at Vijay Mandal Enclave, Malviya Nagar, New Delhi, where accused was arrested and his personal search was conducted. He is also a witness of seizure of divorce papers vide memo Ex.PW2/C.

PW11 HC Sultan Singh on 31.03.2003 had prepared Kalandara Ex.PW11/A under section 107/151 Cr.P.C against the accused ; the original kalandara has been destroyed vide order dated 3-10-2005 Ex.PW11/B of the DCP.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

PW12 Shri Ajeet Bansal, on 19-6-2003, was a Manager at Arya Niwas Hotel, Sansar Chand Road, Jaipur, proved a letter Ex.PW12/A dated 19-6-2003 regarding stay of accused in his hotel from June, 2000 to December, 2000 and as per his record the residential address of the accused was 52-B, Vijay Mandal Enclave, New Delhi. He also brought the original guest register for the period from 2000 to 2001 and proved the relevant entries of accused staying in his hotel as Ex.PW12/B to Ex.PW12/E. He also brought the original guest register to prove his stay and the relevant page is Ex.PW12/F.

PW13 Dr. Adarsh Kumar, Professor, AIIMS had proved the MLC Ex.PW9/H of accused qua the sexual potency of accused.

PW14 SI Jatan Singh recorded the statement of witnesses ; proved certificate Ex.PW12/A ; related documents Ex.PW12/B to Ex.PW12/F regarding the stay of accused at Jaipur.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

He also collected the documents from prosecutrix regarding admission of Master Rajat Malhotra ; seized it vide memo Ex.PW2/E and filed the charge sheet. He filed a report dated 16-6-2003 to Joint Commissioner, CAW Cell along with the charge sheet Ex.PW14/DA ; He also proved the copy of the statement dated 2-7-2003 of Narender Singh to the effect that the notice Ex.PW2/DB of the Family Court, Jaipur was served upon the prosecutrix and the said statement is Ex.PW14/DB.

	PW15	Dr.	Prem	Parkash
proved	the	MLC	Ex.PW9/L	of the
prosecutrix.				

PW16 Shri Deepak Ahuja,

UDC, ITI Malviya Nagar, New Delhi, proved the attendance register for the month of November, 2001 maintained in his office. As per the attendance register the presence of the prosecutrix, LDC was marked on 5-11-2001 and her arrival time on that day is mentioned as 8:30 AM and departure time as 5 PM, in SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

the attendance register Ex.PW16/A.

He was cross examined on the aspect that no other employee had signed the attendance register or has mentioned the time below his / her initials till October 2001 and that in the month of November, 2001 only one another employee Shri Gurwinder Singh has mentioned the time of his arrival but not the time of his departure. It was observed by the court that the attendance register was not having any serial number or page number.

5. After the recording of prosecution witnesses, the statement of accused was recorded under section 313 Cr.P.C wherein he denied the allegations against him. In his statement u/s 313 Cr.P.C he stated that the behaviour of the prosecutrix was erratic which resulted in unpleasant arguments and irreconcilable differences between them. He further stated that on 31-3-2003 at about 6:30 am he reached Saket at the house of the prosecutrix as she had informed him that his son Rajat was ill and was required to be taken to hospital, but when he reached there he found Ms. Pooja and her relatives with the SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

prosecutrix. His calling to the house was a stage managed show and was pre-planned. He had also filed a case for nullity of his marriage against Ms. Pooja in February, 2003. He further stated that he married Pooja on 9-12-2002 after getting divorce from the prosecutrix and the prosecutrix was aware of the proceedings of divorce at Jaipur. The parents of Pooja, before her marriage with accused had verified the factum of his divorce from the prosecutrix. He further deposed that he never lived with the prosecutrix after the decree of divorce. He denied that he has been living in the house of prosecutrix, having physical relations with her after divorce. He further stated that there was a complete break down of his marriage with prosecutrix and that the prosecutrix got prepared a petition for divorce by mutual consent but later she changed her mind and deliberately did not participate in the proceedings before the Family Court at Jaipur. Accused also stated that marriage between him and Pooja was a nullity as Pooja had not taken legal divorce from her earlier husband prior to her marriage with him and that he had obtained a decree of Nullity on 18-3-2005 from the Ld. Judge, Family Court, Jaipur. A case under section 495/120-B/406 IPC against Ms. Pooja is in process SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

at Jaipur District Courts, Rajasthan.

6. Accused had produced the following witnesses in his defence :

DW1 Shri Rakesh Bhargava, an Executive Engineer, PWD Rajasthan, deposed that accused was a Director of M/s Noisecon India Pvt Ltd and was given the work of interior of acoustic of Central Hall at RVSP, Jaipur and that from April 2000 to January, 2001 the accused was required, most of the time, to be present at Jaipur and the accused was staying in Shyam Nagar, Jaipur, during this period.

DW2	Shri	Sanjay	Goel
deposed that accused was		his tenant	

from January, 2002 to September, 2005 at his flat no. B-14, Apollo Apartment, Vidhyadhar Nagar, Sector-3, Jaipur. The said flat was in the name of his wife. A written lease / rent Agreement Ex.DW2/A was executed between the wife of DW2 and the accused. He also proved the receipts Ex.DW2/A-1 to SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

Ex.DW2/A-4 regarding maintenance charges given by accused. DW2 also deposed that before coming to his rented house the accused was staying at Shyam Nagar, Jaipur.

DW3 Shri Vinod Trisal, Vice President, F-Tec (Foresight Technical Education Centre) having 60 study centers spread over in five States, deposed that he knew the accused since April, 2003 as he was working as a Branch Coordinator in one of their study centres at Subhash Nagar, Jaipur. He further deposed that accused was also managing the study center and was looking after its day to day activities including taking of classes in Personality Development and spoken English.

DW4 HC Manoj Kumar produced the summoned record i.e true copy of DD No. 6-A (Ex.DW4/B) dated 15-7-99 P.S Malviya Nagar and deposed that the original DD was destroyed vide order dated 1-5-07 Ex.DW4/A, passed by Addl. DCP.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

DW5 Shri K.B.L Seth, is the owner of house no. C-83, Shyam Nagar, Jaipur, where accused resided as a tenant since January, 2000 to April, 2002, proved the rent receipts Ex.DW5/1 to Ex.DW5/7.

DW6 Shri Mukesh Taneja, a friend of accused, deposed that accused was firstly married in the year 1997 and then in the year 2002. He deposed that in the month of August, 1999, the accused made a telephonic call to him saying that the prosecutrix had left him and his son. DW6 reached his residence at Hauz Khas, New Delhi. The accused then made a complaint at P.S Malviya Nagar and got DD No. 6-A dated 15-7-99 Ex.DW4/B registered. In the year 2000 accused was doing the work of interior decoration of Halls and Multiplex at Jaipur and also of the Rajasthan Vidhan Sabha, Jaipur. Accused used to reside at C-83, Shyam Nagar, Jaipur and DW6 visited the said house for 2 to 3 times. In January, 2001 the relations between accused and his wife were tense. The prosecutrix did SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

not wish to reside with the accused and wanted to have a divorce and was not willing to hear unless divorce papers were signed by accused. She brought the divorce petition from inside her room. Accused signed those papers of divorce by mutual consent. Prosecutrix also signed those papers and accompanied DW6 to a nearby Photostat shop and got the photocopy of the same and gave a photocopy to the accused. DW6 tried to reconcile the matter and ultimately the prosecutrix agreed to give one more chance to their relationship and to reside separately in Saket. After 15-20 days, the accused informed him that he had taken a flat on rent at Saket and both of them had shifted there. During that time accused also used to stay at Jaipur and whenever he used to come to Delhi he used

to visit prosecutrix and his son, but the problem still persisted between them. In year 2001, around August or September, accused had filed a divorce case against the prosecutrix at Jaipur. On 6-12-2001, DW6 on his marriage anniversary, had gone to Shirdi Temple SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

at Lodhi Road, New Delhi where the prosecutrix met him and informed that accused had filed a divorce petition, therefore, she was not willing to talk on this matter. DW6 later attended the second marriage of accused with Pooja in the year 2002. The photograph of marriage is Ex.PW6/A.

7. On the basis of the above evidence it was argued by the Ld. Addl. P.P that the accused be convicted for the offences he is charged with as he without disclosing about divorce to his wife had sexual intercourse with her till 31-3-2003. However, the Ld. Defence Counsel argued (a) the prosecutrix was aware about the divorce proceedings since had signed the summons of the divorce of the Family Court and (b) the accused never lived with prosecutrix till 31-3-2003.

The case of prosecution heavily rests upon the fact that on dated 5-11-2001 the prosecutrix was never served with summons of the matrimonial court at Jaipur.

8. Heard.

The main issues involved in the present case which need consideration are (a) whether or not there was any SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

cohabitation between accused and the prosecutrix till 31-3-2003 ; (b) whether or not the prosecutrix was aware of the divorce proceedings or of passing of the decree of divorce ;

(c) can this court act as a court of appeal against a judgment dated 4-4-2012 of the matrimonial court, Jaipur when the prosecutrix herself has not challenged said Judgment and rather had only initiated an administrative proceeding against the process server, wherein such administrative proceedings, admittedly, the accused was never a party ; and (d) can the prosecution challenge a part of the proceedings before the Family Court, viz., the service of summons without challenging its final verdict.

The dates and the sequence of events are most relevant to find out if the offence under section 376 IPC or section 493 IPC is made out or not.

Some relevant dates are (i) on 4-10-1997 the accused married the prosecutrix and they both resided with parents of the accused till March, 2001 when due to a family dispute they both had shifted to another house bearing no.

L-76-B, LIG DDA Flats, Saket, New Delhi; (ii) on 25-9-2001 a divorce petition was filed at Jaipur, Rajasthan by the accused SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

against the prosecutrix (iii) on 5-11-2001, the summons of the divorce petition was allegedly served upon the prosecutrix ; (iv) on 4-4-2002 a decree of divorce was passed in favour of accused by the Family court at Jaipur ; (v) on 31-3-2003 the accused was allegedly caught by both the ladies, when was residing with the prosecutrix.

Now I come to the first issue viz., (a) Cohabitation.

There is an admission by the accused at the time of arguments on charge that accused and the prosecutrix cohabited together, per order on charge dated 21-3-2008 of the court of Shri Narottam Kaushal, Ld. ASJ, Delhi.

Further the independent witnesses viz., PW1 Shri Anil Gulati had seen the prosecutrix and accused lastly residing at house no. L-52-A, LIG DDA Flats, Saket, New Delhi till about 31-3-2003. Similarly PW5 Shri Anil Tiwari, a family friend, deposed that accused and the prosecutrix used to live together and attended many family functions in his house as a neighbour, even in the year 2002-2003.

PW7 Shri Manoj Chawla, a neighbour, used to regularly see both the accused and the prosecutrix and that the accused used to often call him whenever he was late and used SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

to request PW7 to inform the prosecutrix, his wife.

Similarly PW8 Shri Surjeet Singh Batra, a caretaker of the tenanted premises, deposed that the accused and the prosecutrix resided together in his premises as tenant till February, 2003.

Moreso, PW4 Dr. Manju Khemani, a doctor at Geetanjali Hospital, deposed that she carried the abortion of the prosecutrix on 31-12-2001 with the consent of both the prosecutrix and accused Pankaj Malhotra. She proved the documents Ex.PW4/A to Ex.PW4/8, viz., medical papers qua termination of the pregnancy. The said documents show that the prosecutrix carried a fetus of 7 weeks and 4 days. If one relate it to the past it perhaps was a result of consummation, probably, in the first week of November, 2001 i.e near the time when the summons of the divorce petition, filed at Jaipur court, were allegedly served on 5-11-2001 upon the prosecutrix.

Further, the consent form dated 31-12-2001 Ex.PW4/8 for abortion was signed by the accused, showing him to be the husband of the prosecutrix.

Further, three forms of different schools, of dated 1-1-2001 ; June-July, 2001 and 26-9-2001, collectively exhibited SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

as Ex.PW2/F, relating to the admission of the child Rajat (born from the wedlock of the prosecutrix and accused), were filled by the accused in his own handwriting and signed by both of them, though on 25-9-2001, the accused had filed a divorce petition against the prosecutrix.

Thus the deposition of the witnesses above and the documents proved so far, do show that the accused and the prosecutrix last cohabited together till 31-3-2003 when PW3 Ms. Pooja, his second wife and her relatives, at about 6:30 AM, barged into the house of the prosecutrix and found accused sleeping there.

Thus, to my mind the prosecution proved the fact that the accused and the prosecutrix cohabited together till 31-3-2003.

9. Now I come to issue 2(b) qua the awareness of the prosecutrix of the divorce proceedings and the decree of divorce dated 4-4-2002 granted by the Ld. Family Court, Jaipur.

It was argued by the prosecutrix that the Jaipur Court did not have jurisdiction as the prosecutrix never resided in Jaipur and neither their marriage took place there and that the SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

accused purposely did not mention the complete and correct address in his divorce petition filed at Jaipur court and deliberately omitted the word "Saket" on petition and even did not mention the pin code of Delhi. The name of the father of the prosecutrix was also wrongly mentioned.

It was also argued that accused was living with her at L-78-B, DDA Flats, Saket, New Delhi till 31-3-2003 and as the abortion took place on 31-12-2001, it do show that the summons were never served upon her. Further, it was argued that even in the departmental proceedings initiated against Narender Singh, Process Server, it was held by the Inquiry Officer vide his order dated 29-8-2006 Ex.P1 that Narender Singh was guilty of manipulating the service of summons upon the prosecutrix and hence was recommended for major penalty.

Further, PW16 Deepak Ahuja produced the attendance register of the prosecutrix for the period November, 2001 Ex.PW16/A and per record, on 5-11-2001 she attended her office from 8:30 AM till 5 PM, hence, it is argued that the summons were never served upon the prosecutrix on 5-11-2001 and that she was not aware of the divorce proceedings and neither of the divorce granted against her.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

However, it was argued by the ld defence counsel that the said summons Ex.PW2/DB do bear the signatures of the prosecutrix and though she alleges that accused got her signatures fraudulently but during cross examination by the ld.

Prosecutor, the prosecutrix had deposed that she did not remember if she had ever received such summons or may be the accused took her in good faith and obtain her signatures while misleading her about some other papers. It was argued by the ld counsel for the accused that the prosecutrix failed to categorically deny that she never received or never signed the summons but had simply alleged that she did not remember if she ever received such summons or may be the accused had taken her signatures on false pretext.

A bare perusal of the summons Ex.PW2/DB would show the signatures of the prosecutrix with date and address.

The prosecutrix admitted her signatures on the summons dated 5-11-2001 and herself wrote her address and date of receipt of summons on the summons Ex.PW2/DB. Now if she admits her signatures and writing on the summons Ex.PW2/DB, then she being an educated lady, an officer in a bank, would she easily sign on a blank document merely on the SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

asking of her husband. I doubt. An educated person would never sign any document on a mere asking of a spouse without knowing its contents, especially when relations are not so good and hence later she cannot be allowed to retract this evidence when she herself is not too sure in deposing that the summon was never received by her.

Though the prosecutrix now has challenged the service of summons upon her and has alleged fraud, but the question still remains is if she is competent to do that. Hence, I move to the third limb (c) of the arguments viz., Can this court act as a court of appeal against a judgment dated 4-4-2002 of the matrimonial court, Jaipur, when the prosecutrix herself has not challenged the said Judgment dated 4-4-2002 and rather had only initiated an administrative proceedings against the process server, wherein such administrative proceedings, admittedly, the accused was never a party and hence if such proceedings would have any effect upon the case of the accused ; and (d) Can the prosecution challenge a part of the proceedings before the Family Court, viz., the service of summons, without even challenging its final verdict.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

10. Before answering these questions (c) and (d) let me first refer to the following judgments :

In "Mr. P.C.V Pantult v. Unknown", (1931) 61 MLJ 229, the following was held :

"The principle of the conclusiveness of judgments in rem as regards person is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt : and as regards things, that generally speaking, every one who can be affected by the decisions may protect his interest by becoming a party to the proceedings. In addition to it, it has to be remembered that a decision in rem not merely declares the status of the person or thing but ipso facto renders it such as it is declared ; thus a decree of divorce not only annuls the marriage but renders the wife feme sole; an adjudication in bankruptcy not only declares but constitutes the debtor a bankrupt ; a sentence in a Prize Court not merely declares the vessel prize but vests it in captor."

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

Further in "Syed Askari Hadi Ali Augustine Imam and another vs. State (Delhi Administration) and another, 2009 (3) JCC 1705, it was held that :

A judgment in rem indisputably is conclusive in a criminal as well as in a civil proceeding.

Further in "Surinder Kumar & ors. vs. Gian Chand & ors." [AIR 1957 SC 875]. Kapur, J. speaking for the Bench, opined:

"It is clear that the probate was applied for and obtained after the judgment of the High Court and therefore could not have been produced in that Court. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself."

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

In "Manipur Administration, Manipur v.

Thokchom Bira Singh, AIR 1965 SC 87, it was held that :

"the Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedingsThe law which gives effect to issue estoppel(s) is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel still less with the process of reasoning by which the finding was reached in fact It is enough that an issues have been distinctly raised or found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other."

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

Further in "Hemlata Bakshi VS. Sekhar Nath Bakshi and ors." 2007 (3) CHN 305 the court has held as under:

" The suit is based on fraud on the allegations that no writ of summons was really served upon the plaintiff in the present suit and defendant in the 1971 suit. We are of the view that this plea could have been brought before the same court the moment the plaintiff came to know such fraudulent act by way of suppression of service of writ of summons and could have got the decree passed ex parte, set aside or the plaintiff / appellant herein would have approached the appropriate Appeal court. Instead of taking this two course of action the present suit has been filed on the grounds of fraud. Had this course been taken then it would have been more convenient for the

Court concerned to decide the matter."

In dismissing the second appeal, the learned Single Judge of the Patna High Court considered in what circumstances a subsequent suit would lie to set aside an ex parte. He also SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

considered the effect of the later plaintiff's suit being decreed on the question as to whether that would merely revive the earlier suit upon the ex parte decree being set aside or whether the subsequent decree would also cover the merits of the claim in the earlier suit. After noting several authorities, the learned Single Judge summarized the legal questions thus:

It is well established principle that a decree once passed cannot be challenged by a separate suit except on the ground of fraud practised on the Court. It is not open to suitors who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree.

Such a suit is equivalent to a suit for the rescission and destruction of a former decree of a competent court. That rescission and destruction could be obtained only on the ground of fraud SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

practised on the courts: AIR 1915 PC 99: 42 Ind App. 171.

Though it has been urged on behalf of the respondent that Hemlata's only remedy was by way of making an application under Order 9 Rule 13 of the Code, it is possible that a party to an earlier decree may challenge it by way of a subsequent suit. There is no bar to a subsequent suit being instituted on the ground that an unserved defendant's rights against the decree were protected by Order 9 Rule 13 of the Code.

If a decision has attained finality, a party cannot negate the effect of such decision against him on the ground that it was erroneous. The principles of res judicata apply irrespective of the correctness of the decision, unless there was inherent lack of jurisdiction. Hemlata's challenge to the earlier decree on the ground that changed circumstances would not later the effect of a valid transfer of an Immovable property, was not a challenge touching upon the Courts' authority to receive or try such question. If correctness of a decision were to be made a relevant factor to determine SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

its finality, it would lead to legal anarchy of cataclysmic proportions and rob the conclusiveness that finality connotes.

The judgments cited above give some answers to the questions posed. It has been held that once a judgment in a case of divorce / probate/ insolvency is pronounced ; it shall be a judgment in rem

and shall be conclusive as regard persons as the peace of society requires that matters of social status should not be left in continual doubt.

Now per judgment dated 4-4-2002, the accused and the prosecutrix stood divorced by the decree of divorce granted by the matrimonial court at Jaipur, hence, they cease to be the husband and wife. This judgment in rem indisputably is conclusive not only in a criminal but in a civil proceeding too, per Syed Askar Hadi (Supra). Thus if per judgment dated 4-4-2002, the prosecutrix was found to be served with summons, such findings shall be held conclusive, unless disturbed, either by filing of an application under Order 9 Rule 13 CPC in the same court or by filing a separate suit challenging the judgment/decreed dated 4-4-2002 on plea of fraud. Both these options, admittedly, have not been SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

exercised by the prosecutrix. Rather in the present proceedings she intend to challenge the service of summons upon her on dated 5-11-2001, yet preferring the validity of the final verdict of the matrimonial court by not challenging the judgment dated 4-4-2002. Can she be allowed to challenge a part of the said judgment dated 4-4-2002 being based of fraud yet arguing that the final verdict should not be disturbed. I think it would be rather tilting the facts in favour of the prosecution.

Though the prosecution in order to bring home their plea had refer to "Gram Panchayat of Village Naulakha v.

Ijagar Singh, AIR 2000 SC 3272, wherein the Hon'ble Supreme Court has held that it is not necessary to file a separate suit for challenging a decree on the ground of collusion or fraud and per section 44 of Indian Evidence Act, a party in a collateral proceedings can set up a defence of fraud and can show that a decree / order obtained by the opposite party against him was passed by the court without jurisdiction or was obtained by fraud or collusion or that it is not necessary to bring an independent suit for setting it aside.

No doubt to the proposition of law laid down above.

However, the aforesaid principal of law so laid down would not SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

help the prosecution in the present case on two counts : (a) as held, such alleged collusion or fraud could only be used as a shield of defence by the opposite party in a collateral proceedings ; and (b) one needs to challenge the entire decree and not only an interlocutory order in such proceedings.

I doubt if such a plea of fraud or collusion in obtaining decree dated 4-4-2002 would be available against the accused to prosecute him, as the Hon'ble Supreme Court in the aforesaid judgment, has laid down that such plea of fraud and collusion can only be taken as defence.

Now if the prosecution says that my this observation is not correct then the prosecution is rather going to do more harm to its own case. If I declare that such service of summons dated 5-11-2001 was a fraud played by the court then in such an event I need to consider the judgment / decree dated

4-4-2002, a nullity, per Ujagar Singh (Supra). If that is so then the parties litigating in this criminal proceedings would revert to the same status viz., of husband and wife, as were prior to such decree of divorce dated 4-4-2002. Would in such an event the allegations of rape or under section 493 IPC ever sustain. The answer would be a big No. Hence, to my mind the SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

Ujagar Singh's case would not help the prosecution and rather would go against the prosecution.

Thus, in view of the discussions above wherein I had observed that the prosecutrix had not categorically denied the service of summons upon her and she being an educated lady had not only signed on summons dated 5-11-2001 but even had written the date and her address ; hence it can not be said that she was not aware of the document she was signing at.

More so, PW6 says that the prosecutrix was aware of the divorce proceedings when he met her and also an affidavit Ex.PW3/DA needs to be looked into wherein PW3 Ms. Pooja, the second wife of accused, says that she met the prosecutrix prior to her marriage with accused for verifying whether the prosecutrix has been divorced. These facts cannot be ignored.

Though the Ld. Counsel for the prosecutrix while assisting the prosecution says that PW3 Pooja had challenged her affidavit Ex.PW3/DA in some other proceedings but such documents are not a part of this court record, hence need to be ignored.

Further the failure on the part of the prosecution in producing PW Narendra Singh, the process server as a witness, despite being in the list of witnesses, do make the case of prosecution, SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

a weak case, as he was the best available witness who could have deposed about the service of summons and that the accused could have also exercised his right to cross examine the said process server. The fact that the attendance record so filed by prosecutrix showing the arrival and departure time only of one or two person do create doubt about its genuineness viz., anti timing etc. Thus it appears from facts that the prosecutrix despite knowing about the divorce proceedings against her yet preferred to stay with the accused ; is more in sync with the argument of the accused that even after divorce, the prosecutrix, in a hope to revive their relations, preferred to stay with him.

Here, I would also like to refer to "Pradeepta Kumar Mohapatra v. State", 2013 (6) LRC 366 (Del), wherein the Hon'ble High Court of Delhi has held as under :

"Things are substantially the same in the instant case, inasmuch as, it stands proved that the filing of the divorce petition by the appellant was within the knowledge of the complainant inasmuch as she had also caused her SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

appearance before Family Court at Cuttack on 1st October, 1993. The whole case of prosecution revolves around the fact that an assurance was given by the appellant

that he would withdraw the divorce petition, despite that, he did not withdraw the same.

Complainant remained under the
impression that he must have

withdrawn the petition and under that belief continued to co-habit with him. Complainant was an educated lady, therefore, she should have ensured that the divorce petition had been withdrawn by the appellant. However, she believed the assurance given by the appellant and then stayed with him. However, it is not the case of the prosecution that the appellant, at any point of time, caused the complainant to believe that the divorce petition had been withdrawn or under that belief the complainant continued to cohabit or have sexual intercourse with him in the belief that she continues to be the legally married wife of the appellant.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

The allegations at the most are that the appellant continued to have sexual intercourse with complainant by non- mentioning or suppressing the factum of divorce. From such non-mention or suppression of divorce, it cannot be said that the appellant by deceit caused complainant to believe that she was lawfully married to him and to co-habit or have sexual intercourse with him in that belief. It may be that the appellant suppressed the factum of obtaining divorce decree from the complainant, but he was not alleged to have made any representation to her as to cause her to believe that she continues to be his legally married wife and induced her to co-habit or have sexual intercourse with him in that belief. That being so, the case is not covered within the four corners of Section 493 IPC."

Similarly the complainant in the present case, is also an educated lady, should have assured herself before signing SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.

a document as to for what reason the said document was allegedly got signed by her husband if her allegations were to be accepted on its face value. Thus, the facts do call the benefit of doubt in favour of the accused.

I may here refer to "Krishna Janardhan Bhat Vs. Dattatraya G.Hegde, (2008) 2 SCC (CrI) 166, wherein it was held that :-

"Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also reference to the circumstances upon which he relies."

The prosecution theory apparently creates doubt and is not based on a full proof case / evidence. Hence, accused deserves to be acquitted of the charges framed. Thus, SC No. : 13/2013 State vs.

Pankaj Malhotra PS : Malviya Nagar, New Delhi.

acquitted. His bail bond stands cancelled ; surety discharged.

Accused is directed to furnish bail bond in the sum of Rs.20,000/- with one surety in the like amount, in compliance of section 437-A Cr.P.C. File be consigned to record room.

Announced in the open court today i.e. 3-6-2014 (Yogesh Khanna) ASJ-Spl. FTC / Saket Courts New Delhi.

SC No. : 13/2013 State vs. Pankaj Malhotra PS : Malviya Nagar, New Delhi.