

Delhi High Court

Sh. Sandwip Roy vs Sh. Sudarshan Chakraborty on 4 June, 2007

Author: A Sikri

Bench: A Sikri

JUDGMENT A.K. Sikri, J.

Page 1967

1. The Petitioner (accused) and the Respondent (complainant), in the instant case, are both residents of Chitranjan Park, New Delhi. Complainant is a married person with two children out of the wedlock. He was married on 4.12.1987 at Dhanbad. The Petitioner is stated to be an old friend of the complainant and known to him for last number of years. The Petitioner is an unmarried man and had been a frequent visitor to the family of the complainant.

2. On 22.10.1998, a divorce petition was filed by the complainant against his wife on the ground of adultery. The Petitioner was also impleaded as respondent No. 2 in the said divorce petition as the allegation was that the Petitioner was living in adultery with the complainant's wife number of times. Four months after filing the divorce petition, the complainant on the basis of these very allegations also filed a complaint under Sections 497 & 506 IPC on 9.2.1999. However, some time later the complainant withdrew the divorce petition on 24.11.1999 making a statement that he had compromised the matter with his wife and both had started living together and, therefore, he did not want to pursue the said petition. However, the complainant pursued the complaint against the Petitioner herein.

3. This complaint was initially dismissed by the Learned MM vide order dated 11.9.2003. The complainant, however, Page 1968 preferred revision petition against this order and after hearing the said revision petition, the Learned ASJ passed the order dated 23.12.2003, whereby, remanding the case back to the Learned MM and directing him to reconsider the question of summoning of the Petitioner. On remand, the Learned MM passed the following order on 24.12.2003:

File and order of Court of Shri Lal Singh, ASJ received. Since case is remanded back, so case be registered.

Sessions Court in its findings have already held that there is a prima facie evidence against the accused and offence of adultery is already made out. Hence on basis of findings given by the Ld. ASJ, I find prima facie case under Section 497 IPC against accused. No offence under Section 506 IPC is made out even after reconsidering the evidence. Accordingly, issue summons to accused on PF/Speed post and through process server of court on 20.1.2004.

4. The Petitioner had, in the meantime, preferred petition under Section 482 of the Cr.P.C. against the order dated 23.12.2003 passed by Learned ASJ remanding the case back to the MM. This petition was disposed of by this Court vide order dated 13.2.2004, inter alia, observing:

...It is obvious that a remand order which is based on an allegation that the Magistrate has not summoned the accused inspite of material on record cannot be an order on merits of the case but is a direction to the Magistrate to reconsider the material placed before him in the complaint in accordance with law.

5. After this order was passed, the Petitioner moved an application for recalling summoning orders dated 24.12.2003. This application has been rejected by the Learned MM vide order dated 30.10.2004. The Learned MM, inter alia, observed that in view of the judgment in the case of Adalat Prasad v. Rooplal Jindal and Ors. 113 (2004) DLT 356 (SC), the application for recalling was not maintainable. He also referred to the order dated 23.12.2003 of the Learned ASJ. The aforesaid two orders passed by the Learned MM are challenged primarily on two grounds:

1) With the withdrawal of divorce petition by the complainant on 24.11.1999, the acts of adultery had been condoned by the complainant and, therefore, it was not open to the complainant to pursue the complaint. In support, he referred to the judgment of the Supreme Court in the case of Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and Ors. AIR 1967 Supreme Court 581 and Jasimaddin Sheikh v. Ichohak Mistri Vol. I Calcutta Weekly Notes 498.

2) There was no application of mind by the Learned MM in passing the impugned order as he had not recorded his own satisfaction but was influenced by the orders dated 23.12.2003 passed by Learned ASJ which he could not do. Order dated 13.2.2004 passed by this Court clinches this issue as the Court directed that the Magistrate was to reconsider the material placed before him in the complaint in Page 1969 accordance with the law and to come to his own conclusion. His submission was that MM's order did not amount to taking "cognizance of an offence which was a pre condition" as held by the Supreme Court in CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. and Anr. . He also referred to the judgment of Supreme Court in the case of Pepsi Foods and Ors. v. Special Judicial Magistrate . In support of the submission that summoning of the accused person was indeed a grave matter and it was the duty of the Magistrate to carefully scrutinize the evidence brought on record and then examine if prima facie any offence had been committed by the Petitioner herein and since the Learned MM had not applied his independent mind, the order was bad in law. He also submitted that Adalat Prasad v. Rooplal Jindal and Ors. (supra) case was wrongly applied. As the impugned order dated 24.12.2003 was passed by the Learned MM without giving his own reasons and merely on the basis of observations of the Court of Sessions, conditions precedent for issuing the process under Section 204 CrPC were not satisfied.

6. Learned counsel for the Respondent, on the other hand, argued that the Respondent/complainant withdrew the divorce petition in the interest of his children as he had patched up with his wife but in no way he condoned the acts of adultery committed by the Petitioner. Therefore, it was permissible for him to continue with the complaint filed against the Petitioner. He further submitted that the impugned orders passed by the Learned MM were perfectly valid. The Learned MM had applied his mind and instead of recording his reasons in detail has referred to the reasoning given by the Learned ASJ on the basis of which he could take cognizance and issue summoning orders.

7. The Hon'ble Supreme Court in *Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and Ors.* (supra), which was a case under Hindu Marriage Act and petition for divorce was filed on the ground of adultery, held that the fact that the husband cohabited with his wife even after knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condensation and once the acts of adultery had been condoned, the husband could not seek divorce on this ground. This judgment therefore has no relevancy in the context of Section 497 IPC proceedings.

8. The divorce petition filed by the complainant was withdrawn by making the following statement:

Statement of Shri Sudarshan Chakraverty, Petitioner in person. On S.A. Respondent No. 1 i.e. Smt. Sunetra Chakraverty i.e. my legally wedded wife and two children born from our wedlock during the pendency of the petition, I have compromised the matter with my wife and we have started living together and as such I do not want to pursue the petition, and withdraw.

Page 1970

9. It is clear from the aforesaid statement that not only complainant had compromised the matter with his wife, but both have also started living together. Thus, it cannot be denied that the complainant had condoned the acts of adultery committed by his wife. The question, therefore is, as to whether on this basis, wife's paramour, namely the Petitioner herein, can also say that his acts are condoned as well and the complainant could not pursue the criminal complaint against him. Before answering this question, let me scan through the law on adultery in criminal jurisprudence.

10. Chapter XX of the Indian Penal Code deals with 'Offences Relating to Marriage'. Section 497 of the IPC, with which we are concerned, makes adultery as offence. It reads as under:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

11. The cognizance of this offence can, however, be taken by the Court only upon a complaint made by some person aggrieved by the offence. This is provided in Section 198(1) of the Code of Criminal Procedure. Sub-section (2) of Section 198 Cr.P.C. provides that, for the purposes of Sub-section (1), "no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the Penal Code". Therefore, the complaint can be filed only by the husband of the woman with whom the accused person had sexual intercourse as he is the only one who is made 'aggrieved person' by the aforesaid deeming provision.

12. Interestingly, before the Indian Penal Code was enacted under the British Rule, adultery was not a crime in India either for men or for women. This is stated in Macaulay's Code which was the first draft of the Indian Penal Code framed in 1837. Macaulay's argument was that in the social

infrastructure that existed in those times, the secondary and economically dependent position of women was not conducive to punish adulterous men. So far as women are concerned, his opinion was that considering the social purdah among Hindus, especially among aristocratic, high-caste and affluent families, the question of adultery among women did not arise. Besides, Macaulay was convinced that since polygamy was an everyday affair at that time, the wife was socially conditioned to accept her husband's adulterous relationship. She neither felt humiliated nor was it a culture shock for her. However, the Law Commission of India under the British rule declared adultery a crime committed only by men. In that recommendation of the Law Commission, the law on adultery was drafted in 1860 making only men as the offenders who could be punished for adultery. It did not agree with Macaulay's stand that any punishment for adultery would be detrimental for the dependent wife and would threaten the unity of the family. The Law Commission's stand was based on the premise that adultery struck at the very core of the family unit, eroded all close ties within the family, and all that the family as society's Page 1971 basic social unit stood for. The exclusion of women from the category of offenders was based on the reality that women were already living in humiliating and oppressive conditions within the family.

13. The Law Commission of India in its 42nd report given in the year 1973 recommended inclusion of women as well. This recommendation was justified on the basis of changed, status and position of women. It suggested that the sexist disparity in the law on adultery be removed by bringing women within the scope of the law.

14. The constitutionality of the Section 497 IPC came under challenge before the Supreme Court in the case of *Sowmithri Vishnu v. Union of India (UOI) and Anr.* and 1985 Supp. (1) SCC 137. The argument was that Section 497 IPC violated Article 14 as well as Article 21 of the Constitution. Article 14 argument was based on the premise that there was an irrational classification between men and women as it unjustifiably denied to the women the right which was given to the men. Three contentions were raised in support of this argument namely : (1) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; (2) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and, (3) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman, with the result that husbands have, as it were, a free license under the law to have extra-marital relationship with unmarried women. It was, thus, contended that Section 497 of the IPC was flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism', inasmuch as the provision contained in section was a kind of 'Romantic Paternalism' which stemmed from the assumption that women, like chattels, are the property of men. The argument on Article 21 of the Constitution proceeded on the premise that the right to life includes the right to reputation and, therefore, if the outcome of a trial is likely to affect the reputation of a person adversely, he or she might be entitled to appear and be heard in that trial. It was the submission that if the accused is held guilty of adultery, it would tarnish the reputation of the wife of the convict as well but she was not given any right to be heard.

15. These arguments did not find favor with the superior most Court and the petition was dismissed. Answering the argument on Article 14, the Court observed that by its very definition of offence of

adultery contained in Section 497 of IPC, such an offence could be committed by a man and not by a woman and, therefore, could not be conferred upon the wife to prosecute the woman with whom her husband had committed adultery. The Court observed that the argument was made for recasting definition by extending the ambit of offence of adultery which could not be done as such arguments Page 1972 go to the policy of the law and not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. Following observations from the said judgment are worth a quote:

Though it is true that the erring spouses have no remedy against each other within the confines of Section 497 of the Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law, for divorce on the ground of adultery. 'Adulter' under the civil law has a wider connotation than under the Penal Code. If we were to accept the argument of the Petitioner, Section 497 will be obliterated from the statute book and adulterous relations will have a more free play than now. For then, it will be possible to convict anyone of adultery at all. It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationship is punishable by law. Stability of marriage is not an ideal to be scorned.

16. The debate into the propriety of this provision has again surfaced after the recommendation of the Justice Malimath Committee. While suggesting the reforms in criminal justice system of the country in its Report given in the year 2003, the Committee suggested suitable amendment of Section 497 of the IPC by including women also as offenders and suggesting that Section 497 IPC should be recasted as "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery". The Committee expressly stated: "The object of this Section (i.e. Section 497 of the IPC) is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband)." The debate, therefore, is as to whether the adulterous wife should also be included in the category of offenders and be prosecuted. National Commission for Women has, however, not only objected to this suggestion of inclusion of the wife but it has gone to the extent of recommending that the adultery should be converted from a criminal offence to a civil offence. It has, however, observed that this should be done after the national consensus on the issue. It has also, at the same time, added that Section 198 of the Cr.P.C. be amended in order to allow women to file complaints against unfaithful husbands and prosecute them for their promiscuous behavior.

17. Thus, whereas one extreme view is that not only Section 497 should remain on the statute book but its scope should be enlarged to include the woman as well who was complicit in the act of sex, the other extreme view is to totally abrogate this provision from the penal statute and make it only a civil wrong.

18. What do psychologist think about adultery? Psychology has a completely different story to tell. Psychologist Lucy Gray says that there is no single person on earth who does not have an extra-marital relationship - be it sexually or mentally. "If anybody denies it, he/she is either a hypocrite or not worth it." In the dictionary of psychology, adultery is neither a sin nor a sacred act. It is more a matter of body than of the heart. It is first and last, a satisfaction of the sexual urge.

Sexual fidelity is not the same as love. An adulterer may be as genuinely in love with his spouse as she is in love with him.

Page 1973

19. The libertarian view is also the same which advocates that governments have no entitlements to pry into the private lives of their citizens, much less regulate them. They also argued that every immoral act cannot be considered a crime because there are areas in which legal provisions and moral doctrines may not coincide and may even be in conflict. If legal and moral doctrines appear to be in conflict because principles of morality are changing, it is necessary to bring about amendments and revisions in the old legal principles to fit into changing moral doctrines.

20. Interestingly, the Committee appointed by the Government of the day to suggest the amendments in the criminal law, headed by Prof. N.R. Madhava Menon has also suggested removal of Section 497 of the IPC from the statute book. While listing adultery among the offences that should be removed from the category of criminal acts, the Madhava Menon Panel has said that by treating an adulterer as a criminal actually becomes an obstacle in any rapprochement between husband and wife, besides making the accused vulnerable to extortionist policemen. Says the draft report : "There is a universal tendency to put down all types of social conduct with the use of criminal sanctions without examining the use of possible alternative means of social control and without studying the impact of such step on the status of criminal justice in the Country." In his paper on National Policy on Criminal Justice for India submitted with the Government of India in January, 2007 while suggesting that there should be reclassification of crimes which can be fit in four different types of criminal codes, the committee discussed 'De-criminalization and Diversion'. The recommendation goes like this:

There is a universal tendency to put down all types of anti-social conduct with the use of criminal sanctions without examining the use of possible alternative means of social control and without studying the impact of such step on the status of criminal justice in the Country. There is a view that police is not the appropriate agency to enforce such laws which provide opportunities for corruption and harassment of innocent persons. tort action may remedy the injury and civil disabilities can deter persons from such conduct. Supreme Court has recently called for judicial impact studies before initiating legislation and desired to make provision for implementational costs on a meaningful, scientific basis. In fact, there is increasing demand among behavioral scientists to de-criminalize some of the existing offences. The National Women's Commission reportedly asked for treating adultery as a civil offence. Another group of social activists wanted unnatural offences and attempt to commit suicide to be taken out of the Penal Code. A large number of offences spread over special and local laws are also considered fit to be treated with non-criminal sanctions. A number of such special laws should carry a 'sun-set' clause under which its active life be limited to a fixed period unless extended by the legislature. It is time to embrace de-criminalization as a part of national policy and seek advise of expert bodies like Law Commission to make recommendations in this regard periodically.

21. With this ongoing debate, we have yet to see as to how the Parliament reacts to it and whether Section 497 IPC is retained and offending women Page 1974 are also included thereby enlarging the scope of this section or legislature goes to the other extreme by abrogating Section 497 IPC altogether and adultery is decriminalized by treating it as a social offence rather than criminal offence as suggested by Justice Malimath Committee. As of today, however, Section 497 IPC exists on Statute Book and Courts have, therefore, to apply the same in its present form. The debate assumes significance in the present context inasmuch as the complainant has bought peace with his wife apparently on the ground that he did so to save the family ties.

22. Adultery is a ground for divorce as well. The husband is disqualified from seeking divorce in case he condones the act of adultery committed by his wife. Section 497 IPC, however, does not talk of 'condensation' but only 'connivance'. Thus, where the husband of the wife, connived with the wife who committed sexual intercourse, he cannot prosecute that man. Whereas connivance would mean the involvement of the husband when the sexual intercourse was performed by another man with his wife, the 'condensation' implies pardoning, remission or forgiveness of the adulterer after the act which has the effect of releasing the injury. In that sense the condensation differs from connivance. However, in many cases the two are scarcely distinguishable since a person condones what he compromises and compromise implies condensation.

23. There are cases where before filing the complaints the husband had divorced his wife, the criminal complaints of the husband was dismissed. This course was adopted by the Supreme Court itself in the case of Sowmithri Vishnu v. Union of India (UOI) and Anr. (supra). However, in that case the husband had filed divorce on the ground of desertion and adultery and the divorce was granted only on the ground of desertion and the question of adultery was not gone into. The Supreme Court observed:

There was general agreement before us that since the Petitioner's husband has already obtained divorce against her on the ground of desertion, no useful purpose will be served by inquiring into the allegation whether she had adulterous relationship with Dharma Ebenezer, against whom the husband has lodged a complaint under Section 497 of the Penal Code. Accordingly, we quash that complaint and direct that no further proceedings will be taken therein.

24. In *Hukum Din v. Allachi* (1879) P.R. No. 27, the Punjab Chief Court dismissed the husband's complaint when it appeared that he had, after the act complained of and before filing the complaint, had divorced his wife.

25. Same course of action was adopted by the Calcutta High Court in the case of *Jasimaddin Sheikh v. Ichohak Mistri* (supra). Division Bench of Calcutta High Court found that evidence on record proved that Fatima, wife of the complainant, could not be convicted of the offence under Section 497 IPC. Following observation of the judgment contain the principle of law:

He could be convicted of an offence under Section 497, I.P.C., if there was no condensation on the part of the husband, and I do think that the Page 1975 circumstances of the case warrant the conclusion, that the offence, if any, had been condoned by the husband by his omission to take any

steps since the last six or seven years against the Petitioner, and therefore, no conviction under Section 497, I.P.C., could be legally had in this case. See *Queen v. G.R. Smith* 4 W.R. 31.

What amounts to connivance or collusion on the part of the husband has been explained in several English cases. See *Gipps v. Gipps* II H.L. Cas. I. Even the civil remedy of the husband, viz., dissolution of marriage is gone when there has been such delay as to lead to the conclusion that the Petitioner had either connived at the adultery or was wholly indifferent to it. See *F. Williams v. Williams* I.L.R. 3 Cal. 688 and *Holloway v. Holloway* I.L.R. 5 All. 71 I do not think that the husband can at this distance of time come before a Criminal Court, and be allowed to prosecute the Petitioner successfully under Section 497, I.P.C., or Section 498, I.P.C. I accordingly recommend that the sentence and conviction be set aside.

26. However, in the present case, it is not necessary to rest the decision only on this basis. Even on the facts of this case, I feel that earlier order of the learned MM passed on 11.9.2003 dismissing the complaint was correct.

27. For this, I may revert to some of the salient facts of the case at hand. The complainant had first filed Divorce Petition against his wife on 22.10.1998. Within few months thereafter, i.e. on 6th February, 1999, complaint in question was filed under Sections 497 & 506 of IPC. By that time, complainant had not settled the matter with his wife as far as Divorce Petition under Hindu Marriage Act is concerned, which was withdrawn much thereafter i.e. on 24.11.1999. Obviously, in the Divorce Petition, the complainant had made allegations against his wife of committing acts of adultery with the petitioner herein and carnal relations between them as he wanted divorce on that ground. Since it was a petition to seek divorce on the ground of adultery, the petitioner was also impleaded as Respondent No. 2 in the said petition.

28. Likewise, in the complaint filed on 06.02.1999, the complainant had levelled similar allegations against his wife and the petitioner, which were on the same lines as in the divorce petition. As per the complaint, the allegation is that, in the month of July, 1997, the complainant noticed some change in the attitude, behavior and conduct of his wife and that she was not taking interest towards the complainant. For a number of times, she was found missing without information to the complainant or to the children or to the father of the complainant. Complainant as well as his father inquired from her as to why she had been "going number of times out of the house and even visiting the accused frequently in the absence of the complainant". It is also alleged that the wife of the complainant had no cogent reason to give and reply about his frequently visiting the accused. Complainant and his father found that she had been trying to avoid the questions and reply of aforesaid fact. This created doubts in his mind. It is also alleged that complainant's wife was working in a school as a teacher. School timings were 9.00 AM to 01.00 PM. However, for a number of times, she came in late Page 1976 evening without assigning a good reason, which also caused alarm to the complainant and his other family members. He also alleged that she started neglecting both the minor children and for a number of times, complainant's father as well as children complained about this behavior to the complainant. Complainant's father also found that she was talking to some person "for hours together and the voice was that of a male person".



29. It is also alleged that the complainant came to know from his father and children that the petitioner had been visiting the wife of the complainant in his absence, specially when the complainant used to be out of station and the petitioner used to remain in the bed room of the complainant with his wife for hours together and even sometimes, they used to lock the room from inside. When his wife avoided the answers to the questions put to her and even started fighting, abusing and misbehaving with the complainant, in order to get the real facts, the complainant installed a Dictaphone and a parallel line of the telephone so that the complainant could record conversation of his wife with any person. It is further alleged in the complaint that he was successful in recording the conversation of his wife with the petitioner and from this conversation, he came to know "that the accused and the wife of the complainant Smt. Sunetra Chakraborty has extra marital relations with each other and their conversation clearly establish that they had been indulging in sex with each other".

30. It is alleged that when he confronted his wife and showed the Dictaphone and other conversation recored by him, his wife confessed that she had friendly relations with the petitioner and there was no extra marital relations and she agreed that she would not talk to the petitioner again. The complainant warned his wife and thereafter, the relation of the complainant and his wife remained cordial. However, after a couple of months, the complainant again started "smelling the repetition of the act of his wife and he started feeling that there had been again frequent visits of the accused in the house of the complainant in his absence and about the fact that the wife of the complainant was leaving the house without any information of her coming late in the evening and she was again talking for hours together on telephone with some male persons and even it was again repeatedly informed to the complainant that the accused was visiting the wife of the complainant and they were meeting with each other outside the house of the complainant.

31. He was also informed by some close friends that the petitioner and complainant's wife were found together in Lodhi Hotel. Complainant again became alarmed and confronted his wife. Though initially, she started fighting but after some time, broke and later confessed her extra marital relations with the petitioner. She also confessed that the petitioner had allured her and on the said allurements and misrepresentation, the petitioner had committed an act of adultery number of times with her. This is, however, alleged that before this confession, the complainant was successful in recording through Dictaphone, kept mechanically and fitted with telephone instrument, on 15.10.1998 by virtue of which, it was confirmed that the accused had committed offence of adultery and there were extra marital relations between two of them. He came to know through the said Dictaphone Page 1977 that petitioner had committed act of petitioner with his wife on 10.09.1997 and 11.09.1997 when petitioner booked a room in Lodhi Hotel. He further came to know that this act was repeated on 03.10.1997 in Lodhi Hotel. It is alleged that his wife confessed about having this sexual intercourse with the petitioner on all the aforesaid three dates in Lodhi Hotel. She also confessed that besides the aforesaid acts in Lodhi Hotel, the petitioner had committed such act with her for a number of times in one of the rooms on the first floor of the house, in the absence of the complainant.

32. She also confessed that the petitioner had, for the first time, mixed some intoxicated tablet in the cold drinks and took some obscene photographs and on production of those photographs, he

blackmailed the wife of the complainant by threatening her that he will display all the photographs to her relations and in order to avoid the aforesaid act of the accused, she bowed down to the threatening act of the petitioner and became his victim.

33. As mentioned above, the aforesaid allegations of sexual union between the petitioner and complainant's wife are made at the time when the complainant had not patched up with his wife in this complaint. Though, it is alleged that as per the purported confession of his wife, first time, petitioner indulged in sexual intercourse with complainant's wife after mixing some intoxicated tablet in the cold drink and thereafter, he forced her to do this act repeatedly as he had taken some obscene photographs of that act, on the basis of which he blackmailed her time and again. At the same time, the allegations are also to the effect that the two were having long relationship with each other; she has been going with the petitioner at various places; petitioner had been visiting the complainant's house in the absence of complainant; they had been talking to each other for number of hours and those talks are tape-recorded also.

34. As per the complainant himself, these talks are tape-recorded. On the basis of the said recording, the complainant allegedly came to know that his wife had extra marital relations with the petitioner and "there conversation clearly establish that they had been indulging in sex with each other". Thus he allegedly came to know of the fornication and extra martial copulation on the basis of so called tape recorded conversation. When he confronted his wife on the first occasion with the said tape-recorded conversation, she confessed that she was having only friendly relations with the petitioner and was not having extra marital relations. On the advice and intervention of parents of the complainant, she promised not to talk again with the petitioner. She did not mention that the petitioner had intoxicated her cold drink and committed the heinous act of sexual intercourse and thereafter, blackmailed her by showing the obscene photographs.

35. At this stage, though the complainant alleges that from the tape-recorded conversation, he came to know that the two were having extra marital relationship and adulterous relationship, but when his wife said that there was no such relationship and they were only friendly with each other and she promised not to talk to him again, the complainant warned her and did not proceed with the matter further. In fact, he states that for some time, his relationship with his wife remained cordial, though, after couple of months, Page 1978 he again started smelling the repetition of the act of his wife. Second time, when he again tape-recorded the conversation on Dictaphone, she revealed the alleged story of intoxicating the cold drink.

36. In this backdrop, we may now go through the statement which she made before the learned Metropolitan Magistrate at pre-summoning stage. This statement is made at the time when she and the complainant had buried their differences and the complainant again accepted her as his wife condoning the acts of adultery and resumed the matrimonial relationship. In her statement, she mentions that the petitioner asked to accompany her to Lodhi Hotel where he took her on 10 & 11 September, 1997 and 3rd October, 1997 where she was given cold drinks and some intoxication.

37. This gives an impression that everything happened in September, 1997. On the other hand, in the statement of the complainant, he started noticing the change in behavior of the his wife in the

month of July, 1997 and the other allegations which are made coupled with tape-recording the conversation on Dictaphone, for the first time, show that it happened before September, 1997 though it cannot be said with certainty, as the statements are somewhat vague about the dates. Fact remains that in such a scenario, where the complainant's wife was a willing partner in the adulterous acts or was forced to do so, could be ascertained, had the complainant produced the tape-recorded conversation. For some reason to him, he has kept back the same. There is also reference to letters written by the complainant's wife to the petitioner though, she has now stated in her statement before the learned Metropolitan Magistrate that she was forced to write those letters. All this material is not produced on the basis of which alone the complainant could substantiate the allegation of adultery. Adverse inference, therefore, could be drawn against him.

38. When the learned Metropolitan Magistrate heard the arguments on the first occasion, he passed order dated 11.09.2003, deciding not to summon the petitioner and dismissing the complaint. He took note of the fact that the complainant had not produced the material evidence in Court and concealed the same, and, therefore, adverse presumption could be drawn even against him at that stage. The presumption which he drew was that either there was no such proof as alleged in the complaint or if it is there, it does not favor him. Following portion of the order is relevant:

Complainant has not produced material evidence in court and concealed the same so adverse presumption can be drawn even against him at this stage. It can be presumed that either no such proof as alleged in complaint is available or does not favor him. It is alleged by complainant in the complaint that he came to know from the telephonic conversations (which was recorded) taken between his wife and accused that both had indulged in sexual intercourse and accused thus committed adultery. However, no such tape recorded conversation is produced in court though available with complainant. From those telephonic conversations complainant came to know about the offence of adultery committed but due to non production of material evidence it is difficult to believe the story of the complainant based upon vague and general Page 1979 allegations. Though it is difficult to collect direct evidence of adultery but when own admission and confession of accused having committed offence in the form of tape recorded conversation is available then that would be the best evidence. Non production of the same goes against complainant.

Secondly, as per the complainant, accused booked one room in Lodhi Hotel on some particular dates such as 10 and 11 September, and 3rd October, where the alleged sexual intercourse taken place between accused and CW-1 but no record of that hotel was produced to show that infact any such room was booked. Though such type of extra marital sexual intercourse is committed in very private manner by taking all precautions to conceal but at least some circumstances should be shown by the complainant which leads to the inference that any such intercourse had taken place or any steps were taken in order to facilitate intercourse or adultery. Non production of record of the hotel to show that accused and wife of complainant when there, booked one room and in what capacity they lived and for how much period and what they described about them selves in hotel register are some of the facts, non disclosure of which is fatal to the case of complainant.

39. In his order, he also mentioned that though in the complaint, it was alleged that in the absence of complainant, petitioner used to come to his house and the petitioner and complainant's wife

would lock themselves in the bed room, the complainant neither examined his father nor children but allegedly stated that the complainant about this behavior of the petitioner and complainant's wife. He also commented about the statement of complainant's in the following manner:

CW-1 was a consenting party to the sexual intercourse. Her own conduct makes her also an offender or abettor. Though as per law she cannot be prosecuted or punished for offence under section 497 IPC but her statement is required to be considered very cautiously even at this stage where court has to see only prima facie case. The allegations levelled are vague and general in nature. The statement of CW-1 regarding coming to know about the adultery by complainant is run counter to the averments made in the complaint. According to CW-1 she informed her husband about sexual intercourse with accused and then telephonic conversations was recorded by their planning but according to complainant he came to know about the adultery first time when secretly conversation was recorded. Accused also started sending recorded audio cassettes but no such cassette is produced in court. The allegations levelled regarding threats to kill and defame are general and vague in nature without particular instances, date and place so cannot be relied upon.

40. In this backdrop, second argument of learned Counsel for the petitioner assumes importance. Against the aforesaid order, Revision Petition was filed and the learned ASJ, while allowing the Revision Petition, remanded the case back to the learned Metropolitan Magistrate. He observed that there were clear allegations of having sexual intercourse with the wife of the Page 1980 complainant. Learned Metropolitan Magistrate was wrongly influenced by the fact that the wife of the complainant was a consenting partner inasmuch as consent of the wife is immaterial unless the husband also has no objection and therefore, offence of adultery was clearly made out. He also observed that testimony of the complainant's wife was starting evidence and non-production of the recorded conversation would be immaterial. I feel that the learned ASJ passed cryptic order by mentioning that only there were allegations of adultery, the prima facie case was made out. The order of the learned Metropolitan Magistrate giving reasons why he was dismissing the complaint, was not properly appreciated. The learned Metropolitan Magistrate had subsequently mentioned that he was conscious of the fact that the consent of the wife would be of no relevance but rightly pointed out that in a case like this, her testimony was to be considered with circumspection.

41. Interestingly, while setting aside the order, the learned ASJ remanded back the case for reconsideration for summoning the accused persons. However, the same learned Metropolitan Magistrate now did not reconsider the case by observing that Sessions Court had already given its finding that there were prima facie evidence against the petitioner and passed the summoning order. Order of the ASJ is dated 23rd December, 2003 and the summoning orders were passed by the learned Metropolitan Magistrate on the very next date i.e. on 24th December, 2003.

42. Petitioner had, in the meantime, challenged the order of learned ASJ by filing petition under Section 482 in this Court, which was disposed of vide order dated 13.02.2004 observing that the order of the ASJ was not on merits but only a direction to the Magistrate to reconsider the material placed before him in the complaint in accordance with law. Obviously, in view of this, order dated 24th December, 2003, though already passed, would be wrong as Magistrate was to reconsider the material placed before him in the complaint and not to go mechanically by the observations made by

ASJ. This is how the order of ASJ is interpreted by this Court and on that interpretation, summoning order is clearly bad in law as Magistrate has not applied his own mind afresh.

43. In view of my aforesaid analysis, the matter need not be remanded back to the learned Metropolitan Magistrate. I am of the view that there is no sufficient material produced against the petitioner. This is coupled with the fact that the complainant has withdrawn his Divorce Petition both against his wife and the petitioner, no useful purpose would be served in continuing with these proceedings. The Summoning orders are, therefore, quashed and the complaint is dismissed.

44. There shall be, however, no orders as to costs.