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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

MISC. CRIMINAL CASE No. 40044 of 2023

BETWEEN:-

1. **MR. SHASHANK HARSH S/O VINAY KUMAR HARSH, AGED ABOUT 40 YEARS, OCCUPATION: ENGINEER NAINITAL (UTTARAKHAND)**
2. **SMT. SAROJ HARSH W/O LATE VINAY KUMAR HARSH, AGED ABOUT 67 YEARS, OCCUPATION: HOME MAKER NAINITAL, UTTARAKHAND (UTTARAKHAND)**
3. **SHWETA SHALIN WHEELER W/O MR. MR. LESLIE ASHISH WHEELER, AGED ABOUT 43 YEARS, OCCUPATION: BUSINESS GHAZIABAD (UTTAR PRADESH)**
4. **MR. LESLIE ASHISH WHEELER S/O SHRI JOY WHEELER, AGED ABOUT 43 YEARS, OCCUPATION: BUSINESS GHAZIABAD (UTTAR PRADESH)**

.....APPLICANT

***(MS. SITWAT NABI, LEARNED COUNSEL WITH SHRI YASH VYAS,
LEARNED COUNSEL FOR THE PETITIONER .)***

AND

1. **THE STATE OF MADHYA PRADESH STATION HOUSE OFFICER THROUGH POLICE STATION SHAMGARH THANA DISTRICT MANDSAUR (MADHYA PRADESH)**
2. **ALICE W/O SHASHANK HARSH, AGED ABOUT 31 YEARS, R/O GURJAR COLONY, SHAMGARH (MADHYA PRADESH)**

.....RESPONDENTS

***(SHRI H.S.RATHORE - GOVT. ADVOCATE FOR RES./STATE
(SHRI SUBODH CHOUDHARY, ADVOCATE FOR RES.[COMP].)***

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Reserved on:16.05.2024

This M.Cr.C. having been heard and reserved for orders, coming on for pronouncement this day, the court passed the following:

ORDER

Heard finally, with the consent of the parties.

2 . This petition under Section 482 of Cr.P.C. is preferred by the petitioners for quashment of the FIR bearing Crime No.407/2023, dated 24.08.2023, registered at Police Station-Shyamgarh, District - Mandsaur, under Sections 377, 498-A, 294, 506 of IPC, 1860 and the consequential proceedings.

3 . As per the prosecution story, on 23.08.2023, complainant gave a written complaint stating that the marriage of the petitioner no.1. was solemnized with her on 09.12.2021 in the Court at Nainital. After marriage she started residing at her matrimonial house and discharging her duties as a daughter-in-law. Further allegation is that petitioner no.1 has committed unnatural sex with the complainant on 09.01.2022 due to which she got mouth infection and was under treatment. The complainant was compelled to abort her pregnancy by the petitioners. It was alleged that the petitioners demanded Rs.20.00 lakhs as dowry and also used to torture her verbally and physically for not fulfilling their demands. Therefore being aggrieved the complainant has filed a complaint.

4. Learned counsel for the petitioners submitted that the allegations are prima facie false, and have been levelled against the petitioners only to give criminal angle to the matrimonial dispute. Allegation of unnatural sex by petitioner no. 1 is unequivocally false and the petitioner no.1 and complainant were in happy marriage. There is no material on record put by the complainant to substantiate her baseless and frivolous allegations and the provisions of

Section 377 has been inserted in the said FIR with *mala fide* intention to harass the petitioner, in order to secure vengeance against the petitioner no.1 and his family members which solely arises out of matrimonial dispute. The act of unnatural sex by a husband with his legally wedded wife residing with him is not an offence under Section 377 of IPC, as held by Hon'ble High Court of M.P. in the case of *Umang Singhar vs. State of Madhya Pradesh (2023 SCC Online MP 3221)* and *Manish Sahu vs. State of M.P. & Anr. (M.Cr.C. No.8388/2023)*. There is a significant delay of 1 year and 9 months in lodging the FIR without any proper explanation for the inordinate delay. No medical report was furnished to substantiate the claim that complainant got mouth infection and was under treatment. Counsel further relied upon the case of *Kailash Sonkar & Ors. vs. State of Chhattisgarh & Ors. (W.P. (Crl.)508 of 2021)* in support of her contentions. The petitioners never made any unreasonable demands and they had a very cordial relationship with the complainant. The petitioners were very supportive and caring towards complainant. At the time of death of complainant's father, petitioner no.1 booked expensive flight tickets for complainant and took over the burden of tickets cost upon him.

5. Counsel further contended that the complainant was an abusive wife who harassed petitioner no.1 husband and alienated him from his family. The decision to return to India was made by the complainant with the intention of lodging false cases against the petitioners. With regard to harassment met by the complainant, it is submitted that even after marriage the complainant did not live with her in-laws at her marital home. The petitioners had a very cordial relationship with the complainant they gifted generously with complainant. Complainant in course of torturing, threaten and harassed petitioner no.1,

deliberately made him refrained from talking to his mother, bother, sister and other family members, thereby completely alienated and isolated him from his family members. In relation to abortion claim, the consent letter, undertaking signed by the complainant herself along with whatsapp chats clearly depicts that the abortion was a mutual decision and not coerced by the petitioner no.1 or his family members.

6. Counsel also relied upon the judgment of Hon'ble Apex Court in the case of *Abhishek vs. State of Madhya Pradesh (Cr.A. No.1457/2015) decided on 01.09.2023* wherein the co-ordinate Bench of this Court quashed the FIR against the in-laws citing farfetched and vague allegations and quashed the criminal proceedings initiated at the instance of a wife against her in-laws for the offence under Section 498-A of Cr.P.C. To strengthen her contentions counsel placed reliance upon the decisions in *Kailash Sonkar & Ors. vs. State of Chhattisgarh [2021 SCC Online Chh 3258]*, *Preeti Gupta vs. State of Jharkhand [(2010) 7 SCC 667]*, *Rajan & Anr vs. State o MP. [2023 SCC Online MP 239]*, *Arnesh Kumar vs. State of Bihar [(2014) 8 SCC 469]*, *Nimmgadda Vijay Lakshmi & Ors. vs. State of A.P. [2023 SCC Online AP 1814]*, *Manu Nishchal & Ors. vs. State of NCT & Anr. [2009SCC Online Del 321]*, *Manish Sahu vs. State of M.P. & Anr. [M.Cr.C. No.8388/2023 order dated 01.05.2024]*. Counsel submitted that the respondent no.2 just to take vengeance from the petitioners filed the fictitious complaint. Under these facts and circumstances counsel prayed that the FIR bearing Crime No.407/2023 dated 24.08.2023 registered against the petitioners under Section 498-A, 37 294, 506 of IPC and the consequential proceedings be quashed.

7. Per Contra, learned counsel for the respondent as well as counsel for the respondent/State have vehemently opposed the application by submitting that unnatural sex with his own wife is an offence punishable under Section 377 of IPC and there are specific allegations of harassment and torture so also the petitioners have forced the respondent no.2 to abort her child hence no case is made out for quashment of FIR and the further proceedings, therefore counsel prayed for dismissal of this petition.

8. I have heard the counsel for the parties and perused the record.

9. In view of the aforesaid contentions and arguments advanced by counsel for the parties, it is worth here to quote the definition of "rape" as prescribed under Section 375 of IPC, which reads as under:

375. Rape.- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

10. The definition of "rape" was amended by Act No.13 of 2013 and the amended definition of "rape" as defined under Section 375 of IPC reads as under:-

Rape.-- A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to

understand the nature and consequences of that to which she gives consent.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape

11. From the aforesaid definition it is evident that word 'rape' under Section 375(a) of IPC includes penetration of penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or with any other person. Thus, the act of unnatural sex has been made a part of definition of "rape". Section 375(a), (b), (c) & (d) of IPC includes all sorts of unnatural acts. Therefore, if a person penetrates his penis into the mouth, urethra or anus of a woman, would be guilty of committing rape.

12. Now the point needs to be considered is as to whether the consent of wife residing along with her husband during the subsistence of marriage can claim that the sexual act was committed with her without her consent?

13. In the case of *Manish Sahu Vs. State of M.P. (Supra)* endorsing the view of Hon'ble Apex Court in the case of *Navtej Singh Johar and Others*

vs. Union of India through Secretary, Ministry of Law and Justice reported in (2018) 10 SCC has opined as under:

"17. Thus the consent of both the parties is necessary for taking the act out of the purview of Section 377 of IPC. However, this Court after considering the amended definition of "rape" as defined under Section 375 of IPC has already come to a conclusion that if a wife is residing with her husband during the subsistence of a valid marriage, then any sexual intercourse or sexual act by a man with his own wife not below the age of fifteen years will not be rape. Therefore, in view of the amended definition of "rape" under Section 375 of IPC by which the insertion of penis in the anus of a woman has also been included in the definition of "rape" and any sexual intercourse or sexual act by the husband with her wife not below the age of fifteen years is not a rape, then under these circumstances, absence of consent of wife for unnatural act loses its importance. Marital rape has not been recognized so far.

18. Under these circumstances, this Court is of considered opinion That the allegations made in the FIR would not make out an offence under Section 377 of IPC. My view is fortified by a judgment passed by Co-ordinate Bench of this Court in the case of Umang Singhar Vs State of Madhya Pradesh, Through Station House Officer and Another reported in 2023 SCC OnLine MP 3221."

सत्यमेव जयते

14. In the case of *Umang Singhar vs. State of M.P. & Anr* (order dated 21.09.2023 passed in M.Cr.C. No.59600/2022) co-ordinate Bench of this Court while dealing with question whether the offence under Section 377 of IPC between husband and wife can be weighed parallel to the offence of rape as defined under section 375 IPC has held as under:

"12. Indeed, the primary argument of the learned counsel for the petitioner was that when Section 375 IPC defines 'rape' and also by way of amendment in 2013, Exception-2 has been provided which bespeaks that sexual intercourse or sexual acts by a man with his own wife is not a rape and therefore if any unnatural sex as defined under section 377 is committed by the husband with his wife, then it can also not be treated to be an offence. Secondly,

as per the learned counsel for the petitioner, the impugned FIR is nothing but a malicious prosecution inasmuch as it has been lodged with intent to get ill-gotten gains by extorting money/property due to matrimonial discord between husband and wife, without disclosing any date, time and place of committing offence and also runs short of any explanation about the tardy complaint. Neither the allegations made against the petitioner are specific but are general and omnibus in nature, nor has it been succoured by any encouraging evidence. Thus, the petitioner's prosecution is apparently an abuse of process of law, which to secure the ends of justice, is liable to be annulled at the threshold. Tertiary, Shri Khandelwal argued that in the facts and circumstances of the case, vis-a-vis the existing legal position when Section 375 defines 'rape specifying the offender and victim, and also the body parts which can be used for committing an offence, but repealing the said provision with regard to relation of husband and wife then doctrine of 'implied repeal' would also be applicable considering the unnatural offence.

13. To fathom the depth of submissions made by the learned counsel for the petitioner, it is imperative to go-through the definition of 'rape', in that, for committing rape, as per Section 375(a), an offender is a 'man' who uses the part of the body - (a) Penis, as per Section 375(b) body-parts other than penis and 375(c) any other object. Simultaneously, the said definition describes - at the receiving end the body parts are (a) Vagina, (b) Urethra, (c) Anus, (d) Mouth and (e) other body parts. Considering the offence of Section 377 i.e. unnatural, although it is not well-equipped and offender is not defined therein but body parts are well defined, which are also included in Section 375 i.e. carnal intercourse against the order of nature. At this juncture, it is indispensable to see what is unnatural. The Supreme Court in a petition challenging the constitutionality of Section 377 IPC criminalizes 'carnal intercourse against the order of nature' which among other things has been interpreted to include oral and anal sex. Obviously, I find that Section 377 of IPC is not well-equipped. Unnatural offence has also not been defined anywhere. The five-judge bench of the Supreme Court in re Navtej Singh Johar (supra) testing the constitutionality of said provision although held that some parts of Section 377 are unconstitutional and finally held if unnatural offence is done with consent then offence of Section 377 IPC is not made out. The view of the Supreme Court if considered in the light of amended definition of Section 375 and

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

"10. It is true that repeal by implication is not ordinarily favoured by the courts but the principle on which the rule of implied repeal rests has been stated in Maxwell on Interpretation of Statutes (Twelfth Edition) at p.193 thus:

"If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the later (vide *Kutner v. Phillips*)."

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

16. At this point, if the amended definition of Section 375 seen, it is clear that two things are common in the offence of Section 375 and Section 377 firstly the relationship between whom offence is committed i.e. husband and wife and secondly consent between the offender and victim. As per the amended definition, if offender and victim are husband and wife then consent is immaterial and no offence under Section 375 is made out and as such there is no

punishment under Section 376 of IPC. For offence of 377, as has been laid down by the Supreme Court in re *Navtej Singh Johar* (supra), if consent is there offence of Section 377 is not made out. At the same time, as per the definition of Section 375, the offender is classified as a 'man'. here in the present case is a 'husband' and victim is a 'woman' and here she is a 'wife' and parts of the body which are used for carnal intercourse are also common. The offence between husband and wife is not made out under Section 375 as per the repeal made by way of amendment and there is repugnancy in the situation when everything is repealed under Section 375 then how offence under Section 377 would be attracted if it is committed between husband and wife.

17. In other way, the unnatural offence has not been defined anywhere, but as has been considered by the Supreme Court in the case of *Navtej Singh Johar* (supra) that any intercourse, not for the purpose of procreation, is unnatural. But respectfully I find that when same act as per the definition of Section 375 is not an offence, then how it can be treated to be an offence under Section 377 IPC. In my opinion, the relationship between the husband and wife cannot be confined to their sexual relationship only for the purpose of procreation, but if anything is done between them apart from the deemed natural sexual intercourse should not be defined as 'unnatural'. Normally, sexual relationship between the husband and wife is the key to a happy connubial life and that cannot be restricted to the extent of sheer procreation. If anything raises their longing towards each other giving them pleasure and ascends their pleasure then it is nothing uncustomary and it can also not be considered to be unnatural that too when Section 375 IPC includes all possible parts of penetration of penis by a husband to his wife.

18. Exempli gratia - if sexual intercourse for procreation via penile-vaginal penetrative intercourse is considered to be natural sex and sexual relations of husband and wife is confined to that extent then in case if any husband or wife is not capable of procreation, then seemingly their relationship would become useless, but it does not happen. The conjugal relationship between husband wife includes love that has intimacy, compassion and sacrifice, although it is difficult to understand the emotions of husband and wife who share intimate bond, but sexual pleasure is integral part of their relentless bonding with each other. Ergo, in my opinion, no barrier can be put in alpha and omega of sexual relationship between the husband and his wife. Thus, I find feasible that in view of amended

definition of Section 375, offence of 377 between husband and wife has no place and as such it is not made out."

15. In view of the aforesaid discussions, this Court is of the considered opinion that in the case at hand since the respondent no.2/wife was residing with her husband during the subsistence of their marriage and as per amended definition of "rape" under Section 375 of IPC by which insertion of penis in the mouth of a woman has also been included in the definition of "rape" and any sexual intercourse or act, by the husband with his wife not below the age of fifteen years is not a rape, therefore, consent is immaterial. In these circumstances the allegations made in the FIR does not constitute offence under Section 377 of IPC against the petitioner no.1. Accordingly, the petitioner no.1 is discharged from offence under Section 377 of IPC.

16. Now with regard to offence under Section 294 of IPC *prima facie*, there is no evidence available on record by which it can be ascertained that the accused persons have committed any obscene act in any public place. The said incidents have been occurred in the premises of the house which is surrounded by walls, hence offence under Section 294 of IPC is not made out against the petitioners.

17. Likewise, offence under Section 506 of IPC has also not supported *prima facie* by the evidence placed before the trial Court, there is an omnibus statement regarding threatening to kill, which is not sufficient to establish the charge of offence under Section 506 of IPC because the said threaten must consist the ingredients of fear and frightening. Be that as it may, the allegations are omnibus in nature and not containing any date, time and place. The respondent no.2 had never stated that she was frightened by said threatening, hence offence under Section 506 of IPC is also not made out against the

petitioners.

18. Petitioners have been implicated for offence under Section 498A IPC as well. To make out an offence under Section 498A IPC complainant has not only to allege demand for dowry but also that she was subjected to cruelty by her husband or relatives of the husband for non-fulfillment of their unlawful demand. Cruelty as defined in Section 498A IPC means any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mentally or physically to the woman or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. In the case at hand allegations of demand of dowry of Rs.20.00 lakhs are made against the petitioners. The petitioner no.1 forced the respondent no.2 to have intercourse with his friend and on refusal she has been harassed, assaulted by the petitioner no.1. Further more allegations are also against the petitioners no. 2 to 4 regarding dowry demand and that of taunting her over phone for not fulfilling their demand of dowry. These allegations are made in the FIR as well as in the statement of respondent no.2 recorded under Section 164 of Cr.P.C so also the statement of witnesses recorded under Section 161 of Cr.P.C which is supported by other documentary evidence.

19. Looking to the aforesaid allegations, this Court is of the view that *prima facie* offence under Section 498-A of IPC is made out against the petitioners. Accordingly, the petition regarding quashment of FIR with regard to Section 498-A of IPC is liable to be dismissed.

20. In conspectus of the aforesaid discussions in entirety the petition

under Section 482 of Cr.P.C is partly allowed to the extent that the offence under Sections 377, 294, 506 of IPC against the petitioners are hereby quashed, however, offence under Section 498-A of IPC in the FIR is not quashed and to that extent the present petition is dismissed.

21. Before parting, this Court clarifies that any view or observation made herein would not be binding in any manner on the merits of the case for the concerned trial Court while adjudicating the matter in accordance with law.

22. Resultantly, M.Cr.C. No.40044/2023 stands partly allowed.

Certified copy, as per Rules.

sumathi



(PREM NARAYAN SINGH)
JUDGE