

Sri.george Vs. State

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Court : Karnataka

Decided On : Nov-26-2021

Judge : Hanchate Sanjeevkumar

Appeal No. : CRL.RP 1221/2017

Appellant : Sri.george

Respondent : State

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE26H DAY OF NOVEMBER, 2021 BEFORE THE HONBLE MR. JUSTICE HANCHATE SANJEEVKUMAR CRIMINAL REVISION PETITION NO.1221/2017 BETWEEN: SRI GEORGE, S/O SELVARAJ, AGED ABOUT43YEARS, R/O HOUSE NO.T-1, 98/3, K.P.C.COLONY, HOSANGADI VILLAGE, KUNDAPURA TALUK, UDUPI DISTRICT-576 201. PETITIONER (BY SRI K.PRASANNA SHETTY, ADVOCATE) AND: STATE BY AMASEBAILU POLICE, REPRESENTED BY STATE PUBLIC PROSECUTOR, HIGH COURT BUILDINGS, BENGALURU-560 001. RESPONDENT (BY SRI H.S.SHANKAR, HCGP) THIS CRL.R.P., IS FILED UNDER SECTION397R/W401CR.P.C BY THE ADVOCATE FOR THE PETITIONER PRAYING THAT THIS HONBLE COURT MAY BE PLEASED TO SET ASIDE THE

ORDER

DATED 20.09.2017 MADE IN S.C.NO.02/2017 PENDING ON THE FILE OF ADDITIONAL DISTRICT AND SESSIONS JUDGE, UDUPI (SITTING AT KUNDAPURA) AND DISCHARGE THE PETITIONER FOR THE ALLEGED OFFENCES P/U/S376 AND 417 OF IPC AND ETC., 2 THIS CRIMINAL REVISION PETITION COMING ON FOR ADMISSION THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The present criminal revision petition is filed under Section 397 r/w Section 401 of Cr.P.C., calling in question correctness, legality and propriety of the order dated 20.09.2017 passed on the application filed under Section 227 of Cr.P.C., in S.C.No.2/2017 by the Addl. District & Sessions Court, Udupi, (Sitting at Kundapura), Kundapura, (hereinafter referred to as Sessions Court for short). The application filed by the petitioner/accused for seeking discharge under Section 227 of Cr.P.C., was dismissed by the Sessions Court. Therefore, the petitioner/accused has preferred the present revision petition.

2. The brief facts of the case are that: The prosecutrix/complainant has lodged the complaint before the Amasebailu Police Station and after investigation, charge sheet was filed by the Investigating Officer against the accused for the 3 offences punishable under Sections 376, 417, 323 and 506 of IPC. The case of the prosecution is that, the complainant/prosecutrix has lodged the first information statement before the police making allegation that the complainant and petitioner had met in the month of May, 2012 and both fell in love and the petitioner/accused had promised to marry the complainant and thereafter, both were living together in the house of the petitioner/accused and were leading life like a marital life. It is averred in the complaint that the petitioner was always promising the complainant that he would marry her and cohabitating the complainant and the complainant upon believing the assurance given by the petitioner/accused that he would marry the complainant, therefore, the complainant had surrendered herself to the petitioner/accused. It went on about some years and due to the said cohabitation, the complainant became pregnant, but at the instance of petitioner/accused, the pregnancy was aborted. 4

3. It is submitted that the petitioner/accused was always insisting the complainant that he would marry her, but the petitioner/accused refused to marry the complainant and later on revealed that he has married another girl and thus, refused to marry the complainant/prosecutrix. Therefore, with all these allegations, the complainant has lodged the complaint before the police and after investigation, the Investigation Officer has filed the charge sheet against the petitioner for the offences punishable under Sections 376, 417, 323 and 506 of IPC.

4. The petitioner/accused has filed an application under Section 227 of Cr.P.C., for seeking discharge for the offences punishable under Sections 376 and 417 of Cr.P.C., and to pass further orders as per Section 228(a) of Cr.P.C., regarding the rest of the offences alleged in the charge sheet, but the said application was dismissed by the Sessions Court. Being aggrieved by the dismissal of the application filed 5 under Section 227 of Cr.P.C., the petitioner/accused has preferred the present criminal revision petition.

5. Learned counsel appearing for the petitioner/accused has vehemently submitted that, in the present case, the offence under Section 375 which is punishable under Section 376 of IPC are not attracted, since there is no offence of rape committed by the petitioner/accused, for the reason that the complainant/prosecutrix herself voluntarily surrendered to the petitioner/accused, which does not prove the ingredients of Section 375 of IPC. Therefore, the offence under Section 376 is not attracted. Further submitted that there is no forceful act of ravishing against the complainant, but on the other hand, the complainant herself with her volition has voluntarily surrendered to the petitioner/accused and that they had been living as husband and wife as if there was a marital life. Therefore, with this factual background, it is submitted that the offence under Section 376 of IPC is not attracted. 6

6. Further submitted that the offence under Section 417 of IPC is not attracted as he has not cheated the complainant. The averment in the complaint that the petitioner/accused would marry the complainant is not correct as the petitioner/accused had never promised to marry the complainant, but the complainant herself came to the house of the petitioner/accused and started to live

with the petitioner/accused and for this live-in-relationship, the offences under Sections 417 and 376 of IPC are not attracted as the allegations alleged in the complaint do not constitute an offence under Sections 376 and 417 of IPC, which is lost sight by the Sessions Court and prays for interference with the impugned order.

7. Further learned counsel for the petitioner submitted that when the complainant herself has given consent and offered herself and more over, the complainant being a woman aged 35 years old, therefore, on these circumstances, offences under Sections 376 and 417 of IPC are not attracted. 7 Therefore, prays to discharge the petitioner for these offences and also prays to interfere with the impugned order.

8. On the other hand, learned HCGP submitted that the Sessions Court has rightly dismissed the application filed for discharge. The averments alleged in the complaint attracts an offence under the provision of Section 376 of IPC. Further, submitted that the petitioner had promised the complainant to marry her and used her for his sexual lust and later on has given up and thrown her out from the house is nothing, but an act of cheating and the petitioner has rightly been charge sheeted for the said offences. Therefore, it is rightly considered by the Sessions Court and accordingly, the impugned order cannot be interfered with. Hence, prays for dismissal of the revision petition.

9. Upon hearing the rival contentions of the learned counsel for the petitioner and learned HCGP, the points that arise for consideration are as follows:

8. (I) Whether, in the background of accusations alleged in the complaint and in the charge sheet, if the accused promised the prosecutrix to marry her and make believe the prosecutrix that the accused would marry her and uses the prosecutrix to satisfy his sexual lust and then refusing the prosecutrix to marry her, is amounting to misconception of fact and such consent of prosecutrix is misconception of fact. Thus, is not consent as per Section 90 of IPC. Thus, charge can be framed against the accused for the offence under Sections 376 and 417 of IPC, as per accusations made?. (II) Upon considering the facts and circumstances involved in the case, the order of dismissing the application filed under Section

227 of Cr.P.C., passed by the Sessions Court requires interference by this Court on the ground of illegality as alleged?.

10. The complainant has lodged the complaint before the police by alleging that they got introduced each other in the month of May, 2012, for the first time and later on, close intimacy was developed between them and the petitioner/accused had promised to marry the complainant and accordingly, both of them started living together in the house of the petitioner/accused, which led into making cohabitation. It is alleged in the complaint that the 9 petitioner/accused would marry the complainant and upon assurance made by the petitioner/accused, the complainant believed his promise and herself has surrendered to the petitioner/accused and likewise, they lived together in the house of the petitioner/accused for four years. Resultantly, the complainant got conceived and became pregnant, but later on at the instance of the petitioner/accused, such pregnancy was aborted against the will of the complainant. Further, it is alleged that the petitioner/accused had married another woman and thus, cheated the complainant. Therefore, with these allegations, the complaint was lodged before the police and after conducting the investigation, charge sheet was filed against the petitioner/accused for the offences punishable under Sections 376, 417, 323 and 506 of IPC.

11. During the course of investigation, the Investigation Officer recorded the statement of the complainant under Section 164 of Cr.P.C., before the 10 Jurisdictional Magistrate First Class (hereinafter referred to as learned Magistrate for short).

12. Therefore, being aggrieved upon the charge sheet filed for the offences as above stated and for discharging of the offences, the accused has filed an application under Section 227 of Cr.P.C., before the Sessions Court and the Sessions Court after passing considered order has dismissed the application filed by the petitioner/accused. Being aggrieved by the said dismissal of the application, the present revision petition is filed.

13. Upon considering the complaint averments, charge sheet material, statement of the complainant recorded under Section 164 of Cr.P.C., the prime accusation

against the petitioner is that the petitioner had promised the complainant that he would marry her and used the complainant for satisfying his sexual lust and later on refused to marry her and thrown her out from the house. Thus, the question is whether it constitutes an offence of rape under Section 375 of IPC¹¹ and there is a commission of offence of cheating with other offence as alleged. As per the submission made by the learned counsel for the petitioner, the petitioner has promised to marry the complainant and later on, breaking the said promise of marrying the prosecutrix does not constitute an offence under Section 375 of IPC. Further submitted that the petitioner never promised to marry the complainant. Hence, there is no question of breaking the promise. Therefore, submitted that when the complainant/ prosecutrix has voluntarily surrendered herself to the petitioner/accused and lived together for four years under a single roof and when there is a consent on the part of the complainant, that does not constitute an offence under Section 376 of IPC, much less, under Section 417 of IPC also.

14. Upon considering the statement given by the complainant under Section 164 of Cr.P.C., the complainant has in detail narrated the incident of day today as to how the petitioner/accused had committed 12 the alleged offence as discussed. Therefore, the question to be considered in the background of accusation as per charge sheet and its materials as to whether the act of promise on the part of the petitioner/accused to marry the prosecutrix and using the prosecutrix for sexual intercourse for sometime and later on, refusing to marry the prosecutrix constitute an offence under Section 376 of IPC and also this act amounts to cheating punishable under Section 417 of IPC.

15. At this stage, it is made clear that, the instant case is dealing with only in respect of what is alleged in the complaint, narration in the statement under Section 164 of Cr.P.C and charge sheet materials whether framing of charge arises for the offences under Sections 376 and 417 of IPC or not.

16. In this regard, in the similar facts and circumstances involved in the case, having the similar nature of offence, it is worthwhile to bank upon the principles laid down by the Honble Apex Court in the 13 case of State of U.P Vs. V.Naushad reported in AIR 2014 SC384 In the above cited case, the facts are that the

accused has committed sexual intercourse with the prosecutrix by giving false assurance that he would marry her and after she got conceived, the accused refused to marry the prosecutrix, under these accusations, it was held that it amounts to consent obtained under misconception of fact punishable under Section 376 of IPC. It was held that this act amounts to consent by misconception of facts. Hence, charge can be framed and if proved, punishable for offence under Section 376 of IPC. In the above cited case, with the above said allegations, the Sessions Court has convicted the accused for an offence under Section 376 of IPC, which was reversed by the High Court. In appeal, the Honble Apex Court while interpreting Section 90 of IPC, the facts stated and proved upon the evidence clearly constitute an offence under Section 376 of IPC and thus, the conviction recorded by the Sessions Court was upheld for the offence under Section 376 of IPC. 14

17. The Honble Apex Court in the above said judgment was pleased to observe at Paragraph Nos.10 and 11 as follows: 10. We will answer point Nos.1 and 2 together as they are related to each other. Section 376 of IPC prescribes the punishment for the offence of rape. Section 375 of the IPC defines the offence of rape, and enumerates six descriptions of the offence. The description secondly speaks of rape without her consent. Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix against her consent. The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of bad character. How is consent defined?. Section 90 of the IPC defines consent known to be given under fear or misconception which reads as under:- 90. Consent known to be given under fear or misconception - A consent is not such consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; xxxx Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the present case, the accused had sexual

intercourse with the prosecutrix by giving false 15 assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 of the IPC. Thus, the alleged consent said to have obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her. In the case of *Yedla Srinivas Rao v. State of A.P.* reported in (2006) 11 SCC615 with reference to similar facts, this Court in para 10 held as under:- (Emphasis is supplied) 10. It appears that the intention of the accused as per the testimony of PW1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before Panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, 16 the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent. Further, in para 17 of the said judgment, this Court held that:- In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in

law. This is more evident from the testimony of PW1 as well as PW6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by prosecutor that he would marry her. Thus, this Court held that the accused in that case was guilty of the offence of rape as he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact.

11. The High Court has gravely erred in fact and in law by reversing the conviction of the accused for the offence of rape and convicting him under Section 376 of the IPC. It is apparent from the evidence on record that the accused had obtained the consent of the prosecutrix for sexual intercourse under a misconception of fact i.e. that he would marry her and thus made 17 her pregnant. He is thus guilty of rape as defined under Section 375 of the IPC and is liable to be punished for the offence under Section 376 of the IPC. The trial court was absolutely correct in appreciating the evidence on record and convicting and sentencing the accused for the offence of rape by holding that the accused had obtained the consent of the prosecutrix under a misconception of fact and this act of his amounts to an offence as the alleged consent is on the basis of misconception, and the accused raped the prosecutrix. He brazenly raped her for two years or more giving her the false assurance that he would marry her, and as a consequence she became pregnant. For the reasons stated supra, we have to uphold the judgment and order of the trial court in convicting and sentencing the accused for the offence of rape, by reversing the judgment and order of the High Court. We find the accused-respondent guilty of the offence of rape as defined under Section 375 of the IPC.

18. Section 90 of IPC stipulates as follows: 90. Consent known to be given under fear or misconception A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person:- If the consent is given by a person

who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or 18 Consent of child:- Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

19. Therefore, if the consent is obtained under fear or misconception of fact, then it is not a valid consent. Therefore, even if the consent is obtained, it appears to be voluntary, but it is under misconception of fact, which consent is not a valid consent. The Honble Apex Court has observed that the accused had sexual intercourse with the prosecutrix and consent was obtained under misconception of fact as defined under Section 90 of IPC. Therefore, such consent is not a free consent, but it is under misconception of fact. It is further discussed that it is evident that the accused was never intended to marry the prosecutrix and procured her consent only for having sexual relationship with her, which act of the accused squarely falls under the definition of rape as sexual intercourse is with her consent which was obtained under misconception of fact. Therefore, the accused promising the prosecutrix to marry her and using the 19 prosecutrix for satisfying his sexual lust and later on, refusing to marry the prosecutrix clearly amounts to consent obtained under misconception of fact. Therefore, it is the clear allegation made against the petitioner by the complainant that the petitioner had promised to marry her and developed sexual relationship with the complainant for four years and later on, refused to marry the prosecutrix and even though, on its face value there is a consent on the part of the prosecutrix, but this consent is not a free consent or valid consent, but a consent obtained under misconception of fact. In the present case, misconception of fact is that the petitioner has promised to marry the prosecutrix and later on, refused to marry the prosecutrix. Therefore, making the prosecutrix to believe that the accused would marry the prosecutrix and using her for sexual relationship is the misconception of fact.

20. Therefore, upon the proven facts of the above cited case, the Honble Apex Court had upheld 20 the conviction order passed by the trial Court under Section 376 of IPC, but the principles of law laid down is that, when the accused promised to marry the prosecutrix; used her to satisfy his sexual lust and later on, refusing to marry the prosecutrix is nothing, but a consent obtained under misconception of

fact, which attracts the offence under Section 376 of IPC. Therefore, on these facts and circumstances, the Sessions Court has rightly dismissed the application filed by the accused. Therefore, the petitioner/accused is not entitled for seeking discharge under Section 376 of IPC as it is rightly upheld by the Sessions Court. The petitioner in his application has requested for discharge for an offence under Section 417 of IPC and he has not committed any offence of cheating.

21. Section 415 of IPC reads as follows: 415. Cheating:- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission 21 causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

22. The prosecution case reveals that the petitioner had promised to marry the prosecutrix and later on, refused to marry her after using her for satisfying his sexual lust and this caused harm to the body and reputation of the prosecutrix. Therefore, it constitutes an offence under Section 415 of IPC. The offence of cheating is defined as whoever causes damage or harm to the person in body, mind, reputation or property is said to have committed an offence of cheating.

23. In the present case also, it is the allegation that the petitioner had promised the prosecutrix to marry her and used her for sexual intercourse and later on, refused to marry is nothing, but causing harm to the body and reputation of a person and the petitioner /accused making the prosecutrix to believe that he would marry her and refusing to marry her is nothing, but causing harm to the reputation as it is an 22 offence of cheating under Section 415 of IPC. Therefore, the prosecution has prima facie case to proceed under Section 415 read with Section 417 of IPC also.

24. Therefore, the Sessions Court has rightly considered all these ingredients and rightly dismissed the application filed under Section 227 of Cr.P.C., which needs no interference. Therefore, the revision petition fails as being devoid of merits, which needs no interference. Hence, I answer the point in negative. Accordingly, I pass the following

ORDER

The criminal revision petition is dismissed. I.A.No.1/2017 does not survive for consideration. Sd/- JUDGE PB

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