IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF MARCH, 2022

R

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.48367 OF 2018 (GM-RES)

C/W

WRIT PETITION No.12976 OF 2017 (GM-POLICE)

WRIT PETITION No.10001 OF 2018 (GM-RES)

WRIT PETITION No 50089 OF 2018 (GM-RES)

IN WRIT PETITION No.48367 OF 2018

BETWEEN:

MR.HRISHIKESH SAHOO
S/O JAGANNATH SAHOO
[redacted]

... PETITIONER

(BY SRI HASHMATH PASHA, SR.ADVOCATE FOR
SRI RANJAN KUMAR, P., ADVOCATE (PHYSICAL HEARING))

AND:

1. STATE OF KARNATAKA BY
WOMEN POLICE STATION
EAST ZONE, BENGALURU CITY – 560 030

(REPRESENTED BY LEARNED

GOVERNMENT ADVOCATE)

2. UNION OF INDIA
DEPARTMENT OF LAW AND
PARLIAMENTARY AFFAIRS
REPRESENTED BY ITS
CABINET SECRETARY
4TH FLOOR, A-WING, RASHTRAPATI BHAWAN
NEW DELHI – 110 004
(REPRESETNED BY SECRETARY)

3. SMT. XXXXXX @ XXXXX
W/O HRISHIKESH SAHOO
AGED ABOUT 27 YEARS,
[redacted]

... RESPONDENTS

(BY SMT.NAMITHA MAHESH B.G., AGA A/W
SRI R.D.RENUKARADHYA, HCGP FOR R1 (PHYSICAL HEARING)
SRI MADANAN PILLAI R., CGC FOR R2 (VIDEO CONFERENCING)
SRI A.D.RAMANANDA, ADVOCATE FOR R3 (PHYSICAL HEARING))

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE PRAYING TO DECLARE THAT SECTIONS 29 AND 30 OF THE POCSO ACT IS UNCONSTITUTIONAL BEING VIOLATION OF ARTICLES, 14, 19, AND 21 OF CONSTITUTION AND ETC.,

IN WRIT PETITION No.12976 OF 2017

BETWEEN:

MRS. XXXXXXX @ XXXX
[redacted]

[redacted]

... PETITIONER

(BY SRI RAMANANDA A.D., ADVOCATE (PHYSICAL HEARING))

AND:

1. STATE OF KARNATAKA
HON'BLE MINISTRY OF
PARLIAMENTARY AFFAIRS AND LAW
R/BY ITS SECRETARY
GOVERNMENT OF KARNATAKA
VIDHANA SOUDHA,
BENGALURU – 560 001.

2. THE COMMISSIONER OF POLICE
INFANTRY ROAD
BENGALURU – 560 001.

3. THE INSPECTOR OF POLICE
WOMEN POLICE STATION
BASAVANAGUDI POLICE STATION
BENGALURU – 560070.

4. THE INSPECTOR OF POLICE
WOMEN POLICE STATION
SHIVAJINAGAR POLICE STAITON
BENGALURU – 560 001.

5. KARNATAKA STATE LEGAL SERVICE AUTHORITY
R/BY ITS CHAIRMAN
NYAYADEGULA BUILDING
SIDDAIAH ROAD
BENGALURU – 560 027.

(AMENDED VIDE COURT ORDER

DATED 04.09.2018)

... RESPONDENTS

(BY SMT.NAMITHA MAHESH B.G., AGA A/W
SRI R.D.RENUKARADHYA, HCGP FOR R1 TO R4
(PHYSICAL HEARING);
SMT.B.V.NIDHISHREE, ADVOCATE FOR R5)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT THE R-1 TO OFFER SOCIAL SECURITY, REHABILITATION PROCESS AND FINANCIAL SECURITY IN KEEPING VIEW OF THE FUTURE LIFE OF THE PETITIONER AND HER DAUGHTER'S NAME NOT DISCLOSED IN THE ANNEXURE-B DTD:21.3.2017 IN CRIME NO.13/2017 PENDING ON THE FILE OF CCH-54 INVESTIGATED BY THE R-3 POLICE AND ETC.,

IN WRIT PETITION No.10001 OF 2018

BETWEEN:

KARAM ABDUL AHMED
S/O ABDUL AHMED,
AGED ABOUT 23 YEARS,
R/AT NO.20, FARHANA MANZIL

... PETITIONER

(BY SRI HASHMATH PASHA, SR.ADVOCATE FOR
SRI RANJAN KUMAR P., ADVOCATE (PHYSICAL HEARING))

AND:

1. STATE OF KARNATAKA BY
K.R.PURAM POLICE STATION,
BENGALURU – 560 036

(REPRESENTED BY LEARNED
GOVERNMENT ADVOCATE)

2. UNION OF INDIA
DEPARTMENT OF LAW AND
PARLIAMENTARY AFFAIRS,
REPRESENTED BY ITS
CABINET SECRETARY,
4TH FLOOR, A-WING,
RASHTRAPATI BHAWAN,
NEW DELHI – 110 004
(REPRESENTED BY
ASSISTANT SOLICITOR GENERAL)

... RESPONDENTS

(BY SMT.NAMITHA MAHESH B.G., AGA A/W
SRI R.D.RENUKARADHYA, HCGP FOR R1 (PHYSICAL HEARING)
SRI SHANTIBUSHAN, ASG A/W
SRI B.PRAMOD, CGC FPR R2 (PHYSICAL HEARING))

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE PRAYING TO DECLARE THAT SECTION 29 AND 30 OF THE POCSO ACT IS UNCONSTITUTIONAL BEING VIOLATION OF ARTICLES 14, 19 AND 21 OF THE CONSTITUTION AND ETC.,

IN WRIT PETITION No.50089 OF 2018

BETWEEN:

MRS. XXXXX XXX @ XXXX
W/O HRISHIKESH SAHOO,
AGED ABOUT 28 YEARS,
[redacted]

... PETITIONER

(BY SRI RAMANANDA A.D., ADVOCATE (PHYSICAL HEARING))

AND:

1. THE STATE OF KARNATAKA
BY WOMEN P.S. EAST ZONE,
REPRESENTED BY
STATE PUBLIC PROSECUTOR
HIGH COURT BUILDING,
BENGALURU – 560 001.

2. MR.HRISHIKESH SAHOO
S/O JAGANNATH SAHOO,
AGED ABOUT 43 YEARS
[redacted]

... RESPONDENTS

(BY SMT.NAMITHA MAHESH B.G., AGA A/W
SRI R.D.RENUKARADHYA, HCGP FOR R1 (PHYSICAL HEARING);
R2-SERVED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE PRAYING TO QUASH THE REJECTION ORDER OF THE APPLICATION FILED BY THE ASSISTING PROSECUTOR UNDER SECTION 193 AND SECTION 216 OF CODE OF CRIMINAL PROCEDURE PASSED BY THE LEARNED 50TH ADDL CITY CIVIL AND SESSION JUDGE AT BENGALURU (CCH-51) VIDE IMPUGNED ORDER DTD 16.10.2018 IN SPL.C.C. NO.356/2017 VIDE ANNX-A AND ETC.,

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 20.12.2021, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

What falls for consideration in the subject writ petition is, *"**Integrity and bodily freedom of a woman, the wife, being ravaged by the husband, whether, could be absolved and protected by a law that mandates equality of its application**".*

What pervades the entire petition is, ***"wanton lust, vicious appetite, depravity of senses, loathsome beast of passion, unbridled unleashing of carnal desire of demonish perversion".*** It is these that drove the complainant-wife to register a complaint against the husband for offences punishable, *inter alia,* under Sections 376 and 377 of the Indian Penal Code. Cognizance being taken against the husband for the rape of his wife, is what drives the accused-husband, to this Court.

2. ***FACTUAL EXPOSE'*** as borne out from the pleadings are as follows:

Writ Petition No.48367 OF 2018:

The petitioner- accused No.1 in Spl.C.C.No.356/2017 gets married to the complainant - Mrs.XXXXX @ XXXX on 20.06.2006, at Bhuvaneshwar. The couple stayed at various parts of the nation and at the relevant point in time, he was working at Bangalore and have also a child born out of their wedlock. After few years of living together, relationship of the couple gets horribly strained. Many instances of physical and mental torture to the wife and the child led to the complainant-wife registering a complaint against the husband on 21.03.2017. The complaint becomes an FIR in Crime No.13/2017 for offences punishable under Sections 506, 498A, 323, 377 of the Indian Penal Code ('IPC' for short) and Section 10 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short).

3. The Police, after investigation, have filed a charge sheet against the petitioner. While filing the charge sheet, the offences punishable under Sections 498A, 354, 376, 506 of the IPC and Sections 5(m) and (l) r/w Section 6 of the POCSO Act, 2012, are

invoked. The case is now registered as Spl.C.C.No.356/2017. The parents of the petitioner along with the petitioner were also charge sheeted as accused Nos.2 and 3 and have been discharged pursuant to an order passed by this Court in Crl.P.No.423/2018 disposed on 03.07.2018. Therefore, the trial is now to be conducted only against the petitioner-husband of the complainant.

4. On filing of the charge sheet, the Special Court framed charges against the petitioner alone in terms of its order dated 10.08.2018, for offences punishable under Sections 376, 498A and 506 of IPC and Section 5(m) and (l) r/w Section 6 of the POCSO Act. It is at that juncture, the petitioner has knocked the doors of this Court in the subject criminal petition seeking the following prayers:

"PRAYER

Wherefore, the Petitioner (accused No.1) most humbly prays that this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ of appropriate nature or orders or direction and,

(a) Declare that Sections 29 and 30 of the POCSO Act is unconstitutional being violation of Articles 14, 19 and 21 of the Constitution.

(b) To quash the entire proceedings pending in Spl.C.C.No.356/2017 on the file of Hon'ble L Additional City Civil and Sessions and Special Court for Cases under POCSO Act, Bangalore City as per ***ANNEXURE – 'A'*** *as an abuse of process of Law.*

(c) Grant such other relief or reliefs as this Hon'ble Court deems fit to grant, in the ends of justice."

5. Heard Sri. Hashmath Pasha, the learned senior counsel appearing for the petitioner-husband, Smt.Namitha Mahesh, learned Additional Government Advocate representing respondent No.1-State, Sri Sri.A.D.Ramananda, learned counsel appearing for the complainant-wife, Sri.Shanthi Bhushan, learned Assistant Solicitor General of India representing the Central Government. The respective counsel has made the following submissions:

Submissions of the petitioner:

6. The learned senior counsel Sri Hashmath Pasha would urge the following contentions:

(i) The presumption under Sections 29 and 30 of the POCSO Act is unconstitutional as it imposes a reverse burden of proving innocence on a presumption that the accused is a lady. According to him this concept is unknown to criminal jurisprudence.

(ii) Even if it is presumed that the burden casts upon the prosecution to prove the foundational facts beyond all reasonable doubt the FIR did not contain the offence alleged against the petitioner for the offence punishable under Section 376 of the IPC.

(iii) FIR that was registered was for offence punishable under Section 377 of the IPC while the police filed their final report/charge sheet invoking Section 376 and the learned Sessions Judge takes cognizance of the offence.

(iv) It is his defense against the allegation that the wife, the complainant had in fact extra marital affairs which led to all the problems between the couple. There is no instance narrated in the complaint that would touch upon the offence punishable under Section 498A of IPC.

(v) In so far as allegations under the POSCO Act is concerned, the learned senior counsel would contend that there was no basis to frame the charge under Section 5(1)(m)(L) r/w Section 6 of the POSCO Act as there was no medical evidence as to the commission of any of those offences under those sections. He would submit that CW-2 doctor has categorically opined that there was no penile penetration.

(vi) The learned senior counsel would submit that what is urged against the petitioner insofar as it concerns the wife is offences under Sections 498A, 376, 377 and other allied offences. What is alleged against the petitioner insofar it concerns the daughter is under the POSCO Act. Both the offences being definite and Courts jurisdiction to try these offences being distinct both cannot be tried in the same Court which is now being tried as the designated Court is to try the offence under the POSCO Act.

Submissions of the Union of India:

7. The learned Assistant Solicitor General who represents Union of India/2nd respondent has vehemently refuted these contentions and placed reliance upon several judgments to contend that the plea of challenge to the presumption has been considered and negatived by the Apex Court and this Court in several judgments. Therefore, such a plea would not be available to the petitioner. If that is not available, there is nothing other than that the Union Government needs to answer in the *lis*.

Submissions of the complainant:

8. The learned counsel representing the complainant Sri D.Ramanand would vehemently refute the submissions made by the learned senior counsel and would contend the following:

(i) The foundational facts are already placed by the prosecution before the Court and for it to prove beyond reasonable doubt the trial has not yet commenced.

(ii) On one pretext or the other the petitioner has been moving the Court on umpteen number of occasion and has not allowed the trial to commence.

(iii) He would submit that the allegations being as what is noticed in the complaint or subsequent communications of both the mother and daughter, the petitioner is a beast in the form of a man and should not be shown any indulgence at the hands of this Court and the trial should be permitted to commence.

(iv) He would submit that the learned Sessions Judge has rightly taken cognizance of the offence punishable under Section 376 of the IPC as the facts clearly reveal that the petitioner had sex every time with the complainant torturing and abusing her against her consent and forcibly had his lust fulfilled.

(v) In the peculiar facts of this case though exception to Section 375 protects the husband such protection should not be given in the case at hand. He would submit that the writ petition should be dismissed.

(vi) The Sessions Court has erred in not acceding for addition of a charge to include offences punishable under Section 377 of IPC against the petitioner.

9. The learned Additional Government Advocate Smt. Namitha Mahesh representing the 1st respondent would toe the lines of submissions of the learned counsel appearing for the 2nd respondent and would submit that since the husband is exempted from the allegation of Section 375 of the IPC, even if the facts warrant, it is for this Court to consider the same in the light of the exception. But she would submit that it is a matter for trial.

10. In reply to all the aforesaid submissions of the respective learned counsel for the respondents, the learned senior counsel for the petitioner would submit and accept that no doubt presumption under Sections 29 and 30 of the POSCO Act and their constitutionality has been considered and upheld in several judgments, but that would not mean that the

foundational facts need not be proved beyond all reasonable doubt.

11. I have given my anxious consideration to the submissions made by the learned senior counsel Mr. Hashmath Pasha and other respective learned counsel and perused the material on record.

12. In the light of the submissions made by the respective learned counsel, the following points arise for my consideration:

(i) Whether cognizance being taken against the petitioner-husband for offence punishable under Section 376 of IPC is tenable in law?

(ii) Whether the allegation against the petitioner for other offences is tenable in law?

(iii) Whether the prosecution notwithstanding the presumption under Sections 29 and 30 of the Act has to prove the foundational facts beyond all reasonable doubt?

(iv) Whether the designated Court to try the offences under the Act has jurisdiction to try both the offences under the IPC and the Act in the facts of this case?

(v) Whether chargesheet against the petitioner should be altered to include addition of the offence punishable under Section 377 of IPC?

(vi) Whether proceedings under the POCSO Act against the petitioner needs to be interfered with?

ACTUAL EXPOSE' as discernible from the facts:

13. The facts with regard to marriage and other allegations being not in dispute are not reiterated. The alleged offences resulting in proceedings under the IPC insofar as it concerns the wife and the offence under the Act insofar as it concerns the daughter, is the issue in the *lis,* I, therefore, deem it appropriate to consider the points that have arisen insofar as they concern the offences against the wife at the outset.

Point No.(i):

Whether cognizance being taken against the petitioner-husband for offence punishable under Section 376 of IPC is tenable in law?

14. To consider this issue, it is germane to notice what drove the complainant to register the complaint and what drives the petitioner-accused No.1 to this Court. The entire issue springs from the complaint registered by the wife alleging commission of brutal sexual acts by the husband against her, as also, sexual abuses against the child. It therefore becomes necessary to notice the complaint and its ghastly narration. The complaint runs as follows:

> *"Sub: Complaint against Mr.Hrushikesh, Mrs.Shakunthala and Mr.Jaganath Sahoo*
>
> *All are R/at K.P.C. Layout, S.R.S.Residency, Flat No.306, 6th Cross, Kasavanahalli, Sarjapur, Bengaluru – 560 035, for assault, Criminal Intimidation, harassment for money, forcible unnatural sex and illegal termination of baby by forcible sex and offence of sexual harassment of minor 9 years daughter Kumari. xxxx by Mr. Hrushikesh who is biological father of Kumari. xxxx.*

I crave leave of your good self to take cognizance of my complaint with a request to conceal my name and my daughter's name in the public domain for the reasons stated hereunder:

1. *I am a native of Orissa when I was two years old my father expired in a road accident and I do not recollect his name. I have studied upto 12th standard.*

2. *My mother forced me to marry to Mr.Hrushikesh who is the only son to his parents Mrs.Shakunthala and Mr.Jaganath Sahoo. I got married to Mr.Hurshikesh and I do not want to remember the date where my life was in hell.*

3. ***My husband had repeatedly accused me to each and every person who is known to us that I am not offering him sex shamelessly when he had made me as sex slave.*** *My husband had lodged a false complaint to Vanitha Sahayavani and for the first time I took assistance of my relative to meet the Advocate.* ***I learnt through my Advocate that the person who had called me to the Commissioner's office was booked by my husband and there also he had complained that I am not giving him sex and I am sleeping with my daughter.*** *I did not go to the Commissioner office as I know that my husband will be telling lies that I will not give him sex and I sleep with my daughter which he had repeatedly complained to everyone including my mother, uncle and all known persons to me.*

4. *I was victimized to become a sex slave to Mr.Hrushikesh. On detail counseling of my Lawyer and his wife for the first time I got*

courage to voice out my pains. I had written all my pains to my Lawyer after I was harassed by Mr.Hrushikesh, Mrs.Shakunthala and Mr.Jaganath Sahoo to get money from disposing my ancestral property worth Rs.1 crore and compelled my daughter xxxx to be with them till I get money. My daughter wanted to come to me, my in-laws Mrs.Shakunthala and Mr.Jaganath Sahoo both held my daughter's hair and twisted her hand. My husband Mr.Hrushikesh broke my mobile phone in to pieces and broke my fingers. As the neighbouring flat owners came on hearing our screams, my husband and my in-laws let us go. I have collected some pen drives of my husband and hearing the false accusation that I had beaten by my husband to the neighbours. Out of fear of death and harassment I have rushed to my Advocate office. My Advocate sent me to Nelofar Polyclinic where his client Dr.Mir Iftekhar Ali had come to his office for his legal consultation. I had taken first aid and rushed back to Lawyer's office to complete the questions and answer of my daughter's problems. The details of the question and answers to which I recorded the question and my daughter written her answers simultaneously. The written question and answer of my daughter is enclosed along with this complaint.

5. *I was literally in pain of understanding the sexual harassment of my daughter by my husband Mr.Hrushikesh and I had written my pains in a separate letter addressed to my Advocate and his wife and the copy of the same is herewith enclosed along with this complaint.*

> ***6. I have become a sex slave to my husband right from the day of my marriage. I was compelled and forced to have unnatural anal sex, oral sex by imitating the sex films. My husband did not leave me from giving him forcible sex even after pregnancy and had no courtesy to continue with sex even after my baby got terminated.***
>
> ***7. My husband is totally an inhuman and he forced me to perform all unnatural sex in front of my daughter and many occasions he had beaten her and had forcible sex with me.*** *There was countless sexual harassment which no female in the world would like to express and I want my name and my daughter's name in the complaint to be undisclosed and punish my husband.* ***I am terrible in untold pains from knowing that my husband had sexually harassed my daughter by bringing her early from school and also I do not want any daughter or any mother to undergo the sufferings which both me and my daughter have suffered.***
>
> *I, therefore kindly request you to offer social security by immediately offering rehabilitation for both me and my daughter and punish my husband and in-laws for all the injustice caused to me and my daughter."*
>
> *(Emphasis is mine)*

This is the genesis of the issue before the competent Court. After registration of the complaint for offences under Sections 498A, 377, 354 and 506 read with the provisions of the Act as

quoted hereinabove, investigation was conducted into the matter. After investigation, the Police have filed their final report/charge sheet. The summary of the allegations while filing the charge sheet read as follows:

> *"ಕಾಲಂ ನಂ 6 ರಲ್ಲಿ ನಮೂದು ಮಾಡಿರುವ ಸಾಕ್ಷಿ--1 ರವರ ಮದುವೆಯು ಕಾಲಂ ನಂ 3 ರಲ್ಲಿ ನಮೂದು ಮಾಡಿರುವ ಎ1 ಆರೋಪಿಯೊಂದಿಗೆ 20--06–2006 ರಂದು ಒರಿಸ್ಸಾದ ಭುವನೇಶ್ವರ್ ಇಲ್ಲಿ ಹಿರಿಯರ ಸಮಕ್ಷಮ ನಡೆದಿರುತ್ತದೆ.*
>
> *ಮದುವೆಯ ನಂತರದಿಂದ ಸಾಕ್ಷಿ–1 ರವರು ಎ1 ರಿಂದ ಎ3 ರವರೆಗಿನ ಆರೋಪಿತರೊಂದಿಗೆ ಡೆಲ್ಲಿ ಇಲ್ಲಿ ವಾಸ ಮಾಡಿಕೊಂಡಿರುವಾಗ್ಗೆ* ***ಎ1 ಆರೋಪಿತನು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಲೈಂಗಿಕ ಕಿರುಕುಳ ನೀಡುತ್ತಿದ್ದು, ಅಸಹಜ ಲೈಂಗಿಕ ಕ್ರಿಯೆಗೆ ಒತ್ತಾಯ ಮಾಡಿರುತ್ತಾರೆ. ನಂತರ ಅಶ್ಲೀಲ ವಿಡಿಯೋಗಳನ್ನು ತೋರಿಸಿ, ಲೈಂಗಿಕ ಕ್ರಿಯೆಗೆ ಒತ್ತಾಯ ಮಾಡಿರುತ್ತಾರೆ ನಂತರ ಸಾಕ್ಷಿ–1 ರವರು ಗರ್ಭಿಣಿಯಾಗಿದ್ದು, ಈ ಸಮಯದಲ್ಲಿ ವೈದ್ಯರು ಎ1 ಆರೋಪಿತನಿಗೆ ಲೈಂಗಿಕ ಕ್ರಿಯೆ ನಡೆಸಬಾರದೆಂದು ತಿಳಿಸಿದ್ದು, ಈ ಸಮಯದಲ್ಲಿ ಆರೋಪಿತನು ಸಾಕ್ಷಿ–1 ರವರು ಲೈಂಗಿಕ ಕ್ರಿಯೆಗೆ ಸಹಕರಿಸುತ್ತಿಲ್ಲವೆಂದು ಕೈಗೆ ಸಿಕ್ಕ ವಸ್ತುಗಳನ್ನು ಎಸೆದಿರುತ್ತಾರೆ. ಇದಕ್ಕೆ ಎ2 & ಎ3 ಎ1 ಆರೋಪಿತನ ತಾಯಿ ತಂದೆ ರವರುಗಳಾಗಿದ್ದು, ಸದರಿ ಆರೋಪಿತರು ಏನು ಹೇಳದೆ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಬೈದಿರುತ್ತಾರೆ. ನಂತರ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಮಿಸ್ ಕ್ಯಾರೇಜ್ ಆಗಿದ್ದು, ಈ ಸಮಯದಲ್ಲಿ ವೈದ್ಯರು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ವಿಶ್ರಾಂತಿಗೆ ತಿಳಿಸಿದ್ದು, ಆದರೆ ಎ1 ಆರೋಪಿತನು ಈ ಸಮಯದಲ್ಲೂ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಒತ್ತಾಯವಾಗಿ ಲೈಂಗಿಕ ಕ್ರಿಯೆ ನಡೆಸಿರುತ್ತಾರೆ.***
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> *ನಂತರ ಡೆಲ್ಲಿನಲ್ಲಿಯೇ ವಾಸವಿರುವಾಗ್ಗೆ, ಸಾಕ್ಷಿ–1 ರವರು 2ನೇ ಬಾರಿ ಗರ್ಭಿಣಿಯಾಗಿದ್ದು, ಹೆಣ್ಣು ಮಗುವಾಗಿರುತ್ತದೆ. ಈ ಸಮಯದಲ್ಲೂ ಸಾಕ್ಷಿ–1 ರವರನ್ನು ಎ1 ಆರೋಪಿತನು ತವರು ಮನೆಗೆ ಕಳಿಸಿರುವುದಿಲ್ಲ. ಮಗುವಿಗೆ 9 ತಿಂಗಳಾದ ನಂತರ ಎ1 ಆರೋಪಿತನಿಗೆ ಬೆಂಗಳೂರಿಗೆ ವರ್ಗಾವಣೆಯಾಗಿದ್ದು, ಎ1 ಆರೋಪಿ ಹಾಗೂ ಸಾಕ್ಷಿ–1 ರವರು ಮಗುವಿನೊಂದಿಗೆ ಬೆಂಗಳೂರಿಗೆ ಬಂದು ಕಸುವನಹಳ್ಳಿ, ಸರ್ಜಾಪುರ, ವಾಸವಿರುವಾಗ್ಗೆ, ಎ2 ಮತ್ತು ಎ3 ಆರೋಪಿತರು ಸಹ ಬೆಂಗಳೂರಿನ ಎ1 ಆರೋಪಿಯ ಮನೆಗೆ ಬಂದು ವಾಸ ಮಾಡಿಕೊಂಡಿದ್ದರು. ಎಲ್ಲಾ ಹಿಂಸೆಯನ್ನು ಸಾಕ್ಷಿ–1 ರವರು ಸಹಿಸಿಕೊಂಡಿರುವಾಗ್ಗೆ, ಎ1 ಆರೋಪಿಯು ತನ್ನ ಮಗಳಾದ ಕುಮಾರಿ.ಕಿರಣ್ ಈಕೆಗೆ ಸುಮಾರು 2 ರಿಂದ 3 ವರ್ಷವಿರುವಾಗ್ಗೆ, ಪ್ಲೇ ಗ್ರೂಪ್ ಹಾಗೂ ಫ್ರೀ ನರ್ಸರಿಗೆ ಕಸುವನಹಳ್ಳಿಯ ಐ ಲರ್ನ್ ಐ ಪ್ಲೇ ಶಾಲೆಗೆ ಸೇರಿಸಿದ್ದು, ಇದಕ್ಕೆ ಮಾತ್ರ ಹಣ ನೀಡಿ ನಂತರದಿಂದ ನಾನು ಮಗಳನ್ನು ಸಾಕೋದಿಕ್ಕೆ ಆಗೋಲ್ಲ, ನೀನು ಕೆಲಸಕ್ಕೆ ಹೋಗು ಎಂದು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಒತ್ತಾಯ ಮಾಡಿದ್ದು, ಆಗ ಸಾಕ್ಷಿ–1 ರವರು ಐ ಲರ್ನ್ ಐ ಪ್ಲೇ ಶಾಲೆಗೆ ಕೆಲಸಕ್ಕೆ ಸೇರಿಕೊಂಡಿದ್ದು, ತಿಂಗಳಿಗೆ ಸುಮಾರು 8,000/– ರೂ ಸಂಬಳ*

ಬರುತ್ತಿದ್ದು, ಸಾಕ್ಷಿ–1 ರವರ ಖರ್ಚಿಗೆ ಹಾಗೂ ಮಗಳ ಖರ್ಚಿಗೆ ಎ1 ಆರೋಪಿತನು ಹಣ ಕೊಡುತ್ತಿರಲ್ಲಿಲ್ಲ. **ನಂತರ ಎ1 ಆರೋಪಿತನು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಬೈಂಗಿಕ ಕ್ರಿಯೆಗೆ ಒತ್ತಾಯಿಸಿ, ಅಸಹಜ ಲೈಂಗಿಕ ಕ್ರಿಯೆಗೆ ಸಹ ಒತ್ತಾಯ ಮಾಡಿ, ಕಲವೊಮ್ಮೆ ಗುಧಾ ಮೈಥುನ ನಡೆಸಿರುತ್ತಾನೆ. ಮಗಳನ್ನು ಬೇಗನೆ ಮಲಗಿಸಲು ಹೇಳುತ್ತಿದ್ದರು. ಮಧ್ಯದಲ್ಲಿ ಮಗು ಏಳ್ದರೆ, ಮಗುವನ್ನು ಎತ್ತಿ ಒಗೆಯುತ್ತಿದ್ದರು.** ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ತನ್ನ ತಾಯಿಯೊಂದಿಗೆ ಮಾತನಾಡಲು ಬಿಡುತ್ತಿರಲಿಲ್ಲ. ನಂತರ ಕುಮಾರಿ.ಕಿರಣ್ ಈಕೆಯನ್ನು ಎಲ್‌ಕೆಜಿಗೆ 2012–13ನೇ ಸಾಲಿನಲ್ಲಿ ಕೇಂಬ್ರಿಡ್ಜ್ ಶಾಲೆ, ಹೆಚ್.ಎಸ್.ಆರ್ ಲೇಔಟ್ ಇಲ್ಲಿಗೆ ಸೇರಿಸಲು ಫೀ ಕಟ್ಟಲು ಹಣವನ್ನು ಎ1 ಆರೋಪಿತನು ಸಾಕ್ಷಿ-1 ರವರಿಂದ ಪಡೆದುಕೊಂಡಿರುತ್ತಾರೆ. ಎ1 ಆರೋಪಿತನು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಪಿತ್ರಾರ್ಜಿತವಾಗಿ ಬಂದಿರುವ ಆಸ್ತಿಯನ್ನು ಮಾರಿ ಹಣವನ್ನು ಕೊಡುವಂತೆ ಒತ್ತಾಯ ಮಾಡಿ, ಹಿಂಸೆ ಮಾಡಿರುತ್ತಾನೆ. ಮಗುವನ್ನು ಶಾಲೆಯಿಂದ ಅರ್ಧಕ್ಕೆ ಎ1 ಆರೋಪಿಯು ಕರೆದುಕೊಂಡು ಹೋಗಿರುತ್ತಾನೆ. ಮಗುವನ್ನು ಕೇಳಿದರೆ ತನ್ನ ಅಪ್ಪಾ ಪಿಜ್ಜಾಬರ್ಗರ್ ಕೊಡಿಸಲು ಕರೆದುಕೊಂಡು ಹೋಗಿರುತ್ತಾರಂದು ತಿಳಿಸಿರುತ್ತದೆ. ಮಗು ಶಾಲೆಗೆ ರಜ ಇದ್ದಾಗ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ನಾನು ನೀನು ಕೆಲಸ ಮಾಡುವಲ್ಲಿಗೆ ಜೊತೆಯಲ್ಲಿ ಬರುತ್ತೇನೆಂದು ಒತ್ತಾಯ ಮಾಡುತ್ತಿದ್ದು, ಸಾಕ್ಷಿ–1 ರವರು ಕರೆದುಕೊಂಡು ಹೋದರೆ ಸಾಕ್ಷಿ–1 ರವರು ಕೆಲಸ ಮಾಡುವಲ್ಲಿಗೆ ಹೋಗಿ ಎ1 ಆರೋಪಿತನು ತನ್ನ ಮಗಳಾದ ಕುಮಾರಿ.ಕಿರಣ್‌ಳನ್ನು ತನ್ನೊಂದಿಗೆ ಕರೆದುಕೊಂಡು ಹೋಗಿರುತ್ತಾರೆ. ನಂತರ ಸಾಕ್ಷಿ–1 ರವರು ಹೇಗೋ ತನ್ನ ತಾಯಿಗೆ ಕರೆ ಮಾಡಿ, ಬೆಂಗಳೂರಿಗೆ ಕರೆಸಿಕೊಂಡು, ತನಗೆ ಆಗುತ್ತಿರುವ ಹಿಂಸೆಯ ಬಗ್ಗೆ ತಿಳಿಸಿದ್ದು, ಆಗ ಸಾಕ್ಷಿ–1 ರವರ ತಾಯಿ ತನಗೆ ಪರಿಚಯವಿರುವ ನಿರುಪಮ ರವರನ್ನು ಸಾಕ್ಷಿ–1 ರವರ ಮನೆಗೆ ಕರೆಯಿಸಿದ್ದು, ನಿರುಪಮ ರವರು ಎ1 ರಿಂದ ಎ3 ಆರೋಪಿತರಿಗೆ ಹಾಗೂ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಬುದ್ದಿ ಹೇಳಿ, ಸಾಕ್ಷಿ–1 ರವರನ್ನು ತವರು ಮನೆಗೆ ಒಂದು ವಾರ ಕಳಿಸುವಂತೆ ಹೇಳಿದ್ದು, ಅದರಂತೆ ಸಾಕ್ಷಿ–1 ರವರು ತವರು ಮನೆಗೆ ಹೋಗಿದ್ದು, ಊರಿಗೆ ಹೋದ ನಂತರ ಎ1 ಆರೋಪಿತನು ಫೋನ್ ಮಾಡಿರುವುದಿಲ್ಲ ಹಾಗೂ ಫೋನ್ ತೆಗೆದಿರುವುದಿಲ್ಲ ವಾಪಸ್ ಬರುವಾಗ ಸಹ ಸಾಕ್ಷಿ--1 ರವರು ರೈಲ್ವೆ ನಿಲ್ದಾಣಕ್ಕೆ ಬರುವಂತೆ ತಿಳಿಸಲು ಕರೆ ಮಾಡಿದರೂ ಎ1 ಆರೋಪಿ ಫೋನ್ ತೆಗೆದಿರುವುದಿಲ್ಲ. ನಂತರ ಎ2 ಆರೋಪಿಯು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ನಿನ್ನ ಹಾಗೂ ಮಗಳ ಖರ್ಚಿಗೆ ಹಣವನ್ನು ಎ1 ಆರೋಪಿತನ ಹತ್ತಿರ ಕೇಳಬೇಡವೆಂದು ನನ್ನ ಹತ್ತಿರನೇ ಕೇಳುವಂತೆ ಹೇಳಿರುತ್ತಾರೆ. ಎ2 ಮತ್ತು ಎ3 ಆರೋಪಿತರು ಎ1 ಆರೋಪಿ, ಸಾಕ್ಷಿ–1 ರವರ ಮಧ್ಯೆ ಜಗಳ ತಂದಿಡುತ್ತಿದ್ದರು. ದಿ:–20–03–2017ರಂದು ಸಾಕ್ಷಿ–1 ರವರು ತನ್ನ ಮಗಳಾದ ಕಿರಣ್, 9 ವರ್ಷ ಈಕೆಗೆ ಶಾಲೆ ರಜೆ ಇದ್ದ ಕಾರಣ ತಾನು ಕೆಲಸ ಮಾಡುವಲ್ಲಿಗೆ ಕರೆದುಕೊಂಡು ಹೋಗಿ, ವಾಪಸ್ ಮನೆಗೆ ಬಂದಾಗ, ಎ1 ಆರೋಪಿತನು ಯಾಕೆ ನೀನು ನಿಮ್ಮ ಅಮ್ಮನೊಂದಿಗೆ ಹೋಗಿದ್ದೆ ಎಂದು ಕುಮಾರಿ.ಕಿರಣ್‌ಗೆ ಹೊಡೆಯುತ್ತಿದ್ದು, ಆಗ ಸಾಕ್ಷಿ–1 ರವರು ಬಿಡಿಸಲು ಹೋದಾಗ ಎ1 ಆರೋಪಿತನು ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಹೊಡೆದು ಬಡೆದು ಕೈ ಬೆರಳನ್ನು ತಿರುಚಿರುತ್ತಾರೆ ಹಾಗೂ ಸಾಕ್ಷಿ–1 ರವರ ಮೊಬೈಲ್ ಫೋನ್ ನನ್ನು ತೆಗೆದು ಬಿಸಾಡಿತ್ತಾರೆ. ಇದಕ್ಕೆ ಎ2 ಮತ್ತು ಎ3 ಆರೋಪಿತರು ಇದಕ್ಕೆ ಸಹಕಾರ ನೀಡಿರುತ್ತಾರೆ. ನಂತರ ಸಾಕ್ಷಿ–1 ರವರು ತನ್ನ ವಕೀಲರ ಬಳಿ ಹೋಗಿ ನಡೆದ ವಿಚಾರವನ್ನೆಲ್ಲಾ ತಿಳಿಸಿದ್ದು, ಈ ಸಮಯದಲ್ಲಿ ಸಾಕ್ಷಿ–1 ರವರ ಮಗಳಾದ ಕುಮಾರಿ.ಕಿರಣ್ ರವರು ವಕೀಲರ ಹೆಂಡತಿ ಶ್ರೀಮತಿ.ಉಮಾವತಿ ರವರ ಹತ್ತಿರ ತನ್ನ ತಂದೆ ಒಳ್ಳೆಯವರಲ್ಲ, ಅವರು ನನಗೆ

ಬ್ಯಾಡ್‌ಟಚ್ ಮಾಡಿರುತ್ತಾರೆ. ನಾನು 2ನೇ ತರಗತಿಯನ್ನು ಓದುವಾಗನಿಂದಲೂ ಅವರು ತನಗೆ ಎದೆಯನ್ನು ಮುಟ್ಟುತ್ತಾರೆ, ನನ್ನ ಪ್ರೈವೇಟ್ ಪಾರ್ಟ್‌ನಲ್ಲಿ (ಗುಪ್ತಾಂಗ) ನನ್ನ ಅಪ್ಪನ ಬೆರಳನ್ನು ಹಾಕುತ್ತಾರೆ. ನಾನು ಅತ್ತರೆ ಆಗ ಬಿಡುತ್ತಿದ್ದರು. ನಿಮ್ಮ ತಾಯಿಗೆ ಹೇಳಿದರೆ ನಿನಗೆ ಹೊಡೆಯುತ್ತೇನೆಂದು ನನಗೆ ಅಪ್ಪ ಬೆದರಿಸುತ್ತಿದ್ದರು. ಅತ್ತಾಗ ನನಗೆ ಪಿಜ್ಜಾಬರ್ಗರ್ ಕೊಡಿಸುತ್ತಿದ್ದರು. ಅದಕ್ಕೆ ನಾನು ಯಾರೊಂದಿಗೂ ಸಹ ಈ ವಿಚಾರ ಹೇಳಿರಲಿಲ್ಲವೆಂದು ತಿಳಿಸಿದ್ದು, ಈ ವಿಚಾರ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಗೊತ್ತಾಗಿ ಹೈರಾಣಾಗಿರುತ್ತಾರೆ. ***ಎ1 ರಿಂದ ಎ3 ರವರೆಗಿನ ಆಗೋಪಿತರು ಮದುವೆಯಾದಗಿನಿಂದಲೂ ಸಾಕ್ಷಿ–1 ರವರಿಗೆ ಹಿಂಸೆ ಮಾಡಿಲ್ಲದ, ತನ್ನ ಮಗಳಾದ ಕು॥ಕಿರಣ್ ರವರಿಗೆ 2ನೇ ತರಗತಿಯಿಂದ ಲೈಂಗಿಕ ಹಿಂಸೆ ಎಸಗಿರುವುದು ಇರುತ್ತದೆ.***

ಆದ್ದರಿಂದ ಮೇಲ್ಕಂಡ ಕಲಂ ರೀತ್ಯಾ ಆರೋಪಿತರು ಅಪರಾಧವೆಸಗಿದ್ದು, ಆರೋಪಿತರ ವಿರುದ್ಧ ದೋಷಾರೋಪಣ ಪಟ್ಟಿ."

(Emphasis is mine)

The charge sheet filed by the Police after investigation *(supra)* also depicts graphic details of the demonish lust of accused No.1 who even according to the investigation has had unnatural sex; every time has sexual intercourse torturing or abusing the wife, or threatening to beat the daughter or beating the daughter, all for satisfaction of the gory carnal lust.

15. It is in the teeth of the aforesaid discovery during investigation, the charge sheet is filed by the Police for offences punishable under Sections 498A, 376, 354, 506 of the IPC and Section 5(m) and (l) of the Act. The petitioner, on filing of the final report, files an application under Section 216 of the Cr.P.C.

seeking a prayer to drop the first charge framed under Section 376 of the IPC, as the offence would not get attracted in the case of the petitioner who is the husband of the complainant. This application seeking dropping of the said charge is rejected by the Sessions Court in terms of its order dated 16-10-2018. It is then the petitioner knocks the doors of this Court in the subject petition in the garb of calling in question the Constitutional validity of clauses of presumption under Sections 29 and 30 of the Act.

16. During the pendency of the proceedings before the Sessions Court, the complainant/wife has further addressed communications to all quarters seeking help and in the narration again has clearly indicated as to how brutal the petitioner used to have sex, anal sex with the complainant/wife in the presence of his daughter who was 9 years old at that point in time and later used to touch the private parts of the daughter and also indulged in sexual acts against the daughter. The communications that are made or voluntary letters written by

both the wife and daughter are so chilling and abhorrent that they cannot be reproduced in the order. The issue with regard to daughter which comes under the Act will be dealt with, by me a little later. It is now time in the journey of this order to consider whether cognizance taken and rejection of the prayer for dropping the charge under Section 376 of IPC suffers from want of legal tenability in the peculiar facts of the case.

17. Since the sheet anchor of the submission of the learned senior counsel is with regard to the exemption or exception of husband under Section 375 of the IPC, it is germane to notice Section 375 of the IPC from its inception. The genesis of Section 375 of the IPC and its exception has its roots in the Code propounded by Macaulay in 1837. It is Macaulay's Code that becomes the basis for the Indian Penal Code of 1860, which governs the penal provisions even as on date with certain changes on certain occasions. Exception to Section 375 has existed in the IPC since the time of its enactment by the British in the year 1860. Exception-2 then was guided by the laws that

were existent in all the countries where the British had their foot on. They were several decades ago. It was founded and remained on the premise of a contract in the medieval law that husbands wielded their power over their wives. In the Victorian era women were denied the exercise of basic rights and liberties and had little autonomy over their choice. Their statuses were nothing beyond than that of materialistic choices and were treated as chattels.

18. Post Republic, India is governed by the Constitution. The Constitution treats woman equal to man and considers marriage as an association of equals. The Constitution does not in any sense depict the woman to be subordinate to a man. The Constitution guarantees fundamental rights under Articles 14, 15, 19 and 21 which are right to live with dignity, personal liberty, bodily integrity, sexual autonomy, right to reproductive choices, right to privacy, right to freedom of speech and expression. Under the Constitution, the rights are equal; protection is also equal.

19. Close to eight score and three years, the need to tinker with Section 375 of the IPC did not arise. A fateful incident of a gang rape in the capital led to the Union Government constituting a Committee headed by Justice J.S.Verma, to suggest amendments dealing with sexual offences in the Code. The Committee, after prolonged deliberations, gave several recommendations for amendments to criminal law. One such was concerning 'Marital Rape'. The observations and recommendations of the Committee that are germane to be noticed are as follows:

> **"***15. The Committee is conscious of the recommendations in respect of India made by the UN Committee on the Elimination of Discrimination against Women ("CEDAW Committee") in February 2007. The CEDAW Committee has recommended that the country should "widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape....."*
>
> *72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew*

Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'

74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v UK, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994.

75. We find that the same is true in Canada, South Africa and Australia. In Canada, the provisions in the Criminal Code, which denied criminal liability for marital rape, were repealed in 1983. It is now a crime in Canada for a husband to rape his wife. South Africa criminalised marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. Section 5 of the Prevention of Family Violence Act 1993 provides: 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.' In Australia, the common law 'marital rape immunity' was legislatively abolished in all jurisdictions from 1976. In 1991, the Australian High Court had no doubt that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no

longer the common law.' According to Justice Brennan (as he then was): 'The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.'

76. These jurisdictions have also gone further and recognised that consent should not be implied by the relationship between the accused and the complainant in any event. In the Canadian 2011 Supreme Court decision in R v. J.A., Chief Justice McLachlin emphasised that the relationship between the accused and the complainant 'does not change the nature of the inquiry into whether the complaint consented' to the sexual activity. The defendant cannot argue that the complainant's consent was implied by the relationship between the accused and the complainant. In South Africa, the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act ('Sexual Offences Act') provides, at s. 56 (1), that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

77. Even when marital rape is recognised as a crime, there is a risk that judges might regard marital rape as less serious than other forms of rape, requiring more lenient sentences, as happened in South Africa. In response, the South African Criminal Law (Sentencing) Act of 2007 now provides that the relationship between the victim and the accused may not be regarded as a 'substantial and compelling circumstance' justifying a deviation from legislatively required minimum sentences for rape.

78. It is also important that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally. For example, in South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion. Rates of reporting and conviction also remain low, aggravated by

the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape. Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in Vertido v The Philippines, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.

Recommendations

79. We, therefore, recommend that:

i. The exception for marital rape be removed.

ii. The law ought to specify that:

a. ***A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;***

b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;

c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

80. We must, at this stage, rely upon Prof. Sandra Freedman of the University of Oxford, who has submitted to the Committee that that "training and awareness programmes should be provided to ensure that all levels of

> *the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife".*
>
> *(Emphasis supplied)*

The recommendations of the Committee were accepted by the Union Government partially and amendments were carried out. The present case concerns the amendment to Section 375 of the IPC.

20. Section 375 of the IPC came to be amended with effect from 10-05-2013 after introduction of Criminal Law Amendment Bill before the Parliament, pursuant to the constitution of J.S.Verma Committee for suggesting amendments to criminal law.

Section 375 of the IPC as it stood prior to its amendment on 10-05-2013 reads as follows:

> ***"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.

Pursuant to the amendment, Section 375 of the IPC reads thus:

"375. 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.

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

The Exception to pre-amendment reads as follows:

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

The Exception to post-amendment reads as follows:

"*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."*

There is a marked difference in the afore-quoted provisions, pre and post of the Code and the exception with regard to inclusion of certain physical activity *qua* the woman by a man.

21. The amended exception depicts intercourse by a man with his own wife, the wife not being under 15 years of age would not be a rape. The post amendment the exception adds the words 'sexual acts' by a man along with the words 'sexual intercourse'. The difference is inclusion of the word "or sexual

acts". Therefore, the exception now is of sexual intercourse and other sexual acts by the husband stand exempted. Therefore, a woman being a woman is given certain status; a woman being a wife is given a different status. Likewise, a man being a man is punished for his acts; a man being a husband is exempted for his acts. It is this inequality that destroys the soul of the Constitution which is Right to Equality. The Constitution recognizes and grants such equal status to woman as well. To quota a few:

> ***"Article 14*** *-* ***Equality before law*** *- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*
>
> ***Article 15*** *-* ***Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*** *—*
>
> *(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*
>
> *(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction .....*

Article 16 - Equality of opportunity in matters of public employment. –

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.]

Article 21 - Protection of life and personal liberty.— *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

Article 23 - Prohibition of traffic in human beings and forced labour.––

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 39 - Certain principles of policy to be followed by the State*: The State shall, in particular, direct its policy towards securing -*

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

Article 243-T - Reservation of seats. —

(1) … …

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334."

Article 14 depicts equality before law; Article 15 prohibits discrimination on the ground of religion, race, caste, sex or place of birth; Article 16 mandates equality of opportunity in matters of public employment; Article 21 depicts protection of life and personal liberty to all the citizens of the nation; Article 23 depicts prohibition of trafficking in human beings and forced labour; Article 39 depicts certain principles of policies to be followed by the State in securing rights of its citizens, emphasis is laid on women. Women have been considered to be entitled to reservation under Article 243D in the Panchayats and under Article 243T in the Municipalities in the respective elections.

22. The aforesaid is the prism that depicts constitutional spirit towards right of its citizens, be it a man or a woman. Equality in Article 14 pervades through the entire spectrum of

the Constitution. The IPC itself recognizes several Acts against women to become punishable, a few of them are:

> ***"Section 304-B - Dowry death**.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*
>
> *Explanation.—For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*
>
> *(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]*

> ***Section 498-A -Husband or relative of husband of a woman subjecting her to cruelty**.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*
>
> *Explanation.—For the purposes of this section, "cruelty" means—*
>
> *(a) any wilful 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 mental or physical) of the woman; or*
>
> *(b) 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.]

***Section 312 - Causing miscarriage**.—Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

***Section 313 - Causing miscarriage without woman's consent.—**Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with 348[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

***Section 314 - Death caused by act done with intent to cause miscarriage**.—Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;*

***If act done without woman's consent**.—And if the act is done without the consent of the woman, shall be punished either with 349[imprisonment for life], or with the punishment above mentioned.*

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

Section 315 - Act done with intent to prevent child being born alive or to cause it to die after birth.—*Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.*

Section 316 -Causing death of quick unborn child by act amounting to culpable homicide.—*Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Section 317 - Exposure and abandonment of child under twelve years, by parent or person having care of it.—*Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.*

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.

Section 354 - Assault or criminal force to woman with intent to outrage her modesty.—*Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, 354[shall be punished with imprisonment of either*

description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].

Section 373 - Buying minor for purposes of prostitution, etc.*—Whoever buys, hires or otherwise obtains possession of any 377[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

[Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—"Illicit intercourse" has the same meaning as in Section 372.]

Section 493 - Cohabitation caused by a man deceitfully inducing a belief of lawful marriage*.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Section 494 - Marrying again during lifetime of husband or wife.—*Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or*

wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

***Section 377 - Unnatural offences**.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

23. There are several other enactments which have been enacted post the Constitution with the sole objective of protection of woman or a girl child. The soul of these enactments are, protection of women and equal status to

women. The objects and reasons of the few of the enactments or amendment to existing enactments are as follows:

The National Commission for Women *- The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No.20 of 1990 of Govt.of India) to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women.*

Immoral Traffic (Prevention) Act, 1956 *- An Act to provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for [prevention of immoral traffic].*

The Indecent Representation of Women (Prohibition) Act, 1986 *- An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.*

Dowry Prohibition Act, 1961[1]

"The object of this Bill is to prohibit the evil practice of giving and taking of dowry. This question has been engaging the attention of the Government for some time past, and one of the methods by which this problem, which is essentially a social one, was sought to be tackled was by the conferment of improved property rights on women by the Hindu Succession Act, 1956. It is, however, felt that a law which makes the practice punishable and at the same time ensures that any dowry, if given does ensure for the benefit of the wife will go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside Parliament. Hence, the present Bill. It, however,

takes care to exclude presents in the form of clothes, ornaments, etc., which are customary at marriages, provided the value thereof does not exceed Rs 2000. Such a provision appears to be necessary to make the law workable." Gazette of India, 1959, Extra., Pt. II, S. 2, p. 397. See Joint Committee Report at id., pp. 1191-93.

Hindu Succession (AMENDMENT) Act, 2005

Another path-breaking legislation which aims for gender equality was passed by the House yesterday, namely, the Hindu Succession (Amendment) Bill, 2005 which provides for devolution of interest in coparcenary property to a daughter in the same manner as the son.

The amendments to the Hindu Succession Act fulfil a longstanding promise we had made to our sisters and daughters. Our government is firmly committed to the empowerment of Scheduled Castes, Scheduled Tribes, other backward classes and all minorities. We are equally committed to the empowerment of our women."

The Protection of Human Rights Act, 1993 *- An Act to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.*

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 *- An Act to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide; and, for matters connected there with or incidental thereto.*

> ***Protection of Women from Domestic violence Act, 2005*** *- Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (C E D A W) in it's General Recommendation No. XII (1989) has recommended that State Parties should act to protect women against violence of any kind especially that occulting within the family."*

The afore-quoted are a few of the enactments that are notified in recognition of rights of women as also the wife and for their protection on all counts.

24. On a coalesce of all the afore-said and afore-quoted Articles of the Constitution, the provisions of the IPC and specific Acts promulgated, what would unmistakably emerge is the rights of women, protection of women and their equal status to that of a man without exception**.** Therefore, women are equal in its true sense factually and legally. The aforesaid provisions are quoted only as a metaphor to demonstrate equality without exception pervading through the entire spectrum of those provisions, the Constitution, the code and the enactments.

25. As observed hereinabove, the Constitution, a fountainhead of all statutes depicts equality. The Code practices discrimination. Under the Code every other man indulging in offences against woman is punished for those offences. But, when it comes to Section 375 of IPC the exception springs. In my considered view, the expression is not progressive but regressive, wherein a woman is treated as a subordinate to the husband, which concept abhors equality. It is for this reason that several countries have made such acts of the husband penal by terming it marital rape or spousal rape.

26. Marital rape is illegal in 50 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia and several others. In the United Kingdom, which the present Code largely draws from, has also removed the exception pursuant to a judgment rendered by the House of Lords in ***R v. R*** in the year 1991. Therefore, the Code that was made by the rulers then, has itself abolished the exception given to husbands.

27. Justice Verma Committee *(supra)* also recommended for deletion of the exception of marital rape. But, the amendment came about was only replacing the word 'rape' with 'sexual assault' in Section 375 of IPC. Therefore, the situation now emerges is equality pervades through the Constitution, but inequality exists in the Code *qua* - Exception-2 to Section 375 of the IPC.

28. A man who is well acquainted with a woman performs all the ingredients as is found in pre or post amendment to Section 375 of the IPC, can be proceeded against for offences punishable under Section 376 of IPC. Therefore, a man sexually assaulting or raping a woman is amenable to punishment under Section 376 of IPC. The contention of the learned senior counsel that if the man is the husband, performing the very same acts as that of another man, he is exempted. In my considered view, such an argument cannot be countenanced. *A man is a man; an act is an act; rape is a rape, be it performed by a man the "husband" on the woman "wife".*

29. The submission of the learned senior counsel that the husband is protected by the institution of marriage for any of his acts being performed, as is performed by a common man, again *sans* countenance, for the reason that institution of marriage does not confer, cannot confer and in my considered view, should not be construed to confer, any special male privilege or a license for unleashing of a brutal beast. If it is punishable to a man, it should be punishable to a man *albeit,* the man being a husband.

30. A perusal at the complaint afore-extracted and written communications (which cannot be extracted in the body of the order) would send a chilling effect on any human being reading the contents of it. The wife-the complainant, cries foul in no unmistakable terms that she is being brutally, sexually harassed keeping her as a sex slave for ages. The contents of the complaint are an outburst of tolerance of the wife of the brutal acts of the petitioner. It is akin to eruption of a dormant volcano. In the teeth of the facts, as narrated in the complaint,

in my considered view, no fault can be found with the learned Sessions Judge taking cognizance of the offences punishable under Section 376 of IPC and framing a charge to that effect.

31. The exemption of the husband on committal of such assault/rape, in the peculiar facts and circumstances of this case, cannot be absolute, as no exemption in law can be so absolute that it becomes a license for commission of crime against society. Though the four corners of marriage would not mean society, it is for the legislature to delve upon the issue and consider tinkering of the exemption. This Court is not pronouncing upon whether marital rape should be recognized as an offence or the exception be taken away by the legislature. It is for the legislature, on an analysis of manifold circumstances and ramifications to consider the aforesaid issue. This Court is concerned only with the charge of rape being framed upon the husband alleging rape on his wife.

32. Every ingredient of rape is met with in the alleged complaint. If it were to be a common man, the allegation on the

face of it be punishable under Section 376 of IPC, why not the husband-petitioner. It is for the petitioner to come out clean in the trial, if he is so much in the defensive of his acts. Interjecting the trial in the teeth of the aforesaid complaint and the charge being framed would become a travesty of justice.

33. Therefore, in the light of the ghastly allegations against the petitioner-husband in the complaint and several other communications, I find no error committed by the learned Sessions Judge in taking cognizance, framing the charge under Section 376 of the IPC and also rejecting the application to drop the said charge. If the allegation of rape is removed from the block of offences alleged, it would, in the peculiar facts of this case, be doing tremendous injustice to the complainant-wife and would amount to putting a premium on the carnal desires of the petitioner. Therefore, the point that has arisen for my consideration is held in favour of the prosecution and against the petitioner.

Point No.(ii):

Whether the allegation against the petitioner for other offences is tenable in law?

34. This now takes me to the next point with regard to the alleged offences against the petitioner which are offences punishable under Sections 498A, 354 and 506 of the IPC. The complaint afore-quoted clearly brings out the offence punishable under Section 498A of the IPC. Section 354 of the IPC which deals with assault or criminal force on a woman with intent to outrage her modesty is clearly met in the complaint. Section 506 of the IPC deals with criminal intimidation which is also met in the complaint. Therefore, the offences punishable under Sections 498A, 375, 354 and 506 of the IPC are all clearly spelt out in the complaint, in the statements recorded during the investigation and the contents of the summary in the charge sheet *(supra).* None of the grounds urged by the learned senior counsel with regard to the offences alleged against the wife merit acceptance. There are various disputed questions of fact that

have to be thrashed out only in a full-fledged trial. If the petitioner has anything in his defense on the allegations, it is for him to put up such defense before the Sessions Court and come out clean in the trial. It is not for this Court to interfere with the trial, particularly, in the light of the aforesaid allegations. Therefore, the trial against the petitioner insofar the wife is concerned, for offences under the Code are to be continued, as the petition with the aforesaid contentions *sans* merit.

Point No.(iii):

Whether the prosecution notwithstanding the presumption under Sections 29 and 30 of the Act has to prove the foundational facts beyond all reasonable doubt?

35. The issue is with regard to presumption under Sections 29 and 30 of the Act and notwithstanding the said presumption against the accused the prosecution will have to prove foundational facts beyond all reasonable doubt. The issue has time and again cropped up before the Apex Court or this

Court in several cases concerning identical enactments as also the Act. Therefore, a deeper delving into the issue is not warranted. The Apex Court in the case of ***GANGADHAR @ GANGARAM v. STATE OF MADHYA PRADESH***[1] considering identical provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 has held as follows:

> ***"8. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.***
>
> ***9.*** *That the right of the accused to a fair trial could not be whittled down under the Act was considered in Noor Aga v. State of Punjab [Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748] observing: (SCC p. 450, paras 58-59)*
>
> *"58. … An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of*

[1] ***(2020) 9 SCC 202***

probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

(Emphasis supplied)

The Apex Court was following the judgment in the case of ***NOOR AGA***. In the case of ***NOOR AGA V. STATE OF PUNJAB***[2] the Apex Court held as follows:

"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to

[2] ***(2008) 16 SCC 417***

uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. *It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28)*

"28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

(See also RiteshChakarvarti v. State of M.P. [(2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744])

57. *It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.*

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution

is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. *With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."*

(Emphasis supplied)

A Co-ordinate Bench of this Court in the case of ***G.S.VENKATESH v. STATE OF KARNATAKA***[3] has held as follows:

"36. Coming to the contention urged by the learned HCGP that by virtue of the presumption engrafted under Sections 29 and 30 of the POCSO Act, the trial Court was justified in holding the accused guilty of the offence under Section 4 of the POCSO Act is concerned, at the outset it should be noted that presumption is not proof. "Presumption" is only an inference of certain facts drawn from other true facts. In the words of the Hon'ble Supreme Court in APS Forex Services Pvt. Ltd. Vs. Shakti International Fashion Linkers & Others, MANU/SC/0179/2020 : AIR 2020 SC 945, "Presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence." Presumption does not relieve the prosecution of discharging its burden to prove the guilt of the accused with the standard of proof

[3] ***(2020)3 KCCR 2276***

laid down under the general law. It is only when the foundational facts constituting the offence charged against the accused is proved by the prosecution, the presumption gets attracted. It is trite law that merely on the basis of presumption, a finding of guilt cannot be recorded against an accused facing prosecution for criminal offences.

37. Insofar as the presumptions provided under Sections 29 and 30 of the POCSO Act are concerned, they are not absolute or conclusive presumptions. The sections read as under:-

> *29. Presumption as to certain offences.--Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.*
>
> *30. Presumption of culpable mental state.--(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation: In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact,

38. The use of expression "unless the contrary is proved" appearing in Section 29 makes it clear that the

presumption raised under this section is rebuttable. A rebuttable presumption can be raised only when the foundational facts constituting the offence are established by the prosecution. In a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved. ***In a case where an offence is committed against a child, having regard to the very nature of the offence where it is difficult for the prosecution to prove the facts and circumstances in which the offence had taken place, the Act has cast the burden on the accused to prove the facts within his knowledge as it is easier for the innocent accused to produce evidence contrary to the case proved by the prosecution. This is called reverse burden whereby the burden is shifted to the accused to disprove the facts established by the prosecution. The question of discharging the reverse burden by the accused would arise only when the initial burden cast on the prosecution is discharged to the satisfaction of the Court. Therefore it follows that without the proof of basic facts constituting the offence charged against the accused, the accused cannot be called upon to disprove the case of the prosecution.***

39. In the instant case, as the prosecution has failed to establish the basic facts constituting the ingredients of the offence charged against the accused, the presumption created under Section 29 of the POCSO Act cannot be invoked by the prosecution. For the same reason, the culpable mental state including the intention, motive or knowledge of the alleged offence cannot be imputed to the accused merely on the basis of the presumption under Section 30 of the POCSO Act. It is only when the prosecution proves the basic facts constituting the offence charged against the accused, the prosecution is relieved of establishing the culpable mental state of the accused like the intention, motive and knowledge, by virtue of the presumption engrafted in Section 30 of the POCSO Act.

> *That being the legal position, the presumptions provided under Sections 29 and 30 of the Act is of no avail to the prosecution to sustain the impugned judgment insofar as the conviction of the accused for the offences punishable under Section 376 of IPC and Section 4 of the POCSO Act is concerned."*
>
> *(Emphasis supplied)*

Following the judgment in the case of ***NOOR AGA***, a learned Single Judge of the Kerala High Court in ***LOUIS V. STATE OF KERALA***[4] has held as follows:

> ***"10.*** *Section 29 of the PoCSO Act expressly provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.*
>
> ***11.*** *Section 30 of the PoCSO Act provides that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Sub-section (2) of Section 30 of the PoCSO Act further provides that, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. Explanation to Section 30 further makes it clear that "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.*

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[4] ***2021 SCC OnLine Ker 4519***

12. *In Justin @ Renjith V. Union of India, ILR 2020 Ker 679 it has been held by a learned single Judge of this court that duty of prosecution to establish foundational facts and duty of accused to rebut presumption arise only after prosecution has established foundational facts of the offence alleged against the accused. It is also found that though in the light of presumptions, the burden of proof oscillate between the prosecution and the accused, depending on the quality of evidence let in, in practice process of adducing evidence in a PoCSO case does not substantially differ from any other criminal trial.*

13. *In David v. State of Kerala ((2020) 5 KLT 92 : 2020 Cri LJ 3995) another learned single Judge of this court has held that the presumption under Section 29 of the PoCSO Act does not in any way affect the obligation of the prosecution to produce admissible evidence to prove the foundational facts constituting the offence.*

14. *Harendra Sarkar v. State of Assam ((2008) 9 SCC 204 : AIR 2008 SC 2467) was quoted by the learned Judge in that decision where in it has been held by the Apex Court that the Parliament certainly has the power to lay down a different standard of proof for certain offences or certain pattern of crimes subject to the establishment of some foundational facts and the same would not therefor affect any of the constitutional and established rights of the accused in such cases.*

15. *So Section 29 and 30 of the Act does not give any special rights to the prosecution to refrain from adducing evidence in the normal course as in a criminal case to prove the guilt of the accused beyond reasonable doubt. If the basic facts proving guilt is proved by the prosecution, presumption starts to run. It is for the accused to rebut that presumption. If the prosecution proved the acts, as per Section 30 of the Act, presumption of culpable mental state begins to run. It is for the accused to rebut that presumption."*

A coalesce of all the afore-extracted judgments of the Apex Court and this Court are considered in the teeth of Sections 29 and 30 of the Act, which is extensively considered in the afore-extracted judgment of the Apex Court, this Court and the Kerala High Court, what would unmistakably emerge is, notwithstanding the presumption available against the accused in favour of the prosecution in terms of Sections 29 and 30 of the Act, proving of foundational facts by the prosecution beyond all reasonable doubt is imperative.

36. The prosecution cannot, on the basis of preponderance of probability, rest its case on the ground that proving of innocence is shifted on the accused in the light of Sections 29 and 30 of the Act. The Apex Court in the case of ***GANGADHAR*** following ***NOOR AGA*** and this Court again considering the judgment in ***NOOR AGA*** have delineated and affirmed the view that burden of proving foundational facts beyond all reasonable doubt vests on the prosecution even in statutes where presumption of guilt is hoarded upon the accused. The

judgments are also an answer to the contention of the learned senior counsel that the accused have to prove their innocence after completion of evidence of the prosecution and recording of 313 Cr.P.C. statements of the accused. Therefore, there is no necessity to create a stage for an order to be passed under Section 232 of the Cr.P.C. as contended by the learned senior Counsel.

37. The issue with regard to constitutional validity of presumption under Sections 29 and 39 of the Act has been given up by the learned senior counsel in the light of the Apex Court and that of this Court affirming identical clauses of presumption under this statute and identical statutes against the accused. Therefore, point No.(iii) that has arisen for consideration is accordingly answered by holding that the prosecution has to prove the foundational facts beyond all reasonable doubt and cannot rest its case on preponderance of probability, merely because the statute imposes reverse burden upon the accused

on proving innocence in place of the prosecution proving the guilt.

Point No.(iv):

Whether the designated Court to try the offences under the Act has jurisdiction to try both the offences under the IPC and the Act in the facts of this case?

38. The contention of the learned senior counsel has given way to the aforesaid issue for consideration of facts and allegations in the case at hand with regard to offences punishable under the Code and the Act. Insofar as the complainant/mother is concerned, the offences are under the Code. Insofar as the allegations against the daughter are concerned, the offences are under the Act. The complaint narrated hereinabove give rise to the offences punishable under Sections 5 and 6 of the Act. The contention of the learned senior counsel appearing for the petitioner is that the case is being tried before the specially designated Court under the Act, which Court is not empowered to consider the offences under the Code

and therefore, the trial has to be segregated. The IPC offences should be tried by the designated Court and the POSCO offences by the special Court. This submission is unacceptable in the peculiar facts of this case. The mother and the child both are victims of brutal acts on the part of the petitioner. It is the mother who has complained against the petitioner for the offences committed by him both on herself and her daughter. The mother is also privy to what is narrated in the complaint. Both the cases are triable only by the Sessions Court and the Judge who is now to try both the cases is the Sessions Judge.

39. In several cases two special enactments come into play for a particular offence – one under the Code and the other under the SC/ST (Prevention of Atrocities) Act, both of which are triable by the Sessions Court. One may involve a child and the other may involve the offences under Atrocities Act. Therefore, if the Court does not have jurisdiction itself to try the offences that are now alleged, it would have been a different circumstance altogether and the trial ought to have been segregated. Reference

being made to the judgment of the Apex Court in the case of ***VIVEK GUPTA V. CBI***[5]**,** in the circumstances is apposite, wherein the Apex Court holds as follows :

> ***"12. We have given to the rival submissions our deep consideration and we are of the view that the contention of the respondent must be upheld. It is worth noticing that sub-section (3) of Section 4 of the Act provides that a Special Judge may "also try any offence" other than an offence specified in Section 3 with which the accused may under the Code of Criminal Procedure be charged at the same trial. We have observed earlier that the provisions of the Code of Criminal Procedure apply to trials under the Act subject to certain modifications as contained in Section 22 of the Act and their exclusion either express or by necessary implication.***
>
> ***13.*** *Section 223 of the Code of Criminal Procedure has not been excluded either expressly or by necessary implication nor has the same been modified in its application to trials under the Act. The said provision therefore is applicable to the trial of an offence punishable under the Act. The various provisions of the Act which we have quoted earlier make it abundantly clear that under the provisions of the Act a Special Judge is not precluded altogether from trying any other offence, other than offences specified in Section 3 thereof. A person charged of an offence under the Act may in view of sub-section (3) of Section 4 be charged at the same trial of any offence under any other law with which he may, under the Code of Criminal Procedure, be charged at the same trial. Thus a public servant who is charged of an offence under the provisions of the Act may be charged by the Special Judge at the same trial of any offence under IPC if the same is*

[5] ***(2003) 8 SCC 628***

committed in a manner contemplated by Section 220 of the Code.

14. *The only narrow question which remains to be answered is whether any other person who is also charged of the same offence with which the co-accused is charged, but which is not an offence specified in Section 3 of the Act, can be tried with the co-accused at the same trial by the Special Judge. We are of the view that since sub section (3) of Section 4 of the Act authorizes a Special Judge to try any offence other than an offence specified in Section 3 of the Act to which the provisions of Section 220 apply, there is no reason why the provisions of Section 223 of the Code should not apply to such a case. Section 223 in clear terms provides that persons accused of the same offence committed in the course of the same transaction, or persons accused of different offences committed in the course of the same transaction may be charged and tried together. Applying the provisions of Sections 3 and 4 of the Act and Sections 220 and 223 of the Code of Criminal Procedure, it must be held that the appellant and his co-accused may be tried by the Special Judge in the same trial.*

15. *This is because the co-accused of the appellant who have been also charged of offences specified in Section 3 of the Act must be tried by the Special Judge, who in view of the provisions of sub-section (3) of Section 4 and Section 220 of the Code may also try them of the charge under Section 120-B read with Section 420 IPC. All the three accused, including the appellant, have been charged of the offence under Section 120-B read with Section 420 IPC. If the Special Judge has jurisdiction to try the co-accused for the offence under Section 120-B read with Section 420 IPC, the provisions of Section 223 are attracted. Therefore, it follows that the appellant who is also charged of having committed the same offence in the course of the same transaction may also be tried with them. Otherwise it appears rather incongruous that some of the conspirators charged of having committed the same*

offence may be tried by the Special Judge while the remaining conspirators who are also charged of the same offence will be tried by another court, because they are not charged of any offence specified in Section 3 of the Act.

16. *Reliance was placed by the respondent on the judgment in Union of India v. I.C. Lala [(1973) 2 SCC 72 : 1973 SCC (Cri) 738 : AIR 1973 SC 2204] but the counsel for the appellant distinguished that case submitting that the facts of that case are distinguishable inasmuch as in that case apart from the two army officers, even the third appellant who was a businessman, was charged of the offence punishable under Section 120-B IPC read with Section 5(2) of the Act. Such being the factual position in that case, Section 3(1)(d) of the relevant Act was clearly attracted. In the instant case he submitted, there was no charge against the appellant of having conspired to commit an offence punishable under the Act. The aforesaid judgment refers to an earlier decision of this Court in the case of State of A.P. v. KandimallaSubbaiah [AIR 1961 SC 1241 : (1961) 2 Cri LJ 302] . The learned counsel for the appellant distinguishes that case also for the same reason, since in that case as well the respondent was charged of conspiracy to commit an offence punishable under the Act.*

17. We are, therefore, of the view that in the facts and circumstances of this case, the Special Judge while trying the co-accused of an offence punishable under the provisions of the Act as also an offence punishable under Section 120-B read with Section 420 IPC has the jurisdiction to try the appellant also for the offence punishable under Section 120-B read with Section 420 IPC applying the principles incorporated in Section 223 of the Code. We, therefore, affirm the finding of the High Court and dismiss this appeal.

(Emphasis supplied)

The Apex Court in the aforesaid case was considering offences under two different enactments being tried by the same Court, one for the offences under the IPC and the other under the Prevention of Corruption Act. The Apex Court has interpreted Section 220 of the Cr.P.C. and Section 22 of the Prevention of Corruption Act. Section 28(2) of the Act is identical to what the Apex Court has considered.

40. Therefore, in the light of the judgment of the Apex Court and the provisions of the Act, I am of the considered view that the trial that is now sought to be held before the POSCO Court by the Sessions Judge can also try the offences alleged under the Code. Therefore, the point that has arisen for consideration is answered against the petitioner.

Point No.(v):

Whether charges framed against the petitioner should be altered to include addition of the offence punishable under Section 377 of IPC?

To consider this issue, the contents and the challenge in W.P.No.50089/2018 is to be noticed.

Writ Petition No.50089 of 2018:

41. The victim has preferred writ petitions before this Court in Writ Petition No.12976 of 2017 and Writ Petition No.50089 of 2018. In Writ Petition No.50089 of 2018 the petitioner challenges a rejection order of the application filed by the prosecution to modify or alter the charge for offences under Section 377 of the IPC, as the allegations at the outset against the petitioner are inclusive of Section 377 of the IPC. The Police while filing the charge sheet have excluded Section 377 of the IPC. The prosecution files application under Section 216 of the Cr.P.C. to alter the charge against the petitioner by including the offences under Section 377 of the IPC. Section 377 of the IPC reads as follows:

> *"377. **Unnatural offences**.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either*

> *description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*

If the afore-quoted provision of law is noticed *qua* the complaint and the charge sheet filed, what can unmistakably infer is that the petitioner had indulged in acts of unnatural sex. This is the specific allegation against the petitioner. Therefore, the charges framed ought to have been inclusive of Section 377 of the IPC also.

42. The prosecution did file an application under Section 216 of the Cr.P.C. to include the charge, of and for offence punishable under Section 377 of the IPC. The reason rendered by the trial Court for rejecting the said application as found in paragraph 12 of its order, needs to be noticed:

> *"12. By going through entire record, charge sheet and instant application with objection, this Court already framed charge against accused No.1 in respect of offence under Section 376 of IPC. Now the complainant sought for framing of charge under Section 377 of IPC. Section 377 of IPC defines in respect of unnatural offence: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either*

description for a term which may extend to ten years, and shall also be liable to fine. ***Here, as per the charge sheet the complainant is not a stranger to the accused No.1 and she is his wife. When the allegations made against him attracts under Section 376 of IPC and the charge also framed in respect of said offences, question of considering the request to frame charge under Section 377 of IPC does not arise.*** *However, no material is placed in respect of allegations made against other five persons named above and also no such supporting documents placed by the complainant to believe the alleged offences against them, except hand written letters filed one after another without appearing before the Court and without giving her evidence and also the evidence of victim girl. In respect of other two persons viz., Shakuntala Sahoo and Jagannath Sahoo-the parents of accused No.1, the Hon'ble High Court has quashed the proceedings in its order dated 03-07-2018 in Criminal Revision Petition No.423 of 2018, hence question of taking cognizance against them again and again as prayed by the complainant does not arise. The application lacks bona fide, whatever stand the complainant wants to take against the accused No.1 she has to appear before the Court to give her evidence, if any incriminating evidence appeared against the above said five persons as on the date of the incident, then only the cognizance has to be taken against them, but not as prayed by the complainant. The complainant dodging the case without appearing before the court to give her evidence, even though the trial commenced and the charges framed against the accused No.1. This act of the complainant is not acceptable in this case. Taking into consideration of the entire material facts and circumstances as such in the application, objections and entire records, this Court feels to observe that the application deserves to be rejected. Accordingly, I hold point No.1 in the "Negative".*

(Emphasis added)

The primary reason rendered by the Sessions Judge is that the complainant is not a stranger to the husband –accused No.1 and she is his wife.

43. The finding that when the allegations made against the husband attracts Section 376 of the IPC and a charge is also framed in respect of the said offences, question of considering the request to frame a charge under Section 377 of the IPC does not arise, is erroneous. The allegations clearly make out an offence punishable under Section 377 of the Code which deals with unnatural sex. Therefore, the order under challenge is to be set aside allowing the application filed by the prosecution under Section 216 of the Cr.P.C. with a direction to the trial Court to frame the charge for the offence punishable under Section 377 of the IPC as well. The point that has arisen for consideration is accordingly answered.

Point No.(vi):

Whether proceedings under the POCSO Act against the petitioner needs to be interfered with?

44. The aforesaid issue is with regard to interference against the petitioner in the proceedings under the Act. The complaint, if noticed, would unmistakably highlight the actions of the petitioner which would touch upon offences under the Act. The plea of reverse burden being contrary to the spirit of the Constitution or the criminal law jurisprudence has already been negatived while considering identical provisions of reverse burden in other enactments and answer to point No.(iii) *(supra)*. Looking at the complaint allegations as also the written communications of the child which cannot be extracted and made a part of the order, would all require a trial against the petitioner for him to come out clean by projecting such defence as is available. Any further observation with regard to the allegations or the contentions advanced by the learned senior counsel insofar as it concerns the allegations *qua* the Act would

come in the way of the defence of the petitioner in the trial. Therefore, in my considered view, even for the offences under the Act a full blown trial is necessary in the facts and circumstances of the case. Therefore, this point is also answered against the petitioner.

Writ Petition No.12976 of 2017:

45. This writ petition is also filed by the victim seeking several prayers with regard to social security and compensation. The petition was filed long before all the above petitions were filed. The petition was preferred on 23-03-2017. In the light of the subsequent order passed in the companion petitions, the prayer sought in this petition need not be gone into at this stage. However, it is open to the petitioner-victim to file any such application before the competent Court where the trial would begin and be in progress. Therefore, the writ petition is disposed of as having become unnecessary.

Writ Petition No.10001 of 2018:

46. The facts in this case have no relation to the facts obtaining in the companion petitions. This petition is tagged along with other petitions only for the reason that constitutional validity of Sections 29 and 30 of the Act was called in question as was called in question in the companion petitions. The reasons rendered in answering the issue of presumption under Sections 29 and 30 of the Act in the companion petitions would become applicable to this writ petition as well. Insofar as other reliefs sought are concerned, the facts would be necessary to be seen as is pleaded in the case.

47. The petitioner and the complainant-victim were acquaintances. It is the case of the prosecution that the complainant and her senior college-mate Miss.Kinneri Loth had been to Fusion Lounge, a pub on M.G.Road on 7-10-2016. At about 10 p.m. they were introduced to two boys who were known to the friend of the complainant. After they left the pub

the friend of the victim told the victim that the boys whom she has introduced will drop her in their car. At around 10.15 p.m. accused No.1 took the victim to his house. The petitioner was also accompanied by the friend and they appear to have had dinner in the house of accused No.1. After the dinner the friend of the victim having drunk too much of alcohol slept inside the bedroom and the complainant was still sitting on the sofa. Accused No.1 again offered alcohol to the complainant and the complainant began to drink, at which point in time, the petitioner/accused No.2 began to fondle her by touching her on all parts of the body and tried to molest her. The complainant resisted and gets up from the sofa. It is at that point in time accused No.1 dragged the complainant into the room and commits forcible sexual intercourse/rape. It is the case of the prosecution that after committing such rape accused No.1 threatened not to divulge the incident to the Police. Since parents of the complainant were in Iran, she did not lodge any complaint immediately, but on 19-10-2016, she did lodge a complaint before the jurisdictional police for offences punishable

under Sections 376, 506 and 511 r/w Section 34 of the IPC and Sections 4, 8, 16 and 18 of the Act.

48. The contention of the learned senior counsel appearing for the petitioner is that the petitioner is innocent as he did not commit any forcible sexual intercourse upon the victim. It is only accused No.1 who is alleged to have dragged into the room and committed such act of rape and therefore, he should not be tried for offences under Section 376 of the IPC as he has not committed ingredients of offences punishable under Section 375 of the IPC and any of the provisions of the Act. The allegation is only that he has tried to touch the body, but the girl refused and went away. He would submit that if trial is permitted against the petitioner it would result in miscarriage of justice, as the petitioner is a student of B-Pharma.

49. On the other hand, the learned High Court Government Pleader appearing for the State would vehemently refute the submissions and contends that, it is a matter of trial

as the petitioner had indulged himself in an act that would touch upon the offence of rape. If the evidence is not convincing he would always be acquitted of the charge. In a case of this nature, this Court would not generally interfere in exercise of its jurisdiction under Section 482 of the Cr.P.C.

50. I have given my anxious consideration to the submissions made by the respective learned senior counsel and the learned High Court Government Pleader and perused the material on record.

51. The afore-narrated facts are not in dispute. The allegations against the petitioner and accused No.1 are for offences punishable under Sections 506, 376, 511 and 34 of the IPC along with offences under the Act. It is not in dispute that the victim was below 18 years and the Act becomes applicable to the case. The graphic details with which the complaint is registered as narrated hereinabove would not enure to the benefit of the petitioner to contend that he has nothing to do in

the entire episode of rape against the victim. The role of the petitioner would come about only in a full-fledged trial. After filing of the charge sheet the petitioner files an application seeking discharge on the ground that on perusal of entire charge sheet material and looking into the submission of the complainant-victim there are no materials for the alleged offences against him.

52. The Sessions Court considering the documents that were placed by the prosecution clearly narrates that accused No.2 has given a statement before the doctor that accused No.1 had sexual intercourse with the victim and the same was provoked by accused No.2. Accused No.2 also tried to have sexual intercourse with the victim. Since she refused the only act that he committed was touching private parts of her body. This statement is also signed by accused No.2. Therefore, this being the evidence, it is only a matter of trial in which accused No.2 will have to come out clean for the offence punishable under Section 376 of the IPC and be tried for other offences

under the Act or the Code. There are serious disputed questions of fact that are to be thrashed out only in a trial, as the petitioner was the one who accompanied the victim to the house of accused No.1 and it is the petitioner who first provoked the victim to have sexual intercourse as is alleged. Therefore, these factors will have to come out only in a full blown trial. There is no warrant to interfere at this stage in the light of the allegations under the Act as well. The Apex Court in the case of ***KAPTAN SINGH v. STATE OF UTTAR PRADESH***[6] has held as follows:

> *"9.1. At the outset, it is required to be noted that in the present case the High Court in exercise of powers under Section 482 CrPC has quashed the criminal proceedings for the offences under Sections 147, 148, 149, 406, 329 and 386 IPC. It is required to be noted that when the High Court in exercise of powers under Section 482 CrPC quashed the criminal proceedings, by the time the investigating officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the incident place and after taking statement of the independent witnesses and even statement of the accused persons, has filed the charge-sheet before the learned Magistrate for the offences under Sections 147, 148, 149, 406, 329 and 386 IPC and even the learned Magistrate also took the cognizance. From the impugned judgment and order [Radhey Shyam Gupta v. State of U.P., 2020 SCC OnLine All 914] passed by the High Court, it does not appear that the High Court took into consideration the material collected during the investigation/inquiry and*

[6] ***(2021) 9 SCC 35***

even the statements recorded. If the petition under Section 482 CrPC was at the stage of FIR in that case the allegations in the FIR/complaint only are required to be considered and whether a cognizable offence is disclosed or not is required to be considered. However, thereafter when the statements are recorded, evidence is collected and the charge-sheet is filed after conclusion of the investigation/inquiry the matter stands on different footing and the Court is required to consider the material/evidence collected during the investigation. Even at this stage also, as observed and held by this Court in a catena of decisions, the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducting the trial. As held by this Court in Dineshbhai Chandubhai Patel [Dineshbhai Chandubhai Patel v. State of Gujarat, (2018) 3 SCC 104 : (2018) 1 SCC (Cri) 683] in order to examine as to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the investigating agency nor can exercise the powers like an appellate court. It is further observed and held that that question is required to be examined keeping in view, the contents of FIR and prima facie material, if any, requiring no proof. At such stage, the High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is further observed it is more so, when the material relied on is disputed. It is further observed that in such a situation, it becomes the job of the investigating authority at such stage to probe and then of the court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

9.2. In Dhruvaram Murlidhar Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672] after considering the decisions of this Court in Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , it is held by this Court that exercise of

powers under Section 482 CrPC to quash the proceedings is an exception and not a rule. It is further observed that inherent jurisdiction under Section 482 CrPC though wide is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in the section itself. It is further observed that appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 CrPC. Similar view has been expressed by this Court in Arvind Khanna [CBI v. Arvind Khanna, (2019) 10 SCC 686 : (2020) 1 SCC (Cri) 94] , Managipet [State of Telangana v. Managipet, (2019) 19 SCC 87 : (2020) 3 SCC (Cri) 702] and in XYZ [XYZ v. State of Gujarat, (2019) 10 SCC 337 : (2020) 1 SCC (Cri) 173] , referred to hereinabove.

10. The High Court has failed to appreciate and consider the fact that there are very serious triable issues/allegations which are required to be gone into and considered at the time of trial. The High Court has lost sight of crucial aspects which have emerged during the course of the investigation. The High Court has failed to appreciate and consider the fact that the document i.e. a joint notarised affidavit of Mamta Gupta Accused 2 and Munni Devi under which according to Accused 2 Ms Mamta Gupta, Rs 25 lakhs was paid and the possession was transferred to her itself is seriously disputed. It is required to be noted that in the registered agreement to sell dated 27-10-2010, the sale consideration is stated to be Rs 25 lakhs and with no reference to payment of Rs 25 lakhs to Ms Munni Devi and no reference to handing over the possession. However, in the joint notarised affidavit of the same date i.e. 27-10-2010 sale consideration is stated to be Rs 35 lakhs out of which Rs 25 lakhs is alleged to have been paid and there is a reference to transfer of possession to Accused 2. Whether Rs 25 lakhs has been paid or not the accused have to establish during the trial, because the accused are relying upon the said document and payment of Rs 25 lakhs

as mentioned in the joint notarised affidavit dated 27-10-2010. It is also required to be considered that the first agreement to sell in which Rs 25 lakhs is stated to be sale consideration and there is reference to the payment of Rs 10 lakhs by cheques. It is a registered document. The aforesaid are all triable issues/allegations which are required to be considered at the time of trial. The High Court has failed to notice and/or consider the material collected during the investigation.

11. Now so far as the finding recorded by the High Court that no case is made out for the offence under Section 406 IPC is concerned, it is to be noted that the High Court itself has noted that the joint notarised affidavit dated 27-10-2010 is seriously disputed, however as per the High Court the same is required to be considered in the civil proceedings. There the High Court has committed an error. Even the High Court has failed to notice that another FIR has been lodged against the accused for the offences under Sections 467, 468, 471 IPC with respect to the said alleged joint notarised affidavit. Even according to the accused the possession was handed over to them. However, when the payment of Rs 25 lakhs as mentioned in the joint notarised affidavit is seriously disputed and even one of the cheques out of 5 cheques each of Rs 2 lakhs was dishonoured and according to the accused they were handed over the possession (which is seriously disputed) it can be said to be entrustment of property. Therefore, at this stage to opine that no case is made out for the offence under Section 406 IPC is premature and the aforesaid aspect is to be considered during trial. It is also required to be noted that the first suit was filed by Munni Devi and thereafter subsequent suit came to be filed by the accused and that too for permanent injunction only. Nothing is on record that any suit for specific performance has been filed. Be that as it

> ***may, all the aforesaid aspects are required to be considered at the time of trial only.***
>
> … … … …
>
> *14. In view of the above and for the reasons stated above, the impugned judgment and order [Radhey Shyam Gupta v. State of U.P., 2020 SCC OnLine All 914] passed by the High Court quashing the criminal proceedings in exercise of powers under Section 482 CrPC is unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. Now, the trial is to be conducted and proceeded further in accordance with law and on its own merits. It is made clear that the observations made by this Court in the present proceedings are to be treated to be confined to the proceedings under Section 482 CrPC only and the trial court to decide the case in accordance with law and on its own merits and on the basis of the evidence to be laid and without being influenced by any of the observations made by us hereinabove. The present appeal is accordingly allowed."*
>
> *(Emphasis supplied)*

In the aforesaid case, the Apex Court has held that in the teeth of seriously disputed questions of fact, the Court exercising its jurisdiction either under Section 226 of the Constitution of India or under Section 482 of the Cr.P.C. would not interfere or interject such trial.

53. The order impugned rejecting the discharge application of the petitioner is not even called in question in the case at

hand. What is called in question is quashing of entire proceedings in Special C.C.No.41 of 2017 under the Act. Therefore, there is no warrant to interfere in the case at hand.

TO SUM UP:

- **Charge framed against the husband for alleged offence punishable under Section 376 of the IPC for alleged rape of his wife, in the peculiar facts of this case, does not warrant any interference. It is a matter of trial.**
- **Other offences alleged against the petitioner, the ones punishable under Sections 498A, 354, 506 of the IPC are clearly brought out in the complaint and in the charge sheet. This is again a matter of trial.**
- **The prosecution, notwithstanding presumption against the accused under Sections 29 and 30 of the POCSO Act, has to prove foundational facts beyond all reasonable doubt.**

- **The charge framed by the Sessions Court is to be altered by inclusion of offence punishable under Section 377 of the IPC owing to peculiar facts of this case.**
- **The designated Court hearing cases relating to offences under the POCSO Act can try the offences under the IPC as well, in the facts of the case.**
- **Allegations against the petitioner-husband for offences punishable under the POCSO Act for alleged sexual acts on the daughter cannot be interfered with. It is yet again a matter of trial.**

EPILOGUE:

Ergo, a parting observation in the facts and circumstances of the case may not be inapt. Ours is a nation governed by the Constitution. Article 14 of the Constitution of India pervades through the soul of every statute and every bead of decision making. There is no statute promulgated post the Constitution where there is no application of concept of equality as enshrined

in Article 14 of the Constitution of India. The Constitution is not a statute, but is the fountain head of all statutes. If the Constitution mandates equality, the statute ought to follow suit. If a man, a husband, a man he is, can be exempted of allegation of commission of ingredients of Section 375 of the IPC, inequality percolates into such provision of law. Therefore, it would run counter to what is enshrined in Article 14 of the Constitution. All human beings under the Constitution are to be treated equal, be it a man, be it a woman and others. Any thought of inequality, in any provision of law, would fail the test of Article 14 of the Constitution. Woman and man being equal under the Constitution cannot be made unequal by Exception-2 to Section 375 of the IPC. It is for the law makers to ponder over existence of such inequalities in law. For ages man donning the robes of a husband has used the wife as his chattel; butt his crude behavior notwithstanding his existence because of a woman. The age old thought and tradition that the husbands are the rulers of their wives, their body, mind and soul should be effaced. It is only on this archaic, regressive and preconceived

notion, the cases of this kind are mushrooming in the nation. This is in fact in public domain. A brutal act of sexual assault on the wife, against her consent, *albeit* by the husband, cannot but be termed to be a rape. Such sexual assault by a husband on his wife will have grave consequences on the mental sheet of the wife, it has both psychological and physiological impact on her. Such acts of husbands scar the soul of the wives. It is, therefore, imperative for the law makers to now "***hear the voices of silence"***.

54. For the aforesaid reasons, I pass the following:

O R D E R

(i) Writ Petition No.48367 of 2018 filed by accused No.1 stands ***dismissed***.

(ii) Writ Petition No.12976 of 2017 is ***disposed of*** having become unnecessary.

(iii) Writ Petition No.10001 of 2018 stands ***dismissed.***

(iv) Writ Petition No.50089 of 2018 is ***allowed in part.*** The Sessions Court is directed to frame a charge for offences punishable under Section 377 of the IPC against the petitioner.

(v) The observations made in the course of this order are only for considering the cases of the petitioners in challenge to the provisions of the Act and the Code. The Sessions Court shall not be influenced or bound by the observations made in the course of this order.

In view of disposal of the petitions, all pending applications also stand disposed.

Sd/-
JUDGE

bkp
CT:MJ