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**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 24<sup>th</sup> March, 2018*

*Pronounced on: 30<sup>th</sup> May, 2018*

**+ CRL.A. 388/2016 & CRL.M.(Bail) 500/2018**

**MAHENDRA @ MANISH**

..... Appellant

Through: Mr. Ajit Kumar, Ms. Nikita Sharma, Mr. Ashwani Kumar, Ms. Nutan Kumari, Mr. Kunal Yadav and Ms. Priya Yadav, Advs.

Versus

**STATE (NCT OF DELHI)**

..... Respondents

Through: Mr. Rajat Katyal, APP for the State with SI Manish Yadav, P.S. Vasant Kunj (North).

Mr. Santosh Kumar, Mr. Rajiv Ranjan Mishra, Mr. R.N.Mishra and Ms. Shruti Sharma, Advs. for respondent.

**+ CRL.A. 1010/2017**

**'M' (name withheld)**

..... Appellant

Through: Mr. Santosh Kumar, Mr. Rajiv Ranjan Mishra, Mr.R.N.Mishra and Ms. Shruti Sharma, Advs.

Versus

**VIJETA @ VARSHA @ LALI**

..... Respondents

Through: Mr.Ajit Kumar, Ms.Nikita Sharma, Mr.Ashwani Kumar and Ms.Nutan Kumari, Advs.for R-1.

Mr.Rajat Katyal, APP for the State/R-2.

SI Manish Yadav, P.S. Vasant Kunj (North).

+ CRL.A. 1011/2017

STATE (GNCT OF DELHI)

..... Appellant

Through: Mr. Rajat Katyal, APP for  
the State

SI Manish Yadav, P.S. Vasant Kunj  
(North).

Versus

VIJETA @ VARSHA

..... Respondent

Through: Mr. Ajit Kumar, Ms. Nikita  
Sharma, Mr. Ashwani Kumar and  
Ms. Nutan Kumari, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE S.P.GARG**

**HON'BLE MR. JUSTICE C.HARI SHANKAR**

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**JUDGMENT**

**C. HARI SHANKAR, J.**

1. Mahendra (the appellant in Crl Appeal 388/2016) has, *vide* the impugned judgment, dated 24<sup>th</sup> February, 2016, passed by the learned Additional Sessions Judge (hereinafter referred to as “the learned ASJ”), been found guilty of having committed the offences contemplated by Sections 493, 495 and 375 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), which cover “cohabitation, caused by a man deceitfully inducing a belief of lawful marriage”, “the same offence with concealment of the former marriage from the person with whom the subsequent marriage is contracted”, and “rape”, respectively. Resultantly, the learned ASJ has convicted and punished Mahendra under Sections 376, 493 and 495 of the IPC and has, *vide* separate order on sentence, dated 26<sup>th</sup> February, 2016, sentenced Mahendra to suffer (i) for the offence punishable under Section 376, rigorous imprisonment for life with fine of ₹ 5 lakhs, and default

simple imprisonment for 2 years, and (ii) for the offences punishable under Sections 493 and 495 of the IPC, to suffer rigorous imprisonment for 10 years and fine of ₹ 1 lakh, with default simple imprisonment for one year in each case. The sentences have been directed to run concurrently. Mahendra has been extended the benefit of Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C.”).

2. Simultaneously, the impugned judgement acquits Vijeta @ Varsha (the respondent in Crl Appeal 1010/2017), who was charged, along with Mahendra, under Section 120-B read with Section 376 of the IPC, of the said charges.

3. Mahendra has, therefore, chosen to appeal against his conviction and sentence, whereas the State, and the prosecutrix ‘M’, have chosen to appeal against the acquittal of Vijeta.

### **Facts**

4. These appeals, which throw up interesting questions of fact and law, permit us, mercifully, to steer almost completely clear of references to police procedures, or to medical and forensic evidence.

5. On 16<sup>th</sup> August, 2013, a written complaint (Ex. PW-11/A), was tendered by ‘M’ [whose identity must remain undisclosed, in view of the proscription contained in Section 228-A (1) of the IPC], at the Vasant Kunj Police Station, on 16<sup>th</sup> August, 2013, complaining that “Mahendra/Manish” had, by fraudulently presenting his wife Vijeta as

his sister, contracted marriage with 'M' and had, by consummating the marriage, outraged her modesty and ruined her life. It was further averred, in the complaint, that 'M' had come to know of the marriage of "Mahendra/Manish" with Vijeta, and the fact that they had a daughter from the said marriage, from a news item aired on television, more than a year thereafter. The complaint, therefore, exhorted the Police to prosecute and punish Mahendra/Manish under Sections 376 and 495 of the IPC.

6. FIR 324/2013 was registered, in the Police Station, on the basis of the aforesaid complaint submitted by 'M', against Mahendra, under Sections 376 and 493 of the IPC, and against Vijeta, under section 120-B read with Section 376 of the IPC. Investigations commenced, during the course of which Mahendra and Vijeta were arrested, medically examined, and their statements recorded under Section 161 of the Cr.P.C. 'M' was also medically examined. However, nothing turns on the MLCs issued consequent on the examination of any of the *dramatis personae* before us; hence, further reference, thereto, may conveniently be eschewed.

7. The statement of 'M', under Section 164 of the Cr.P.C., was recorded by the learned Metropolitan Magistrate (hereinafter referred to as "the learned MM") on 19<sup>th</sup> August, 2013. The statement, which was partly in English and partly in Hindi, may be reproduced, with the vernacular portions translated into English, thus:

**“On SA**

I am a physically challenged person. On 23<sup>rd</sup> of 2010 my father had given an advertisement in Punjab Kesri Newspaper inviting proposals from grooms who were interested in living in my father’s house. The accused Mahendra/Manish had come to meet me, along with his sister Vijeta/Varsha. On 30<sup>th</sup> August, 2010, we were married at Arya Samaj temple, Vasant Vihar. Thereafter, we had sexual/physical relations, like a husband and wife.

However, he later started to mentally torture me. He used to remain away from home for days at a stretch, and would not return home at night. On my inquiring, he often used to give excuses, saying that his sister was not well, his car had broken down, etc. On 9<sup>th</sup> May, 2011, Mahendra told me that he had to proceed to Calcutta, on work, for a month. He told me that he was engaged in the leather business, for which he had to go for fieldwork, for which, on his asking, my father had also given him a car. He did not take me with him to Calcutta supposedly on the ground that, being physically challenged, I would not be able to live with him.

He returned on 13<sup>th</sup> July, 2011. For some time thereafter, we stayed with parents. Normally, we used to stay in a separate flat in Safdarjung Enclave, which had been given by my father in dowry.

On 23<sup>rd</sup> July, 2011, there was a theft in the house of my father. On 24<sup>th</sup> July, 2011, my husband fled from the house, taking the car.

On 4<sup>th</sup> August, 2011, there was a TV interview with DCP Chhaya Sharma, from which I got to know that the theft, at my house, had been perpetrated by my husband Mahendra, and that Vijeta/Varsha, who had come with him masquerading as his sister, was his 1<sup>st</sup> wife, and that they had a daughter. At the same time, a report was published in the newspaper, from which I got to know that Mahendra and his 1<sup>st</sup> wife were running a fake friendship club. By cheating me, he established physical relations with me.

Mahendra also took ₹ 2.5 lakhs from my father on 20<sup>th</sup> September, 2010, by lying that he was an orphan. On the

basis of my complaint and order of the court, FIR has been registered, against Mahendra, on 16<sup>th</sup> August, 2013. I want him to be punished as per law.

He misrepresented his caste and educational qualifications, to me, as well. He has cheated me.”

Jasjeet Kaur, learned MM who recorded the above statement of ‘M’, under Section 164 of the Cr.P.C., proved the said statement, in her testimony during trial.

8. Investigations, by the Police, followed, which led, inexorably, to the filing of chargesheet, dated 12<sup>th</sup> November, 2013, before the learned MM. The chargesheet alleged that, after the recording of the statement, of ‘M’ under Section 164 of the Cr.P.C., ‘M’ produced, before the IO, her marriage certificate, which indicated that Mahendra had, prior to his marriage with ‘M’, shown himself to be unmarried. It was further alleged that (i) certain property papers, (ii) the birth certificate of Ishika, the daughter of Vijeta and Mahendra, in which Vijeta and Mahendra were shown as her parents, (iii) press release papers relating to FIR No. 190/11, (iv) the Prudential life insurance Policy, of the ICICI Bank, of the appellant, in which Vijeta was shown as his wife, and (v) four photographs, were recovered, which indicated that, prior to his marriage with ‘M’, Mahendra was already married to Vijeta, and that they had a daughter named Ishika. It was further noted, in the chargesheet, that, after considerable effort, Mahendra was arrested on 25<sup>th</sup> October, 2013, and that, in their statements under Section 161 of the Cr.P.C., Vijeta and Mahendra had confessed to their crime. After conducting the potency test of Mahendra, at the AIIMS, *vide* MLC No 10795/2013 (Ex. PW-8/A), it

was opined, in the chargesheet, that the facts indicated offences, under Sections 376/493/495/120-B, of the IPC, to have been committed by Mahendra and Vijeta. Thus opining, the chargesheet was, as already noted above, filed, by the IO, before the learned MM, on 12<sup>th</sup> November, 2013.

9. The case was assigned to the court of the learned ASJ on 24<sup>th</sup> August, 2015. Mahendra was charged for having committed rape, upon 'M', by establishing physical relations with her, concealing the fact of his earlier marriage with Vijeta. He was, therefore, arraigned under Sections 376, 493 and 495, read with 120-B of the IPC. Vijeta was charged for having criminally conspired with Mahendra, by impersonating herself as his sister, and causing 'M' to believe that Mahendra was unmarried and was, therefore, arraigned under Section 120-B read with Section 376 of the IPC.

10. Both Vijeta and Mahendra pleaded not guilty; the case, therefore, proceeded to trial.

### **Evidence adduced during trial**

#### **Oral Evidence**

11. The prosecutrix 'M', her mother Sushma Nagpal and her brother Ankit Nagpal deposed, during trial, as PW-11, PW-3 and PW-12 respectively. We may proceed, straightaway, to their depositions.

12. The examination-in-chief and cross examination of the prosecutrix 'M', was recorded on 23<sup>rd</sup> and 24<sup>th</sup> September, 2014. In

her examination-in-chief, 'M' reiterated the allegations, contained in her statement under Section 164 of the Cr.P.C., that, pursuant to the advertisement, dated 23<sup>rd</sup> May, 2010, published by her parents, in the newspaper, calling for applications from prospective grooms, Vijeta and Mahendra came to the house, introducing themselves as sister and brother, with Vijeta stating that Mahendra was unmarried. She alleged that, having been hoodwinked thus, by the sister-brother team, she married Mahendra on 30<sup>th</sup> August, 2010, and that the marriage was duly consummated. Later, she alleged, Mahendra started torturing her, and remaining absent from home. It was further averred, by 'M', that, on 23<sup>rd</sup> July, 2011 when she, along with Mahendra, came to her parents house, they were informed that a theft had been committed there and that, on the next day, i.e. 24<sup>th</sup> July, 2011 Mahendra left the house in the car, but did not return. She alleged that it was only on 4<sup>th</sup>/5<sup>th</sup> August, 2011, that she got to view, in a news clip on a television channel, a statement by Deputy Commissioner of Police (DCP) Chhaya Sharma, to the effect that the theft, that had taken place in her parent's house was, in fact, perpetrated by Mahendra and, further, that Mahendra and Vijeta were husband and wife, and that they had a girl child.

**13.** 'M' further averred, in her statement, that she had submitted, to the IO, a copy of her marriage certificate (Ex. PW-11/A), which was seized *vide* Seizure Memo Ex. PW-11/C. In cross examination, 'M' deposed that, on the occasion in August, 2010, when Mahendra and Vijeta had visited her house she had enquired, from Vijeta, of her identity, to which Vijeta responded that she was the maternal cousin sister of Mahendra and that she was married to one Bajaj, and had no



children. She admitted that these facts were not to be found either in her statement to the IO nor in her complaint (Ex. PW-11/A). It was further testified by the prosecutrix 'M' that, prior to finalizing the marriage, her parents had visited the house of Mahendra in August, 2010, where they found him alone, and had satisfied themselves before agreeing to the nuptial alliance. She admitted that Vijeta did not attend her marriage with Mahendra, though some of his relatives were present. She also admitted that she had no photographs in which Vijeta was to be seen in the company of her or her parents. She alleged, further, that, Mahendra had told her parents that he was an orphan.

**14.** In her further cross-examination on 24<sup>th</sup> September, 2014, the prosecutrix 'M' admitted that on the day when she saw the TV news clip, she did not make any complaint to the police, but reiterated that it was only from the said clip that she got to know that Mahendra was already married to Vijeta prior to his marriage with her. She denied the suggestion that she had registered a false case against Mahendra, out of pique at his having been granted bail in FIR No.190/2011.

**15.** Sushma Nagpal, the mother of 'M' deposing as PW-3, substantially supported the statement of 'M'. She deposed, inter alia, that (i) in response to the matrimonial, published by her, and her husband, seeking alliance for the marriage of their daughter 'M', on 23<sup>rd</sup> May, 2010, Mahendra came to their house in August, 2010, with a proposal to marry 'M', (ii) he was accompanied by Vijeta, and stated that he was unmarried and that Vijeta was his sister, who was married to some other person, (iii) having finalized the alliance, the

marriage of 'M' with Mahendra was solemnized on 30<sup>th</sup> August, 2010, (iv) at the time of marriage, 'M's parents i.e. PW-3 and her husband, gifted one i10 car and Rs. 2.5 lacs in cash, (v) two to four days after the marriage, Mahendra started absenting himself from the house, at times for ten to fifteen days, on one pretext or another, (vi) on 9<sup>th</sup> May, 2011, Mahendra left the house stating that he was going to Calcutta, and requesting Sushma Nagpal and her husband to allow their daughter to stay with them, whereafter Mahendra returned only on 13<sup>th</sup> July, 2011, (vii) on 23<sup>rd</sup> July, 2011, ₹ 80 lacs in cash, and some jewellery items, were stolen from their house, (viii) from that day, Mahendra went missing, (ix) later, Mahendra and Vijeta were apprehended and the police informed Sushma Nagpal and her husband, on 4<sup>th</sup> August, 2011, that the stolen articles had been recovered from their possession (x) it was only thereafter that she got to know that Mahendra and Vijeta were husband and wife and had a female child.

**16.** In cross-examination, PW-3 admitted that, when Mahendra and Vijeta visited their house in August, 2010, she spoke to Mahendra for one and a half hours. She deposed that they had visited Mahendra, at the residential address provided by him, where they found him alone. She further testified that, while 'M' had done Honors in Sociology and was having a Post Graduate Diploma, Mahendra was, as per his own disclosure, a first year student of Zakir Hussain College. She stated that Mahendra had informed them that he was an orphan, and was staying with his sister. She further deposed, in cross-examination, that the marriage of Mahendra, with her daughter 'M', was attended only by four to five relatives of Mahendra, who were

stated, by Mahendra, to be his paternal aunt and sisters' in-law. Deposing further, PW-3 Sushma Nagpal stated that she and her husband had given of ₹ 2.5 lakhs, in cash, to Mahendra, in the presence of their family members, as he said that he needed the money to discharge a mortgage taken by him on his flat. She admitted that Vijeta was not present at the time of marriage of Mahendra with 'M' at the Arya Samaj temple. She further asserted that it was only when Mahendra was arrested, in the theft case, that they had come to know that he was married to Vijeta, and that Vijeta was not his sister. At the same time, she admitted that she had not seen any proof regarding marriage of Mahendra with Vijeta. In her further cross-examination by learned counsel appearing for Mahendra, PW-3 Sushma Nagpal deposed that, immediately after marriage, Mahendra and 'M' had shifted to a flat in Safdarjung Enclave, where they stayed for seven to eight months, during which period none of them had made any complaint against Mahendra, to the effect that he was demanding dowry. She further deposed that Mahendra had left his home in May 2011 and returned in July, 2011, whereafter he, and 'M', were residing with them (i.e. Sushma Nagpal and her husband). She admitted that none of them had lodged a complaint, against Mahendra, between 30<sup>th</sup> August, 2010 and 16<sup>th</sup> August, 2013, and that it was only on 16<sup>th</sup>/17<sup>th</sup> August, 2013, that they had lodged a Police complaint against Mahendra.

**17.** PW-12 Ankit Nagpal deposed, in his examination-in-chief on 24<sup>th</sup> September, 2014, that, it was after their arrest in connection with the theft that had taken place at their house, that Mahendra and Vijeta disclosed that they were, in fact, husband and wife, and that the real

name of Vijeta was Varsha. He also alleged, in his deposition, that Mahendra and Vijeta had conspired with each other, and had defrauded his sister 'M' into marrying Mahendra. While seeking to support the allegation, made by PW-3 Sushma Nagpal, that Mahendra and Vijeta had represented themselves as brother and sister on the occasion of their visit in August 2010, he admitted that he was not present in the house at that time. He insisted that Mahendra and Manish were one and the same person. He further submitted that, in support of the allegations made by him, he had handed over, to the Police, (i) photo copies of property documents of Vijeta, regarding a deal in UP, in which Manish and his sister-in-law were witnesses, (ii) some photographs of Mahendra and Vijeta, (iii) certain notarized documents such as General Power of Attorney, Will, etc., bearing the thumb impression and signature of Vijeta and Mahendra, in which Vijeta was shown as the wife of Mahendra @ Manish, (iv) a copy of an ICICI Prudential Policy, taken in the name of Mahendra @ Manish, in which Vijeta was shown as the nominee, and they were shown as husband and wife, (v) the discharge slip of Vijeta @ Varsha, from the hospital, and (vi) the birth certificate of a female child, in which the parents of the child were shown as Manish and Varsha, which were collectively exhibited as Ex. P-12/A (documents) and P-12/B-1 to B-3 (photographs), and were seized by the IO *vide* Seizure Memo Ex. PW-12/A. He further stated that, on 19<sup>th</sup> October, 2013 and 26<sup>th</sup> October, 2013, 'M' had handed over certain documents to the IO, which were seized in his presence, and that he had signed the Seizure Memos issued in respect thereof.

18. In his cross-examination, PW-12 Ankit Nagpal deposed that the photo copies of documents, submitted by him to the IO and marked Ex. PW-12/A collectively, were obtained by him consequent on the arrest of Mahendra and Vijeta, and that, while some of the documents were found in the house of Mahendra at Safdarjung Enclave, some others were obtained by him from the City Hospital and the MCD Office.

19. The evidence of the Police Witnesses, as adduced during trial, necessarily has limited significance in a case such as the present; to the extent they do matter, however, reference thereto is necessary. Const. Kavita Yadav, deposing as PW-4, while alleging that, in her disclosure statement recorded consequent on her arrest, Vijeta disclosed that Manish was her husband, admitted, nevertheless, that, in her presence, no document, showing Manish @ Mahendra and Vijeta to be husband and wife, was recovered by the IO. PW-5 Const. Vipin Kumar deposed, in examination-in-chief, that the IO had recovered some property documents, at the instance of Mahendra/Manish, which were seized *vide* Seizure Memo Ex. PW-5/A. However, in cross-examination, he admitted that he had no idea regarding the nature of the papers recovered by the IO SI Poonam Yadav (PW-14), and that, though he, along with the IO SI Poonam Yadav, had visited F-22, Nangloi, Shiv Ram Park, where Mahendra resided as a tenant, nothing was seized therefrom. In the very same deposition, however, Const. Vipin Kumar went on to state that the papers recovered by SI Poonam Yadav were recovered from the cupboard in the house at F-22, Nangloi. It may be mentioned, at this juncture itself, that Ex. PW-5/A indeed indicates that the documents,

recovered thereunder, were recovered from the cupboard at F-22, Nangloi, where Mahendra used to stay on rent.

20. Testifying as PW-14, the IO, SI Poonam Yadav deposed, in her examination-in-chief on 28 October, 2014, that, (i) on 20<sup>th</sup> August, 2013, she seized photocopies of the property documents of Mahendra and Vijeta, along with their photographs (collectively exhibited as Ex. P-12/A), *vide* Seizure Memo Ex. PW-12/A, (ii) on the same day, i.e. 20<sup>th</sup> August, 2013, she seized (a) the marriage certificate of Manish @ Mahendra, with 'M', *vide* Seizure Memo Ex. PW-11/C, and also got it verified from the concerned Arya Samaj Temple, and (b) the birth certificate of the child of Manish @ Mahendra and Vijeta @ Varsha, and (iii) during his police remand, she seized, from Manish @ Mahendra, photo copies of certain property related documents (Ex. PW-14/D collectively), *vide* Seizure Memo Ex. PW-5/A.

21. Raman Viz, the Sub-Registrar, MCD, Rohini, testified as PW-13, on 28<sup>th</sup> October, 2014. He brought, with him, the record pertaining to the issuance of Birth Certificate No C3364710 dated 27<sup>th</sup> September, 2012 (Ex. PW-13/B), which indicated that, on 9<sup>th</sup> May, 2011, a female child was born to Varsha Sharma and Manish Sharma at the City Hospital. The photocopy of the record of the Hospital was collectively exhibited as Ex. PW-13/A, the original whereof was seen and returned.

Statements of Mahendra and Vijeta under Section 313, Cr.P.C.

22. Vijeta, in her statement under Section 313 of the Cr.P.C., denied the allegation that, in connivance with her, Mahendra proposed

to marry 'M', without disclosing his earlier marriage to her, by introducing himself as her brother, and that she, in connivance with him, stated that she was married to some other person. She admitted, however, that, in the birth certificate (Ex. PW-13/B) of Ishika, she was shown as her mother and Manish Sharma was shown as her father, and that, as per the records of the City Hospital (Ex. PW-13/A), a female child was born to her and Mahendra at the said hospital. To a query that, of the documents seized from House No F-22, Nangloi, (i) in the property documents and *Ikrarnama*, her name figured as Smt. Vijeta Sharma, with the name of her husband shown as Mahendra Sharma, (ii) in the affidavit, GPA, Agreement to sell, possession letter, Will and receipt, her name figured as Varsha Sharma, and the name of her husband as Manish Sharma, and (iii) in the GPA and in the insurance papers relating to the ICICI Prudential Life Insurance, the name of her husband figured against the proposal and her name figured against the nominee, she merely stated that they were a "matter of record". Similarly, she stated that the reflection, of her name as purchaser, in the certified copy of the Sale Deed dated 24<sup>th</sup> July, 2008, recovered at the instance of Mahendra from House No F-22, Nangloi, was also a "matter of record". The reflection of Mahendra, as her husband, in Sale Deed Ex. PW-14/D, relating to the purchase, by Vijeta, of land measuring 41.8 Sq. m, was also stated to be a "matter of record", following which Vijeta asserted that she "was living with the accused though as husband and wife but it was a live-in relationship".

23. Mahendra, in his statement under Section 313 of the Cr.P.C., while accepting the fact of his marriage with 'M', and the consummation thereof, categorically denied all allegations of his having introduced Vijeta, to 'M', as his sister, having concealed the earlier marriage between Vijeta and himself, having received ₹ 2.5 lakhs, having tortured 'M' or remained away from home for protracted periods of time, or having had anything to do with the theft which took place at the house of Sushma Nagpal (PW-3) on 23<sup>rd</sup> July, 2011. He also denied the allegation that, on 4<sup>th</sup>/5<sup>th</sup> August, 2011, 'M' saw a news clip on the television, regarding the said theft, which indicated that he, in connivance with Vijeta, had orchestrated it, and that he was already married to Vijeta with one girl child, indicating that he had cheated 'M'. He also denied the suggestion that, from the photographs Ex. P-12/B-1 to B-3, P-1, P-2 and P-3, and the documents seized *vide* Seizure Memo Ex. PW-11/B, PW-12/A, PW-14/B and PW-14/C, it was clear that he was known by two names, i.e. Mahendra and Manish, and that Vijeta was also known by two names, i.e. Vijeta and Varsha. Significantly, while accepting (i) the fact of the Police having informed Sushma Nagpal that the articles stolen from her residence were recovered from the possession of Mahendra and Vijeta, (ii) the reflection, in the birth certificate of Ishika (Ex. PW-13/B), as well as in the records of the Hospital (Ex. PW-13/A), of himself and Varsha as the parents of Ishika, (iii) the recording, by the IO, of his disclosure statement (Ex. PW-9/D), (iv) the seizure, at his instance, of the property papers, address proof, affidavit, GPA, Agreement to Sell, Sale Deed, Will and *Ikrarnama*, from his house at F-22, Nangloi, *vide* Seizure Memo Ex. PW-12/A, (v) the reflection, in



the property document and *Ikrarnama*, of Vijeta as Smt. Vijeta Sharma, and himself as Mahendra Sharma, (vi) the fact that, in the affidavit, GPA, Agreement to Sell, possession letter, Will and receipt, the name of Vijeta appeared as Varsha Sharma, and his name appeared as Manish Sharma, and (vii) he having been shown as the “proposer”, and Vijeta as the “nominee”, in the papers relating to the ICICI Prudential Life Insurance, he merely stated that they were a “matter of record”. As did Vijeta, Mahendra, too, accepted, as a “matter of record”, his having been shown as the husband of Vijeta, in the property document Ex. PW-14/D, i.e. Sale Deed dated 24<sup>th</sup> July, 2008, but stated that he “was living with the accused though as husband and wife but it was a live-in relationship”.

#### Documentary Evidence

**24.** The documents, which would be pivotal to adjudicating on the controversy before us, were seized, by the IO, under the following three Seizure Memos:

- (i) *Vide* Seizure Memo dated 20<sup>th</sup> August, 2013 (Ex. PW-12/A), the following documents/papers, produced by Ankit Nagpal (PW-12), were seized:
  - (a) some property papers,
  - (b) an “address proof affidavit”,
  - (c) a GPA,
  - (d) an Agreement to Sell,
  - (e) a Deed of Will,
  - (f) an *Ikrarnama*,

- (g) birth certificate of the daughter of Vijeta and Mahendra, issued by the Municipal Corporation of Delhi (MCD),
- (h) Hospital papers,
- (i) papers relating to the life insurance policy taken on ICICI Prudential,
- (j) a press release and
- (k) three photographs.

The Seizure Memo further stated that the above documents showed that Mahendra @ Manish and Vijeta @ Varsha were married and that they had one daughter. It merits mention, here, that all the documents, referred to from (a) to (j) *supra* and exhibited, collectively, as Ex. PW-12/A, were photocopies. As regards the source of procurement of these photocopies, as already noted hereinabove, Ankit Nagpal (PW-12) stated, in his cross-examination on 24<sup>th</sup> September, 2014, that “some of the documents were found from the house of accused which was situated at Safdarjung Enclave and some of the documents were obtained by me from City Hospital and MCD office.” It is also relevant to mention that, of these photocopies, the photocopy of the Birth Certificate, dated 27<sup>th</sup> September, 2012, of Ishika was verified, during trial, by PW-13 Raman Viz, the Sub- Registrar (Birth and Death) of the New Delhi Municipal Corporation (NDMC), by comparison with the computer record, subsequent where to it was re-exhibited as Ex. PW-14/D-1.

(ii) *Vide* another Seizure Memo, also dated 20<sup>th</sup> August, 2013 (Ex. PW-11/C), the marriage certificate, dated 30<sup>th</sup> August, 2010, of 'M' with Manish @ Mahendra, issued by the Arya Samaj Temple, Vasant Vihar, in which Manish @ Mahendra showed himself as unmarried, was seized.

(iii) *Vide* Seizure Memo, dated 25<sup>th</sup> October, 2013 (Ex. PW-5/A), certified copies of certain documents, relating to sale and purchase of property at Khasra No 44, Awasiya Colony, Om Vihar, Loni, Ghaziabad, which were transacted between Vijeta and Om Prakash were, at the instance of Mahendra, recovered from House No F-22, Nangloi, in which Vijeta Sharma was shown as the wife of Mahendra Singh.

25. Inasmuch as the marriage between Mahendra and 'M' is not disputed by anyone before us, no reference is being made to the documents which solely relate to, and prove, the said marriage.

### **The Impugned Judgement**

26. The impugned judgement, dated 24<sup>th</sup> February, 2016, acquits Vijeta of all charges against her, while convicting Mahendra under Sections 376, 493 and 495 of the IPC, and proceeds on the following reasoning:

(i) It was settled, by the judgement of the Supreme Court in *Bhupender Singh vs U.T. of Chandigarh, (2008) 8 SCC 531*, that entering into sexual relations, with the wife of a second marriage, during the subsistence of an earlier marriage,

amounted to “rape”, within clause “Fourthly” of Section 375 (2) of the IPC.

(ii) The birth certificate of Ishika (Ex. PW-13/B), wherein Vijeta had been shown as her mother and Manish as her father, had been proved by Raman Viz (PW-13), from the office of the Sub- Registrar.

(iii) The objection to Ex. PW-14/D, i.e. the Sale Deed, dated 24<sup>th</sup> July, 2008, to the effect that the document was only a certified copy, was not available to the accused, in view of the legal position that an objection, regarding the mode of proof of a document was required to be taken at the first available opportunity, failing which the admissibility of the document could not be challenged at a later stage.

(iv) Meeting of minds, and a common agreement to commit a crime, were the essentials of the offence of “criminal conspiracy”, contemplated by Section 120-B of the IPC.

(v) Though the prosecutrix ‘M’ alleged that Vijeta had visited her house once, in August, 2010, none of the witnesses were able to prove the exact date and time of her visit, in the company of Mahendra.

(vi) Further, PW-3 Sushma Nagpal had stated that it was Mahendra who said that he was unmarried, whereas Ankit Nagpal (PW-12) stated that both Mahendra and Vijeta said that Vijeta was unmarried, even though he admitted that he himself was not present on the said occasion. Except for a bald statement, therefore, there was no evidence available on record,

on the basis of which it could be said, conclusively, that Vijeta had visited the house of 'M' in August, 2010.

(vii) Moreover, PW-3 deposed, in her cross examination, that, when they visited the house of Mahendra, Vijeta was not found there. Given our societal mores, it was uncommon, in such circumstances, for the absence of Vijeta, supposedly the sole relative of Mahendra, at the time of his marriage, to go unnoticed, or for her not to have been invited to the marriage by the parents of 'M'. Neither was there any explanation forthcoming as to why, when the other relatives of Mahendra were present at the marriage, no enquiry, regarding the absence of Vijeta, was made.

(viii) It was an admitted position that Vijeta did not attend the marriage of Mahendra and 'M'.

(ix) It was highly doubtful whether Vijeta would introduce Mahendra as an unmarried person, so as to hatch a conspiracy to solemnise his second marriage with the prosecutrix 'M', concealing the fact that she herself was married to him at the time.

(x) In these circumstances, the delayed lodging of complaint, on 16<sup>th</sup> August, 2013, though 'M', and her family, came to know of the earlier marriage of Mahendra with Vijeta on 4<sup>th</sup>/5<sup>th</sup> August, 2011, assumed significance, especially when there was no explanation for such delay. The possibility of the belated complaint having been made as an afterthought, to falsely implicate Vijeta, who was already a co-accused with Mahendra

in FIR No 190/11, dealing with the theft of ₹ 80 lakhs from the house of the prosecutrix 'M', could not be ignored.

(xi) In these circumstances, the prosecution could not be said to have established its case against Vijeta beyond reasonable doubt.

(xii) The submission of Mahendra, that he, and Manish, were not one and the same person, was an afterthought. There was nothing on record, to suggest that the appellant was not using the name "Manish" as well. This defence had been taken after conclusion of the trial. In his entire statement, under Section 313 Cr.P.C., Mahendra never stated that he was not known by the name "Manish". In the entire record of the trial, Mahendra figured as "Mahendra @ Manish", and never objected thereto. Moreover, when questioned regarding the birth certificate of Ishika (Ex. PW-13/B), in which his name was shown as Manish Sharma, and Vijeta's name was shown as Varsha, Mahendra merely said that it was a "matter of record". This objection was, therefore, without substance.

(xiii) The birth certificate of Ishika (Ex. PW-13/B) proved, beyond reasonable doubt, that Mahendra was married to Vijeta @ Varsha. The hospital records (Ex. PW-13/A) also suggested that the baby girl was born out of the wedlock of Mahendra and Vijeta. These exhibits had been duly proved by PW-13, and no objection was raised, at the time of exhibition thereof. Even otherwise, they were certified copies and admissible in evidence.

(xiv) The Sale Deed, dated 24<sup>th</sup> July, 2008 (Ex. PW-14/D), executed in favour of Vijeta, which was recovered at the instance of Mahendra, further established, beyond reasonable doubt, the fact that Vijeta was the wife of Mahendra. This document was much prior to the marriage of Mahendra with ‘M’, which took place only on 30<sup>th</sup> August, 2010.

(xv) In the circumstances, it was clear that Mahendra had contracted his second marriage, with the prosecutrix ‘M’, during the lifetime of his first wife, by concealing the fact of his earlier marriage, and deceitfully causing Vijeta to believe that she was lawfully married to him, though the said marriage was void *ab initio*. As such, Mahendra was liable to be held guilty and convicted for offences under Section 376, 493 and 495 of the IPC.

**27.** *Vide* subsequent order, dated 26<sup>th</sup> February, 2016, the learned ASJ held that, as Mahendra had “not only ravished the prosecutrix physically but he also ravished her mentally knowing very well that prosecutrix is a *divyang* and is totally dependent upon him” and had, thereby, “ruined the entire family of the prosecutrix and committed the breach of the trust imposed by the family that he will look after the prosecutrix being ‘*Ghar Jamai*’”; and that as it was “clear that he (was) a manipulating man and he tried to take all kind of advantages because of the vulnerability of the prosecutrix being the *divyang* and contracted the second marriage and even cohabited with the prosecutrix and established physical relationship under misconception of the prosecutrix of being his legally wedded wife”; there were no “mitigating circumstances to take a lenient view while awarding the

sentence”. Opining, therefore, that “the cases like in hand must set an example in the society that once there is conviction, there is no undue sympathy while awarding the sentence upon the convict”, and “considering the gravity of the offence and peculiar nature of the case”, the learned ASJ sentenced Mahendra to rigorous imprisonment of life and fine ₹ 5 lakhs with default simple imprisonment of 2 years, for the offence punishable under Section 376 of the IPC, rigorous imprisonment for 10 years and fine of ₹ 1 lakh, with default simple imprisonment for one year, for the offence punishable under Section 493 of the IPC, and rigorous imprisonment for 10 years and fine of ₹ 1 lakh, with default simple imprisonment of one year, for the offence under Section 495 of the IPC, with the merciful caveat that the sentences would run concurrently.

### Analysis

28. The most – indeed, the only – definitive authority, regarding the applicability of clause “Fourthly” of Section 375 (2) of the IPC, in a case such as this, it is, undoubtedly *Bhupender Singh (supra)*, authored by Arijit Pasayat, J., for himself and P. Sathasivam, J. The facts, in that case, are broadly similar to those obtaining in the present. The complainant Manjit Kaur filed a complaint, against the appellant Bhupender Singh, alleging that, misrepresenting himself as unmarried, Bhupender Singh developed intimacy with her, and proposed marriage, to which she agreed, following which they got married. The marriage was consummated. Later, she got to know that Bhupender Singh was already married to one Gurinder Kaur, and that they had children out of the said wedlock. She filed a complaint,



leading to registration of an FIR, against Bhupender Singh, under Sections 420/376/498-A of the IPC. It was sought to be contended, by Bhupender Singh, before the Supreme Court, that the complainant Manjit Kaur had consented to sexual intercourse with him, even after knowing the fact that he was married and that, therefore, clause “Fourthly” of Section 375 of the IPC, would have no application. The Supreme Court rejected the said contention, in para 16 of its judgement, holding thus:

*“Though it is urged with some amount of vehemence that when the complainant knew that he was a married man, clause “Fourthly” of Section 375 IPC has no application, the stand is clearly without substance. Even though the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the appellant-accused is concerned. Since he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab initio. In any event, the appellant-accused could not have lawfully married the complainant. A bare reading of clause “Fourthly” of Section 375 IPC makes this position clear.”*

(Emphasis supplied)

**29.** Section 375 of the IPC, with clause “Fourthly”, thereto, reads as under:

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

*(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.”

30. Section 375 “Fourthly” has, therefore, two essential ingredients, i.e. (i) that the prosecutrix should not be lawfully married to the accused and (ii) that the prosecutrix should, however, believe herself to be lawfully married to the accused, resulting in her giving consent for sexual intercourse. It is important to highlight, here, that, as held in *Bhupender Singh (supra)*, knowledge, by the second wife (we will for the sake of convenience refer to her thus, though the second marriage was void), of the subsisting first marriage, is not a *sine qua non*, for clause “Fourthly” to apply.

31. Two questions, therefore, would arise in the present case, i.e.

- (i) whether the prosecutrix ‘M’ was lawfully married to Mahendra and,
- (ii) if not, whether she consented to sexual relations with Mahendra because she *believed herself to be lawfully married* to him.

32. It is only if the answer to the first question is in the negative, and the answer to the second question is in the positive, that Mahendra could be alleged to have committed the offence of rape, under clause “Fourthly” of Section 375 of the IPC.

33. The prosecution has alleged, and the learned ASJ has found, ‘M’ not to have been lawfully married to Mahendra, for the reason that the marriage of Mahendra, with Vijeta, was subsisting at the time. It is this finding which is principally challenged by learned counsel appearing for Mahendra before us, by contending that, in fact,

Mahendra was never married to Vijeta, and that they only shared a live-in relationship. The consequence, he would submit, would be that the marriage of Mahendra with 'M' was perfectly valid, and that the sexual activity, between them, having taken place within the confines of a valid marriage, could not, by any stretch of imagination, visit his client with penal consequences.

**34.** Were, then, Mahendra and Vijeta married, or were they only sharing a live-in relationship? While examining this aspect, we have to be mindful of the fact that criminal consequences, impinging on the life and liberty of the persons concerned, would result from our decision and that, therefore, the fact has to be established beyond reasonable doubt, and not merely on probabilities.

**35.** The learned ASJ has held that Mahendra and Vijeta were married, on the basis of (i) the birth certificate, dated 27<sup>th</sup> September, 2012 of Ishika (Ex. PW-13/B), (ii) the related Hospital papers (Ex. PW-13/A) and (iii) Sale Deed, dated 24<sup>th</sup> July, 2008 (Ex. PW-14/D).

**36.** We need not labour much, on the birth certificate of Ishika (Ex. PW-13/B), in view of the answers, provided by Vijeta to Question No. 3, and by Mahendra to Question No. 10, put to them during the course of recording of their statements under Section 313 of the Cr.P.C. The questions, and responses, may be reproduced as under:

To Vijeta:

**Q3.** It is further evidence against you in testimony of PW-13 that as per birth certificate Ex. PW-13/B in which *your name is appearing against the name of mother/father as Manish Sharma and Varsha and relevant records of the hospital Ex. PW-13/A, a female child was born to you and co-accused at City Hospital, Main Samaypur, New Delhi and this birth was registered at Sl.No.MCDOLIR-0111-004758113. What have you to say?*

**Ans.** *It is correct.*

To Mahendra:

**Q10.** It is further in evidence against you in testimony of PW-13 that as per birth certificate Ex. PW-13/B in which *your name along with co-accused is appearing against the name of father/mother as Manish Sharma and Varsha and from relevant records of the hospital Ex. PW-13/A, a female child was born to your wife/co-accused at City Hospital, Main Samaypur, New Delhi and this birth was registered at Sl. No. MCDOLIR-0111-004758113. What have you to say?*

**Ans.** *It is a matter of record.*

(Emphasis supplied)

**37.** “Matter of record”, we may note, is a term of law, and not of art, and has a definite connotation. The expression is defined, in P. Ramanatha Aiyar’s authoritative Advanced Law Lexicon as “facts the truth of which can be established by reference to a record”, “any judicial matter or proceeding entered on the records of a Court, and to be proved by the production of such record” and “matter evidenced by record and provable only by the record or an authenticated copy”. As such, by referring to the fact that Ishika was the child of Varsha and himself, as a “matter of record”, in the context of the birth certificate, Mahendra not only impliedly acknowledged himself and Varsha as being the father, and mother, respectively, of Ishika, but also admitted

that he was also known as “Manish” and that Vijeta was also known as “Varsha”. This frank admission, of Mahendra, perhaps attributable to the disinclination, of every parent, to disown her, or his own offspring, also stands corroborated by the testimony of Vijeta, which accepted the contents of the birth certificate in a far more unequivocal manner.

**38.** It merits reiteration, in this context, that the birth certificate, dated 27<sup>th</sup> September, 2012, though a photo copy, was proved by PW-13 Raman Viz, the Sub-Registrar of Births and Deaths, by verification with the computer record, whereafter it was re-exhibited, in the evidence of SI Poonam Yadav (PW-14), as Ex. PW-14/D-1.

**39.** In view of the acceptance and acknowledgement, by both Mahendra and Vijeta, of the birth certificate of Ishika, as well as the contents thereof, any further reference to the Hospital records, is rendered unnecessary. It is obvious, therefore, that the fact of Mahendra and Vijeta being the father, and mother, respectively, of Ishika, stands conclusively proved.

**40.** Having said that, however, it is a simple biological truism that there is no presumption, either in law or in fact, that the parents of a child are necessarily married to each other; least of all could such a presumption be drawn, where criminal consequences could result therefrom. There is no reference, in the birth certificate of Ishika, or in any of the associated Hospital Documents, as exhibited in these proceedings, to Mahendra and Vijeta as husband and wife; all that

these documents indicate is that they were the father, and mother, respectively, of the girl child. Law has to factor in itself changing societal, and social, mores, and, in an age in which the sacramental bond of marriage is often sacrificed at the altar of the more “convenient” live-in association, parentage can no longer be regarded as creating any kind of presumption - even rebuttable - of marriage. Significantly, live-in-relationships have also, now, been accorded legislative imprimatur, with “relationships in the nature of marriage” being included in the definition of “domestic relationships” in clause (f) of Section 2 of the Protection of Women from Domestic Violence Act, 2013 as has been held by A.K. Sikri, J in *Nanda Kumar vs. State of Kerala, 2018 SCC OnLine SC 492*. We observe, here, that a Division Bench of this Court has, in *Suman Singh vs. Vinod Kumar, 2012 SCC OnLine Del 4174*, held that even if paternity were to be established by DNA testing, “that by itself would not establish the existence of a marriage between parties”. We, therefore, have necessarily to hold that the reliance, by the prosecution, on the birth certificate of Ishika, and on the associated Hospital documents, does not advance its case to any extent, as these documents cannot go to indicate, far less prove, that Mahendra and Vijeta were married.

**41.** Adverting, now, to the Sale Deed Ex. PW-14/D, we find that the document is a certified copy of the original, duly certified under the seal of the Sub-Registrar, Ghaziabad. It represents a transaction between Om Prakash and “Smt. Vijeta Sharma, wife of Sh. Mahendra Sharma”. It bears the photographs of both parties to the transaction, i.e. Om Prakash and Vijeta Sharma, as well as their respective

thumbprints. The photograph of Vijeta, as it figures on the body of the said document, when compared with the photographs Ex. P-12/B-1 to Ex. P-12/B-3, also establishes the identity of Vijeta. When questioned, regarding this Sale Deed, and the representation, thereon, of Vijeta as “Smt. Vijeta Sharma, wife of Mahendra Sharma”, the response of both Vijeta, and Mahendra, in their statements recorded under section 313 of the Cr.P.C., was that it was “a matter of record”. Section 79 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”) enjoins on the Court to “presume, to be genuine, any document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorised thereto by the Central Government”, provided only that “the document is substantially in the form, and purports to be executed, in the manner directed by law in that behalf”. The said Section further enjoins, on the Court, to “presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper”. The implication of Section 79 of the Evidence Act, on the present case, is obvious; a presumption exists, in law, that the Sale Deed (Ex. PW-14/D), and the recitals therein, are genuine. The presumption would, therefore, shift to the person claiming that the document is not genuine, to so establish. In the present case, far from there being any claim, either by Mahendra or Vijeta, that the Sale Deed was not genuine, both of them have frankly confessed the recitals, in the said document, to their

being husband and wife, to be a “matter of record”. The document bears the photograph, and the thumb impression, of Vijeta, and was recovered, at the instance of Mahendra, from his residence at F-22, Nangloi, *vide* Seizure Memo Ex. PW-5/A, which was itself proved by PW-5 Const. Vipin Kumar as well as by PW-14 SI Poonam Yadav. Section 106 of the Evidence Act would, clearly, cast the onus, on Vijeta and Mahendra, to explain the circumstances in which they were shown as wife and husband in the said document and, if the document did not so indicate, how it was recovered, at the instance of Mahendra, from the premises occupied by him. No attempt, far less effort, has been made to discharge this onus; consequently, the inevitable conclusion is that the marital relationship between Vijeta and Mahendra stands proved by the recital, in the Sale Deed Ex. PW-14/D, to the said effect.

**42.** Without referring to the other exhibited documents, which are photocopies, we are, therefore, in agreement with the finding, of the learned ASJ, that the fact of Vijeta being the wife of Manish @ Mahendra, stood proved by the prosecution. The submission, of Mr. Ajit Kumar appearing for Mahendra, to the effect that Vijeta and Mahendra were only in a live-in relationship is, therefore, rejected.

**43.** Per corollary, the marriage, between Mahendra and ‘M’ was void; Mahendra could not, therefore, be regarded as the “husband”, in law, of ‘M’. The first ingredient of clause “Fourthly”, in Section 375 of the IPC, therefore, stood satisfied.



44. The second ingredient, also required to be simultaneously satisfied before clause “Fourthly” could kick in with full force, would be whether consent, to sexual intercourse with Mahendra, was granted, by ‘M’, because she believed herself to be lawfully married to him.

45. That this requirement, of clause “Fourthly” in Section 375 of the IPC, stands satisfied, is apparent from the fact that sexual relations, between ‘M’ and Mahendra commenced only consequent upon, and subsequent to, their marriage. ‘M’ consistently deposed, in her statement under Section 164 of the Cr.P.C., as well as in her deposition during trial (as PW-11), that she, and Mahendra, had physical relations “after marriage”. No suggestion, to the effect that any sexual intimacy existed, between the prosecutrix ‘M’ and Mahendra, prior to their marriage, was even put to her in cross-examination; neither has such a case been put forward by Mahendra or Vijeta, at any stage of the proceedings. Mahendra, too, admitted as much in his testimony under Section 313 of the Cr.P.C., as is evidenced by “Q4”, put to him during the course thereof, and his response thereto:

“Q4. It is further in evidence against you in testimony of PW 11 that *after marriage* you made physical relationship repeatedly with PW 11. What have you to say?

A. *It is correct.”*

(Emphasis supplied)

It is apparent, therefore, that the motivation, for physical relationship with Mahendra, insofar as ‘M’ was concerned, was the fact that she

was married to him. The second ingredient of clause “Fourthly”, in Section 375 of the IPC also, thereby, stands satisfied.

46. In this view of the matter, the question of whether, at the time of submitting herself to sexual intercourse with Mahendra, ‘M’ had, or did not have, knowledge, regarding his earlier, albeit subsisting, marriage with Vijeta, pales into insignificance, especially in view of the law laid down by the Supreme Court in *Bhupender Singh (supra)*, which specifically rejected the defence, by the errant husband in that case, that his prosecutrix-wife had consented to sexual intercourse with the full knowledge of his earlier marriage. The conviction, of Mahendra, under Section 376 of the IPC, therefore, deserves to be sustained.

47. With that, we proceed, now, to the conviction, of ‘M’, under Sections 493 and 495 of the IPC.

48. Section 493 of the IPC reads as under:

**“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 10 years, and shall also be liable to fine.”

49. A comparison of Section 493, with clause “Fourthly” of Section 375, of the IPC, reveal that they are similarly worded, in that both contemplate submission, of the wife, to sexual relations with the

accused, in the belief that she is lawfully married to him. The point of difference, between the two provisions, is the introduction, in Section 493, of the element of “deceit”, on the part of the man. To the same effect, in a case such as the present, would operate Section 495 of the IPC, which reads thus:

**“495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.** – Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of former marriage, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.”

**50.** The justifiability, of the conviction of Mahendra, under Section 493 and 495 of the IPC, it is obvious, would depend on whether it could be said that he had deceitfully concealed, from ‘M’, the fact of his former marriage with Vijeta.

**51.** “Deceit” and “concealment” are positive elements, which, therefore, require to be proved, beyond reasonable doubt, by the prosecution. When we scan the entire evidence in the present case, we find that the only evidence, of concealment, from ‘M’, of the fact that Mahendra had earlier been married to Vijeta, is to be found in the testimonies of the prosecutrix ‘M’ herself, and of her mother Sushma Nagpal, deposing as PW-3. Ankit Nagpal (PW-12), too, has testified to the same effect, but has, in the very same breath, admitted that he was not present at the time of the alleged visit, by Mahendra and Vijeta, to their house, in August, 2010; his testimony is, thereby, reduced to hearsay. Mahendra and Vijeta, in their statements under

Section 313 of the Cr.P.C., have categorically denied the said allegation. There is no independent corroboration of the alleged misrepresentation, by Mahendra and Vijeta, that Vijeta was the sister of Mahendra, or, for that matter, of Mahendra and Vijeta having visited Sushma Nagpal at the prosecutrix, at all, in August, 2010. The only evidence to this effect being in the form of the belated complaint, dated 16<sup>th</sup> August, 2013, by 'M' in the Police Station, supported by the later testimonies, by 'M' and her mother, during trial, we share the reluctance, of the learned ASJ, to accept, at face value, the allegation that such a visit had occurred and that, during such visit, it was misrepresented, to them, that Mahendra and Vijeta were brother and sister. In fact, we are surprised at the fact that, having acquitted Vijeta, on the basis of the said reasoning, the learned ASJ, nevertheless, convicted Mahendra, under Sections 493 and 495 of the IPC. In the absence of any other corroborative evidence, we are unable to hold that there was positive deceit, or concealment, practised by Mahendra, or by Vijeta, on the supposedly innocent prosecutrix 'M', which persuaded her to agree to cohabit with Mahendra.

**52.** In the circumstances, we are unable to sustain the conviction, of Mahendra, by the learned ASJ, under Sections 493 and 495 of the IPC.

**53.** We, however, concur with his decision to acquit Vijeta, entirely, of all charges against her. The gravamen of the charge, against Vijeta, is conspiracy, on her part, with Mahendra, in inducing the prosecutrix 'M', to enter into sexual relations with Mahendra. The learned ASJ is correct in observing that the *sine qua non*, for

conspiracy, under Section 120-B of the IPC, is mental conclave, for commission of the offence in question. In view of the fact that we have upheld the applicability, to the present case, of clause 'Fourthly', of Section 375 of the IPC, on the twin considerations of the marriage between Mahendra and 'M' being void by reason of his subsisting earlier marriage with Vijeta, and the submission, by 'M', for sexual intercourse with Mahendra, only because of her marriage to him, the question of any conspiracy, of Vijeta, in the matter, does not arise at all. Even otherwise, we agree with the learned ASJ that there is no evidence of Vijeta herself having ever been privy to deceitful concealment, by Mahendra or by anyone else, of the fact that she was married to him and not his sister. Barring the uncorroborated testimonies of the prosecutrix and Sushma Nagpal (PW-3), there is precious little – indeed, nothing at all – to substantiate such a charge. 'M' admitted, in her statement, that no such allegation was contained either in her statement to the Investigating Officer, or in her complaint (Ex.PW-16/A). She also admitted that Vijeta did not attend her marriage with Mahendra. Sushma Nagpal (PW-3), while deposing on similar lines further conceded that she had never come across any proof that Mahendra had married Vijeta. If Vijeta had, indeed, visited the home of the prosecutrix with Mahendra, masquerading as his sister, we fail to understand why she was not invited to their marriage, or how her absence, on the said occasion, went unnoticed, without inviting any comment. We agree, with the learned ASJ, therefore, that the charge of conspiracy, foisted on Vijeta, was without any substance at all, and that she, therefore, deserved to be acquitted of the said charge.

**Sentence**

54. Coming, now, to the aspect of sentence, it is apparent, at the very first glance, that the learned ASJ has been needlessly harsh, in the matter of awarding sentence to Mahendra. The observations entered by the learned ASJ, in his order on sentence, dated 26<sup>th</sup> February, 2016 [which we have quoted in para 27 (*supra*)] appear, to us, to be completely fanciful and platitudinous and totally unwarranted, to say the least, in the facts of the present case. It is only the interpretation of clause “Fourthly” of Section 375 of the IPC, as provided by the Supreme Court, in its judgement in ***Bhupender Singh (supra)***, that has persuaded us to uphold the conviction, of Mahendra, under Section 376; else, it is difficult to believe that the prosecutrix ‘M’ was entirely unaware of the earlier subsisting marriage between Vijeta and Mahendra, till the time of her filing her belated complaint, in the Police Station, on 16<sup>th</sup> August, 2013. The explanation, that it was only pursuant to an item shown on a TV news channel, that ‘M’, and her mother Sushma Nagpal (PW-3) became aware of the earlier marriage between Mahendra and Vijeta, is, on the face of it, not believable. No evidence, to support this assertion, is available on record. Neither is any explanation, worth the name, preferred, regarding the delay of two more years before ‘M’ sought to complain to the Police. To us, it is apparent, that, while, by virtue of the fact that Mahendra was aware of his earlier marriage with Vijeta and, consequently, of his marriage with ‘M’ being void in law, and that Vijeta submitted to sexual intercourse with Mahendra only after their marriage, Mahendra stood exposed to the penal consequences contemplated by Section 376 of the IPC, the prosecutrix ‘M’ could not

be likened to an innocent prey of a sexual predator. There is no allegation, at any point in the proceedings, of Mahendra having compelled, far less forced, 'M' to submit to his sexual overtures. Rather, it is clear that, of her own will and volition and with full consent (in fact, if not in law), 'M' maintained a normal sexual relationship with Mahendra, and that the provocation, for her to set in motion, against him, the criminal law of the land, was only the fact of his earlier having been married to Vijeta of which, 'M' would assert, she came to know much later. To visit Mahendra, in such a situation, with the extreme penalty of rigorous imprisonment for life appears, to us, preposterous. We are of the view, therefore, that, in the peculiar circumstances of this case, a punishment of 7 years' rigorous imprisonment, with proportionate reduction of fine, would be more than sufficient, to deter Mahendra from indulging in such sexual adventurism in future.

### **Conclusion**

55. Resultantly, we dispose of these appeals in the following terms:

- (i) Crl Appeal 1010/2017 and Crl Appeal 1011/2017 are dismissed.
- (ii) Crl Appeal 388/2016 is partly allowed. The conviction of Mahendra under Sections 493 and 495 of the IPC, and the corresponding sentence awarded to him, therefor, by the learned ASJ in the impugned judgement and order, are set aside. The conviction of Mahendra under Section 376 of the IPC is, however, upheld. The sentence awarded to him, by the learned

ASJ, for the said offence is, however, reduced to 7 years' rigorous imprisonment, with fine of ₹ 10,000/–, in default whereof he would have to suffer simple imprisonment for three months more.

56. Trial Court record be sent back with copy of the judgement. Intimation be sent to Superintendent Jail.

**C.HARI SHANKAR  
(JUDGE)**

**S. P. GARG  
(JUDGE)**

**MAY 30, 2018**  
dsn/Ashish

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