IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 21st OF SEPTEMBER, 2023

M.CR.C. NO.59600 / 2022

BETWEEN:-

UMANG SINGHAR, S/O. MR. DAYARAM SINGHAR AGED ABOUT 48 YEARS, OCCUPATION PUBLIC SERVANT, R/O. BEHIND PWD OFFICE, VIDHAYAK NIWAS, DISTRICT DHAR (M.P.)

.....PETITIONER

(BY SHRI VIBHOR KHANDELWAL – ADVOCATE, SHRI ASHISH AGRAWAL – ADVOCATE AND SHRI JAYESH GURNAM - ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH THROUGH STATION HOUSE OFFICER, POLICE STATION NAOGAON, DISTRICT DHAR (M.P.)**

2. **VICTIM X W/O. UMANG SINGHAR, AGED ABOUT 38 YEARS, OCCUPATION POLITICIAN, R/O MLA HOUSE, OPPOSITE PWD OFFICE, DHAR (M.P.)**

.....RESPONDENTS

(NO.1/STATE BY SHRI PUNEET SHROTI – GOVERNMENT ADVOCATE)

(NO.2 BY SHRI SANJAY AGRAWAL – SENIOR ADVOCATE WITH SHRI RAHUL GUPTA - ADVOCATE)

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Reserved on: 16.08.2023

Pronounced on: 21.09.2023

This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

On finding the pleadings being complete and the learned counsel for the rival parties concurred to argue the matter finally, it was thoroughly heard and order was reserved for pronouncement.

2. This petition is filed under Section 482 of Cr.P.C. for quashing the FIR registered vide Crime No.540/2022 at Police Station Naogaon, District Dhar on the fulcrum of a complaint made by respondent No.2 against the petitioner for the offence punishable under Sections 294, 323, 376(2)(n), 377, 498-A, 506 of the Indian Penal Code.

3. Multifarious grounds have been urged by the learned counsel for the petitioner while seeking to quash the FIR. Conversely, the learned counsel for the respondents imprecating the act of the petitioner as not less than transgression of law, vehemently urged for no interference by this Court.

4. To lift the curtain on from the verity of the allegations made against the petitioner, it is expedient to muster the relevant facts. Suffice it to state that the petitioner is a Member of M.P. State Legislative Assembly from the Constituency – Gandhwani. He belongs to Scheduled Tribe community. He is an elected MLA for third time. He used to be a Cabinet Minister in the State of M.P. Ergo, it is claimed that the petitioner being an upper echelon, reputed and has goodwill in the Society.

As stated in the petition, respondent No.2 is wife of the petitioner and they entered into marriage on 16.04.2022 and thereafter started living together as husband and wife. It is averred in the petition

that on 02.11.2022 respondent No.2 misbehaved with the petitioner as well as his staff members and shown violent attitude towards them. A complaint in that regard was made at Police Station Naogaon District Dhar by one of the maids of the petitioner and respondent No.2. On the basis of said complaint, FIR was registered vide Crime No.540/2022. Copy of said written complaint is made appendage to this petition.

The petition further divulges that the demeanour of respondent No.2 was drastically becoming violent day-by-day. In that context, the petitioner also made a complaint at Police Station Naogaon District Dhar on 02.11.2022. The complaint bespeaks about a threat given by respondent No.2 to the petitioner for fallaciously implicating him in criminal case. It also reflects that respondent No.2 raised an illegitimate demand of Rs.10 Crore and as such the petitioner was being extorted. Copy of said complaint is also made part of the petition.

As per the petitioner, as soon as respondent No.2 came to know about said complaint, she also submitted a hand-written complaint to the Police Station Naogaon making various false, frivolous and baseless allegations against the petitioner, but as per the petitioner those allegations were omnibus that too without disclosing any time or date as to when that alleged act was committed by the petitioner. Said complaint was also made on 02.11.2022. In the said written complaint, she had mentioned that no action on the same was required to be taken.

From the said date, the petitioner and respondent No.2 have abominated each other and started living separately. After she received the notice of the case of damages, and then on 16.11.2022 a complaint was made by respondent No.2 against the petitioner making several allegations against him. As per the petitioner, the contents of earlier

complaint made on 02.11.2022 and the contents of complaint made on 16.11.2022 by respondent No.2 are antithetical. Both the complaints were given to the petitioner with an offer for settling the dispute amicably outside the law if amount of Rs.10 Crore is paid, else the petitioner was threatened of facing dire consequences. The petitioner has also filed a copy of complaint dated 16.11.2022 along with the petition.

On the basis of complaint made by respondent No.2, the impugned FIR has been registered against the petitioner. Of a note, period of alleged crime is mentioned as between 15.11.2021 and 18.11.2022. Challenging the said FIR, the instant petition has been filed.

5. The principal thrust of challenge is on the ground that essentially Section 375 of IPC defines 'rape' and as per the definition, it covers all possible acts, which prior to amendment of 2013, were falling under Section 377 of IPC, but subsequent to the amendment of 2013 in the definition of 'rape' as provided under Section 375 of IPC, the entire allegations labeled by respondent No.2 against the petitioner, fall completely and squarely within the definition of 'rape' and therefore the petitioner is falling within Exception-2 of Section 375 of IPC.

6. Learned counsel for the petitioner sanguinely submitted that even under Section 375 of IPC there is intelligible differentia between sexual intercourse or sexual act "by a man with another woman" and "by a man with his own wife". Despite the act being completely identical, the former one is an offence, albeit latter one is not. He submitted that as per Section 377 of IPC, although it relates to voluntary carnal intercourse against the order of nature "by a husband with his wife" but the same needs to be interpreted in the light of the amended Section 375 of IPC. He further submitted that the principal object of the

Legislature from inception is to protect the marital institution from being destroyed by the misuse of statutory provisions and according to him despite various amendments in IPC, the husband has always been safeguarded even for those acts which are otherwise punishable under Section 376 of IPC. He submitted that in a conjugal relationship what could be "against the order of nature" is to be examined in the Indian perspectives, keeping in mind the object of the Legislature to protect the marital institution. Shri Khandelwal submitted that though there is no specific repeal with regard to offence of Section 377 of IPC but in view of the changed definition of 'rape' under Section 375 and as per Exception-2, the husband cannot be said to be an accused for making relation with his wife and Section 375 contained all parts of the body over which any act which is said to be a rape is done, the said part is also included and any act is done by a man with a woman, the offence of unnatural sex, Section 377 is made out. He further submitted that when exception is provided and husband has been given protection from rape then it would also include offence of Section 377. Shri Khandelwal also submitted that any consensual sexual act, sexual intercourse or carnal intercourse between husband and wife with or without the use of any object or any body part of procreation, foreplay or excitement or for the satisfaction of sexual urge or for sexual pleasure cannot be considered as against the order of nature and therefore such consensual sexual act, sexual intercourse or carnal intercourse between the husband and wife cannot fall within the definition of unnatural offence punishable under Section 377 of IPC, however, if such sexual act, sexual intercourse or carnal intercourse between husband and wife is non-consensual then it obviously will fall under the amended definition of rape as defined under Section 375 of IPC. He submitted that the latter statute describes

an offence created by earlier statute and imposes a different punishment or varies the procedure, the earlier statute is repealed by implication. If there is any conflict, inconsistencies or repugnance between two enactments, both cannot stand together and earlier enactment is considered to be abrogated by the latter and latter will hold the field. According to learned counsel, the amended definition of Section 375 of IPC covers all those acts which were earlier punishable exclusively under Section 377 of IPC considering them earlier against the order of nature, post-amendment of 2013 though considered to be unnatural offence but became part of the amended definition of rape and cannot be considered as "against the order of nature" and they should otherwise be considered part of the amended definition of Section 375 of IPC and according to Shri Khandelwal Section 377 virtually became redundant. Questioning the verisimilitude of respondent No.2, Shri Khandelwal submitted that the FIR lodged by respondent No.2 is nothing but a malign act on her part inasmuch as the said complaint contained falsely improvised fact, just to grab the property of and to extort money from the petitioner. He pinpointing the first complaint made by respondent No.2 to the police on 02.11.2022 submitted that there was no allegation of unnatural sex but in second complaint, on the basis of which FIR lodged, she developed the story and made allegation of unnatural sex so as to bring home the offence of Section 377 of IPC. Shri Khandelwal submitted that the petitioner has also filed a suit for damages and permanent injunction in the Court of Civil Judge, Second Division, Gurgaon against respondent No.2 on 14.11.2022 in which damages were claimed on the basis of conduct of respondent No.2 alleging therein that she was pestering and misbehaving with the petitioner and her attitude/ temperament towards the petitioner has created an atmosphere in which

it was arduous for the petitioner to live even for a single day with her. After the notice of case for damages through mobile was served upon respondent No.2 on 16.11.2022, then on the same day, she made a complaint as a counterblast. She started humiliating him publicly and endeavoured to disparage his sound political image and instinctively her attitude wreaked havoc in the life of petitioner, who firmly realized that her presence would be hazardous for his political career. In the said suit, cause of action was shown to have arisen in the month of October, 2022 when respondent No.2 threatened the petitioner to publish all illusory write-ups in newspapers. He submitted that respondent No.2 just to take vengeance from the petitioner filed the fictitious complaint. To reinforce his contentions, Shri Khandelwal has placed reliance on various decisions, they are *in re* **Navtej Singh Johar and others v. Union of India (2018) 10 SCC 1; State of Haryana and others v. Bhajan Lal and Others 1992 Supp (1) SCC 335; State of Karnataka v. I. Muniswamy and others (1977) 2 SCC 699; Arnesh Kumar v. State of Bihar and another (2014) 8 SCC 273; Shakson Belthissor v. State of Kerala and another (2009) 14 SCC 466; Madhavrao Jiwajirao Scindia and others v. Sambhajirao Chandrojirao Angre and others (1988) 3 SCC 692; Inder Mohan Goswami and another v. State of Uttaranchal and others (2007) 12 SCC 1; Kapil Agarwal and others v. Sanjay Sharma and others (2021) 5 SCC 524; Anand Kumar Mohatta and another v. State (NCT of Delhi), Department of Home and another (2019) 11 SCC 706; T. Barai v. Henry Ah Hoe and another (1983) 1 SCC 177; Yogendra Pal Singh and others v. Union of India and others (1987) 1 SCC 631; Kishorebhai Khamanchand Goyal v. State of Gujarat and another (2003) 12 SCC 274; Harshad S. Mehta and others v. State of Maharashtra (2001) 8 SCC 257;**

Offshore Holdings Private Limited v. Bangalore Development Authority and others (2011) 3 SCC 139; Vijay Kumar Sharma and others v. State of Karnataka and others (1990) 2 SCC 562; State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582; Kailash Sonkar and others v. State of Chhattisgarh through Police Station and another 2021 SCC OnLine Chh 3258; Dharangadhra Chemical Works v. Dharangadhra Municipality and another (1985) 4 SCC 92; Kunwar Singh Marko v. Shiv Dayal Sarote 1998 SCC OnLine Mp 494; Deepak Maravi v. Smt. Kala Bai in M.Cr.C.No.198/2009 and **Kumari Bai w/o Anand Ram v. Anandram Nathu Thakur 1998 SCC OnLine MP 42.**

7. In contrast, Shri Sanjay Agrawal, learned Senior counsel appearing for respondent No.2 vigorously opposed the submissions made on behalf of the petitioner and submitted that as per amended definition of Section 375 and Exception-2, the petitioner being the husband can very well claim exemption from an offence under Section 376 of IPC but not from the offence of Section 377. Sanguinely, he submitted that the offence of Section 377 does not fall within the definition of Section 375 and as such the petitioner has perfectly been incriminated under the said offence looking to the direct allegation made by respondent No.2. Although Shri Agrawal submitted that benefit of Exception-2 attached to Section 375 can also not be granted to the petitioner for the reason that the petitioner cannot be considered to be the husband of respondent No.2. Shri Agrawal pointed out that the petitioner was already married and suit for divorce with mutual consent was filed by him on 29.02.2022 against his first wife Vineeta and he submitted that the said case was pending before the Principal Judge,

Family Court, South Saket, New-delhi registered as SMA No.338/2022 and was fixed for 12.01.2023 after a cooling period of six months because first hearing was conducted on 02.06.2022. He submitted that indubitably the petitioner and respondent No.2 soleminized marriage on 16.04.2022, but on that day the petitioner was ineligible to enter into second marriage with respondent No.2 and as such she was not his legally-wedded wife because first marriage was subsisting and according to him even the offence of Section 376 is attracted against the petitioner as per Clause "Fourthly" of Section 375 of IPC. Vociferously, he submitted that second marriage with respondent No.2 by the petitioner has no legal sanctity. He further submitted that this is also not an appropriate stage to interfere inasmuch as this fact was not brought to the notice of the Court where charge-sheet has been filed and the Court could also make enquiry under Section 173(8) of CrPC, which in no way limits or affects the powers of this Court to pass an order even under Section 482 of CrPC for further investigation based on subsequent new and vital fact. As per Shri Agrawal, the petitioner has misused his position and knowing fully well that his first marriage was subsisting, tempted respondent No.2 for getting married with him and developed the physical intimacy. He also submitted that instead of quashing the FIR, this Court can direct further investigation to the effect that when first marriage of the petitioner was subsisting as to how he entered into second marriage and supplementary charge-sheet can also be filed in this regard. He further submitted that although the petitioner has taken a ground of tardy FIR, but he submitted that in a case of rape delay is immaterial. While relying upon the following decisions Shri Agrawal submitted that it is not a case where FIR can be quashed and there is sufficient material gleaned by the prosecution constituting the offence

registered against the petitioner and as such the petition being bereft of substance, deserves dismissal. To strengthen his contentions, learned counsel has placed reliance on the decisions *in re* **Bhajan Lal (supra); Prabatbhai Aahir alias Parbatbhai, Bhimsinghbhai Karmur and others v. State of Gujarat and another (2017) 9 SCC 641; Central Bureau of Investigation v. Aryan Singh etc. 2023 SCC OnLine SC 379; Kaptan Singh v. State of Uttar Pradesh and others (2021) 9 SCC 35; Pawan Kumar v. State of Himachal Pradesh (2017) 7 SCC 780; State of Karnataka v. Krishnappa (2000) 4 SCC 75; Suchita Srivastava and another v. Chandigarh Administration (2009) 9 SCC 1; State of Maharashtra and another v. Madhukar Narayan Mardikar (1991) 1 SCC 57; Bhupinder Singh v. Union Territory of Chandigarh (2008) 8 SCC 531; Vijay Peinuly v. The State of Uttarakhand in Cri.Appeal No.592/2020; Devendra Nath Singh v. State of Bihar and others (2023) 1 SCC 48** and **Manendra Prasad Tiwari v. Amit Kumar Tiwari and another 2022 SCC OnLine SC 1057**.

8. Simultaneously, learned counsel for the State submitted that under the existing circumstances when charge-sheet has already been filed, the petitioner should have challenged the charge-sheet and now he is estopped from claiming of quashing FIR. Supporting the stand taken on behalf of respondent No.2, Shri Shroti submitted that there are specific contours of law and no advantage can be accorded to the petitioner by contorting the interpretation of the Legislature. Ergo, he implored for outright dismissal of the petition.

9. In repartee, learned counsel for the petitioner submitted that as regards the stand taken by respondent No.2 about subsisting of first

marriage and ineligibility of petitioner to enter into second marriage, it was lawfully permissible for the petitioner. He submitted that respondent No.2 was well aware of tribal rituals and that the petitioner being belongs to scheduled tribe community, was eligible to perform second marriage and they took the matrimonial plunge according to the custom of tribe. The statements of witnesses as available in the charge-sheet and even the statement of respondent No.2 would demystify that second marriage was performed according to customs of tribe and Shri Khandelwal while placing reliance on various decisions of this Court, in which for tribe second marriage has been held 'permissible', submitted that the petitioner did not veil this fact. Since respondent No.2 was fully aware of the said factual aspect, therefore, nothing illegal was committed by the petitioner.

10. Patiently, I have heard the submissions of learned counsel for the rival parties and perused the record with vigilantism.

11. Juxtaposing the rival submissions, the documentary material available on record and the law relatable to the issue in hand, the core question which is drifted towards the surface is "Whether the offence of Section 377 IPC between husband and wife can be weighed parallel to the offence of rape as defined under section 375 IPC".

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

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

13. To fathom the depth of submissions made by the learned counsel for the petitioner, it is imperative to go-through the definition of 'rape', in that, for committing rape, as per Section 375(a), an offender is a 'man' who uses the part of the body - (a) Penis, as per Section 375(b) body-parts other than penis and 375(c) any other object. Simultaneously, the said definition describes - at the receiving end the body parts are (a) Vagina, (b) Urethra, (c) Anus, (d) Mouth and (e) other body parts. Considering the offence of Section 377 i.e. unnatural, although it is not well-equipped and offender is not defined therein but body parts are well defined, which are also included in Section 375 i.e. carnal intercourse against the order of nature. At this juncture, it is

indispensable to see what is unnatural. The Supreme Court in a petition challenging the constitutionality of Section 377 IPC criminalizes 'carnal intercourse against the order of nature' which among other things has been interpreted to include oral and anal sex. Obviously, I find that Section 377 of IPC is not well-equipped. Unnatural offence has also not been defined anywhere. The five-judge bench of the Supreme Court *in re* **Navtej Singh Johar** (supra) testing the constitutionality of said provision although held that some parts of Section 377 are unconstitutional and finally held if unnatural offence is done with consent then offence of Section 377 IPC is not made out. The view of the Supreme Court if considered in the light of amended definition of Section 375 and the relationship for which exception provided for not taking consent i.e. between husband & wife and not making offence of Section 376, the definition of rape as provided under Section 375 includes penetration of penis in the parts of the body i.e. vagina, urethra or anus of a woman, even though, the consent is not required then as to how between husband and wife any unnatural offence is made out. Apparently, there is repugnancy in these two situations in the light of definition of Section 375 and unnatural offence of Section 377. It is a settled principle of law that if the provisions of latter enactment are so inconsistent or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the latter. The Supreme Court *in re* **Dharangadhra Chemical Works** (supra) has observed as under:-

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

> "If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the later (vide Kutner v. Phillips)."
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> In Zaverbhai Amaldas v. State of Bombay [AIR 1954 SC 752] this Cout has approved the above principle in the context of two pieces of legislation, namely, The Essential Supplies (Temporary Powers) Act, 1946 as attended by Act LTI of 1950 (a Central Act) and Bombay Act XXXVI of 1947 the provisions whereof in the context of enhanced punishment were repugnant to each other. The Court held that the question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under the Bombay Act and the Central Act constituted a single subject matter and in view of Article 254(1) of the Constitution Act LTI of 1950 (Central enactment) must prevail.,,,,"

14. Over and above, *in re* **T. Barai** (supra), the Supreme Court has observed as under:-

> **"25**. It is settled both on authority and principle that when a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication. In Michell v. Brown Lord Campbell put the matter thus :
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> "It is well settled rule of construction that, if a later statute again describes an offence created by a former statute and affixes a different punishment, varying the procedure, the earlier statute is repealed by the later statute; see also Smith v. Benabo.
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> In Regina v. Youle, Martin, B. said in the oft-quoted passage :
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> "If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different

> punishment is imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act."
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> The rule is however subject to the limitation contained in Art. 20(1) against ex post facto law providing for a greater punishment and has also no application where the offence described in the later Act is not the same as in the earlier Act i.e. when the essential ingredients of the two offences are different."

15. The view taken by the Constitutional Bench of the Supreme Court *in re* **Navtej Singh Johar** (supra) observing that due to legislative changes, some of the offences of Section 377 have become redundant and held as under:-

> "**423** At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile–vaginal penetrative. It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment. Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts

> between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14."

16. At this point, if the amended definition of Section 375 is seen, it is clear that two things are common in the offence of Section 375 and Section 377 firstly the relationship between whom offence is committed i.e. husband and wife and secondly consent between the offender and victim. As per the amended definition, if offender and victim are husband and wife then consent is immaterial and no offence under Section 375 is made out and as such there is no punishment under Section 376 of IPC. For offence of 377, as has been laid down by the Supreme Court *in re* **Navtej Singh Johar** (supra), if consent is there offence of Section 377 is not made out. At the same time, as per the definition of Section 375, the offender is classified as a 'man'. here in the present case is a 'husband' and victim is a 'woman' and here she is a 'wife' and parts of the body which are used for carnal intercourse are also common. The offence between husband and wife is not made out under Section 375 as per the repeal made by way of amendment and there is repugnancy in the situation when everything is repealed under Section 375 then how offence under Section 377 would be attracted if it is committed between husband and wife.

17. In other way, the unnatural offence has not been defined

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

18. *Exempli gratia* - if sexual intercourse for procreation via penile-vaginal penetrative intercourse is considered to be natural sex and sexual relations of husband and wife is confined to that extent then in case if any husband or wife is not capable of procreation, then seemingly their relationship would become useless, but it does not happen. The conjugal relationship between husband wife includes love that has intimacy, compassion and sacrifice, although it is difficult to understand the emotions of husband and wife who share intimate bond, but sexual pleasure is integral part of their relentless bonding with each other. Ergo, in my opinion, no barrier can be put in alpha and omega of sexual relationship between the husband and his wife. Thus, I find feasible that in view of amended definition of Section 375, offence of

377 between husband and wife has no place and as such it is not made out.

19. Apart from the legal position, if the factual aspects of the present case are seen, it is gathered that the petitioner is a tribe; he was married and this fact was known to respondent No.2 and she entered into marriage which was solemnized as per Adivasi customs. This fact is undisputed that the marriage was solemnized as per Adivasi customs and in view of the law laid down by the High Court of M.P. in number of cases giving approval to second marriage for tribes and considered its legal sanctity, the marriage of the petitioner even though divorce from first wife did not take place, cannot be considered to be illegal act on the part of the petitioner as also respondent No.2 has admitted that she is the wife of the petitioner. For ready reference, I feel it apposite to reproduce the observations made by the High Court in case of **Deepak Maravi** (supra), which read as under:-

> "7. The question now would rest on the pivot as to whether the second marriage is permissible according to the customs of the Gond community and further as to whether the provisions of Hindu Marriage Act are not applicable upon the parties. The Apex Court in the case of **Dr. Surajmani Stella Kujur (supra)** [2001 AIR SCW 711] has already held that if the parties are of tribal community the provisions of Hindu Marriage Act are not at all applicable which would mean that second marriage is not at all prohibited even if the first wife is alive. The same view has been taken by the Division Bench of this Court in the case of **Kunwar Singh Marko (supra)** [1998 ILR 769] wherein the Chief Justice Shri A.K. Mathur (as His Lordship then was) spoke for the Bench and held that keeping of one more wife is permissible under the customs of Adivasi Gond and because there is no prohibition to solemnize second

> marriage during the life time of first marriage in the Gond community, the second marriage cannot be said to be void. The same view has been taken in another decision by the learned Single Bench in the case of **Kumari Bai w/o Anand Ram (supra)** [(1998) 2 MPLJ 584]."

In this context, a decision *in re* **Kunwar Singh Marko** (supra) is also relevant. Further, *in re* **Kumari Bai** (supra), it has been held as under:-

> "**16**. The conduct of the respondent in marrying the petitioner in Churi form, suggest that her relationship with earlier husband must have come to an end. That earlier husband Bhawanisingh or Mansingh whatever his name, has not been produced. It is clear from perusal of this evidence that the marriage relationship under custom in these community of Gonds is not as sacrosanct as it is considered under Shastrik Hindu Law. In Shastrik Hindu Law there is no provision of divorce except in Shudras by custom. These Gonds are governed by their personal customs which vary on different aspects. Divorces are rather common and second marriage of the wife is one of the indicators of end of marriage with previous husband. It is also common that a person keeps more than one wife among these Gonds. So the second marriage by Churi in the life time of first wife will not be called a void marriage. It will still be a marriage.
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> **17**. There is no evidence as to what was the custom regarding the married wife marrying another person. Learned counsel for the respondent argued that such a custom would be against public policy as public policy is always against polyandry as well as against polygamy. As regards polygamy the same was recognized under Shastrik Hindu Law and even in various communities under customs it continues. Such customs are old. So far as polyandry is concerned, there is no evidence about it. In this case we cannot say that this is a case where Kumaribai married with Anandram while her earlier husband

> was alive. If so, Anandram would have spoken about it. He is silent. No question was asked from Kumaribai or Kartikram. So the mere fact that she was married, earlier to her marriage with Anandram will not necessarily lead to inference of continuity of earlier marriage, or that earlier husband was still alive when marriage with Anandram took place. So it cannot be said that on that account, this marriage of the claimant with Anandram as bad, or illegal in any manner."

The prosecutrix has given a written complaint on 02.11.2022 to the police without disclosing any act about commission of unnatural sex by the petitioner, although made a note therein that 'not to take any action on her complaint'. After receiving a notice of the suit for damages through mobile, on 16.11.2022 she submitted a complaint to the police alleging about unnatural sex, that too without disclosing specific date, place and time. More precisely, the petitioner had filed a suit for damages against respondent No.2 and notice was served upon her on 16.11.2022 through mobile and according to the petitioner, thereafter she made her mind to go for lodging a fictitious complaint. If there was any manhandling by the petitioner, the offence under the Domestic Violence Act could have been registered. As regards demand alleged by the petitioner, respondent No.2 was demanding Rs.10 Crore from him and when demand was not fulfilled, she made a complaint against the petitioner with a threat of ruining his political career and social image. According to the facts and circumstances and in view of the law laid down by the Supreme Court in case of **Bhajan Lal** (supra) and the guidelines framed therein for quashing the FIR where a criminal proceeding is manifestly attended with *mala fide* and or proceeding is maliciously instituted with an ulterior motive or wreaking vengeance on the accused and with a view of spite him due to private and personal

grudge, can be quashed. The relevant paragraph of said decision is reproduced hereunder:-

> "102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

* * * * *

20. Indubitably, Shri Sanjay Agrawal, Senior Advocate appearing for respondent No.2 has also relied on the decision of the Supreme Court *in re* **Bhajan Lal** (supra) and submitted that in view of

the contents of FIR, if offence is made out then at pre-trial stage, the FIR cannot be quashed. He pinpointed that allegation of offence under Section 377 IPC is made by respondent No.2 against the petitioner, therefore, FIR cannot be quashed. He also by placing reliance on other decisions submitted that in case of rape, although delay is immaterial and even if delay is unexplained, FIR cannot be quashed. However, in the case at hand, this Court is not delving into delay part nor interfering in the matter on that ground. Although Shri Agrawal has drawn attention of this Court towards the definition of Section 375 of Clause 'Fourthly" that *"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."*, but in view of the discussion made in foregoing paragraphs and submissions of learned counsel for the petitioner saying that indisputably the petitioner belongs to a tribe and marriage was solemnized according to the custom of tribes under which second marriage is legally permissible, the respective Clause of definition of Section 375 is not attracted. Indeed, the complaint *ex facie* crystalizes that respondent No.2 stated that she is wife of petitioner and factum of marriage has also been mentioned by her, ergo at such juncture, the application of Clause "Fourthly" Section 375 of IPC is meaningless. As such, his contention with regard to re-investigation and filing supplementary charge-sheet under Section 173(8) of CrPC is also insignificant, rather it does not have substance for the reason that even in the statement made before the police, respondent No.2 has stated that the marriage was solemnized as per tribes' custom.

21. Considering the overall fact-situation of the case at hand, it

is clear that the petitioner and respondent No.2 hold political posts in the same political party; knowing each other since long; prosecutrix entered into marriage with petitioner; their relationship after some time of marriage became estranged; complaints were made by them against each other; the petitioner filed a suit for damages; FIR was lodged by respondent No.2 without disclosing any specific date, time and place of committing alleged offence by the petitioner but only specified that from 15.11.2021 to 16.11.2022 offence was committed whereas during their married time, they visited several places, enjoyed honeymoon, therefore, in my opinion the act of the petitioner is not punitive for the offence punishable under Sections 376(2)(n) and Section 377 of IPC. Quite apart, for constituting offence under Section 498-A IPC, there is no allegation of any demand of dowry. At the most offence under the Domestic Violence Act could have been registered, but that too immediately after commission of such crime. For other offences i.e. Sections 294 and 506 of IPC, no date, place and time has been disclosed and as such the complaint in my opinion is a malicious prosecution filed by respondent No.2 as there was *inter se* dispute between husband and wife.

22. With above deep contemplation, I **allow** the petition. Thus, FIR registered vide Crime No.540/2022 at Police Station Naogaon, District Dhar on the fulcrum of a complaint made by respondent No.2 against the petitioner for the offence punishable under Sections 294, 323, 376(2)(n), 377, 498-A, 506 of the Indian Penal Code. is hereby quashed.

23. Before parting with the case, it needs to be emphasized that all subsequent proceedings pursuant to said FIR, will instinctively cease

to an end.

24. The petition stands **allowed**.

(SANJAY DWIVEDI)
JUDGE

sudesh

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