

A.F.R.

Court No. - 93

Case :- APPLICATION U/S 482 No. - 12701 of 2020

Applicant :- Kunwar Singh

Opposite Party :- State Of U.P. And Anr.

Counsel for Applicant :- Bipin Kumar Tripathi

Counsel for Opposite Party :- G.A., Narendra Kumar, Shiv Sharan Tripathi

Hon'ble Arun Kumar Singh Deshwal, J.

1. Counter affidavit, filed by the State, is taken on record.
2. Heard Sri B.K. Tripathi, learned counsel for the applicant, Sri Shiv Sharan Tripathi, for opposite party No.2 and Sri Rajeev Kr. Singh, learned A.G.A. for the State.
3. The present application has been filed for quashing the entire proceeding of Criminal Case No. 504 of 2019 (State vs. Kunwar Singh), arising out of Case Crime No. 4 of 2018, u/s 376, 504, 506 I.P.C., P.S. Mahila Thana, District Maharajganj, including the charge sheet dated 4.8.2018, cognizance order dated 14.3.2019 as well as impugned order dated 11.2.2020, pending before C.J.M., Maharajganj.
4. Contention of learned counsel for the applicant is that from the F.I.R. as well as the statement of the victim/opposite party No.2 u/s 164 Cr.P.C., it is clear that initially, the applicant and opposite party No.2 were in a relationship and subsequently, their marriage was fixed. During that period, the applicant and opposite party No.2 indulged in a consensual physical relationship. As far as the allegation of an intimate moment video is concerned, no such video is part of the case diary. It is lastly submitted that the only allegation against the applicant is that after getting the job, the applicant refused to marry opposite party No.2. In support of his contention, counsel for the applicant has relied upon the judgements of Apex Court in ***Pramod Suryabhan Pawar vs. State of Maharashtra and another; (2019) 9 SCC 608, Shambhu Kharwar vs. State of U.P. and others; AIR 2022 SC 3901*** as well as ***Naim Ahamed vs. State (NCT of Delhi); 2023 LiveLaw (SC) 66.***
5. Per contra, learned counsel for opposite party No.2 stated that the applicant from the very beginning had mala fide intentions to

develop a physical relationship with opposite party No.2 for his lust under a false promise of marriage. It is the case of cheating by the applicant to opposite party No.2 to satisfy his lust. It is further submitted that whether there was a false promise of marriage at the time of establishing physical relationship is a question of evidence that can be seen at the time of trial.

6. Learned A.G.A. has also adopted the argument of learned counsel for opposite party No.2.

7. From the perusal of the F.I.R. as well as the statement u/s 164 Cr.P.C., one thing is clear that: the applicant and opposite party No.2 were in a consensual relationship for more than one and half year and during that period their marriage was also fixed with the consent of the families of both the parties and during that period both the parties also established physical relationship. However, subsequently, on getting a job in Railways, the applicant and his family members refused for the marriage. Thereafter, the impugned F.I.R. was lodged.

8. The Apex Court, in the case of ***Pramod Suryabhan Pawar (supra)***, observed that consent with respect to Section 375 IPC involves an understanding of the circumstances and an individual who makes a reasoned choice to act after evaluating various actions and various possible consequences, consents to such action. The Apex Court also observed in the judgement mentioned above that "misconception of fact" is the appellant's promise to marry the girl, and there is a distinction between a false promise given on the understanding by the maker that it will be broken and breach of promise which is made in good faith but subsequently not fulfilled. Paragraph Nos.12, 14 and 18 of the aforesaid judgement is being reproduced as under:-

"12. This Court has repeatedly held that consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100] which was a case involving the invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15)

"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] : (SCC p. 118, para 12)

"12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

14. *In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In Anurag Soni v. State of Chhattisgarh [Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509] , this Court held : (SCC para 12)*

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC."

Similar observations were made by this Court in Deepak Gulati v. State of Haryana [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (Deepak Gulati) : (SCC p. 682, para 21)

"21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused;"

18. *To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."*

9. The aforesaid proposition of law was again relied upon by the Apex Court in the case of **Shambhu Kharwar (supra)** and **Naim Ahamed vs. State (NCT of Delhi) (supra)**.

10. From the perusal of the record, it is clear that the applicant and the opposite party No.2 have developed an emotional relationship which culminated in fixing their marriage with the consent of the parties' families. During that period, they also engaged in sexual relationships. It was admitted by opposite party No.2 in her statement u/s 164 Cr.P.C. that after the fixation of their marriage, the applicant stayed at her house for nine days. During that period, they also had sexual intercourse. Therefore, from the perusal of the record, it is established that the applicant and opposite party No.2 had a consensual relationship for one and a half years. Their marriage was also fixed; subsequently, the applicant refused to marry opposite party No.2.

11. Under Section 90 of I.P.C., consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over one and half years. It hardly needs any elaboration that the consent by the opposite party No.2 was a conscious and informed choice made by her after due deliberation. It is being spread over a long period coupled with a conscious positive action not to protest.

12. Therefore, in view of the law laid down by the Apex Court in the cases mentioned above, not respecting the promise made initially to marry though the promise was not false from the very beginning, in such cases if the physical relationship is established, then same cannot be termed as offence u/s 376 I.P.C. It is also admitted by counsel for both the parties that now applicant as well as opposite party No.2 have got married and are living happily with their respective spouses and the applicant is a government servant.

13. Considering the aforesaid facts and circumstances, this Court is of the view that no offence u/s 376 I.P.C. is made out, therefore, proceeding of Criminal Case No. Criminal Case No. 504 of 2019 (State vs. Kunwar Singh), arising out of Case Crime No. 4 of 2018, u/s 376, 504, 506 I.P.C., P.S. Mahila Thana, District Maharajganj, is hereby quashed.

14. With the aforesaid observation, the application is **allowed**.

Order Date :- 12.10.2023

Vandana

(Arun Kumar Singh Deshwal,J.)