

Court No. - 88

Case :- APPLICATION U/S 482 No. - 26515 of 2023

Applicant :- Ashraf

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

Counsel for Applicant :- Bhaskar Bhadra

Counsel for Opposite Party :- G.A.

Hon'ble Sanjay Kumar Singh,J.

1-Heard Mr. Bhaskar Bhadra, learned counsel for the applicant and Mr. Deepak Mishra, learned Additional Government Advocate assisted by Km. Priyanka Singh, learned Brief Holder for the State of U.P.

2-This application under Section 482 Cr.P.C. has been filed by the accused-applicant with a prayer to quash the charge-sheet dated 27.03.2022, cognizance order dated 02.05.2022, bailable-warrant dated 27.04.2023 and proceedings of criminal case no. 867 of 2022 (*State vs. Asharaf*) against the applicant, arising out of case crime no. 1113 of 2021, under Sections 376(2)(n), 328, 506 I.P.C., Police Station Baradari, District Bareilly pending in the court of Additional Chief Judicial Magistrate-Ist, Bareilly.

3-The brief facts of the case which are required to be stated are that a first information report of the present case was lodged on 04.12.2021 by the prosecutrix herself against Ashraf (present applicant), Banti and Shanu alleging *inter-alia* that the applicant is running a general merchant's shop. About two years back, he called the prosecutrix in a house adjacent to his shop and at the point of country made pistol, committed rape upon her. He also made a false promise to marry her and on that false promise, he used to make physical relation with her. About three months back, when the prosecutrix, asked the applicant for marriage, he called her on the pretext of marriage and offered her cold drink mixed with poisonous substance and after consuming the same, she became ill for which her treatment was done in the District Hospital. Co-accused persons are also threatening her. On 20.11.2021, she came to know that the applicant is

going to marry with another girl.

4-It is argued by learned counsel for the applicant that the applicant has been falsely implicated in this case. It is next argued that victim is major girl aged about 19 years and was consenting with the applicant. The actual date of alleged rape committed by the applicant for the first time on her has not been disclosed by the prosecutrix. There was some understanding between the applicant and the victim with regards to marriage, which could not materialize, therefore, the marriage of the applicant was fixed with someone else and after which the present first information report has been lodged.

5- It is next argued that it is not a case of rape but a case of consensual relation between the applicant and the victim. She has not given consent under any misconception of the facts, hence, her consent for making physical relation with applicant no.1 was valid consent and promise to marry cannot be considered as inducement in every rape case. It is argued that medical report of the victim does not support the allegation of giving cold drink to her by the applicant by mixing some poisonous substance.

6- Learned counsel for the applicant, placing reliance upon the judgments of the Apex Court in the case of **Shambhu Kharwar Vs. State of U.P. and another**, 2022 SCC OnLine SC 1032 and **Pramod Suryabhan Pawar vs. The State of Maharashtra & Anr**, (2019) 9 SCC 608, submits that under the facts of the case, criminal proceeding against the applicant is liable to be quashed.

7-Per contra, learned Additional Government Advocate for the State refuting the submissions advanced on behalf of the applicant submitted that upon perusal of F.I.R. and on the basis of the allegations made therein as well as materials collected by the investigating officer against the applicant as per prosecution case, the cognizable offence against him is made out. The criminal proceedings against the applicant cannot be said to be abuse of the process of the Court. Hence this

application is liable to be dismissed.

8-Having examined the matter in its totality, I find that when victim came to know that applicant is getting married with another girl, she did not make physical relation with the applicant. Victim in her statements under Section 161 and 164 Cr.P.C. supported the contents of F.I.R. The other prosecution witnesses namely Smt. Rani (mother of victim), Sri Puttan Beg (father of victim), Raju, Smt. Reshma as well as independent witnesses namely Sri. Wasi Ali, Uwais Veg, Smt. Sabia, Smt. Sabli have also supported the prosecution case. Materials on record also reflects that the victim consented for physical relation only for the reason that accused-applicant had promised to marry her. The applicant has admitted his physical relation with the prosecutrix but there is no whisper in the application that what was the difficulty with him to keep his promise to marry the prosecutrix. Now the applicant has come up with a plea that there was no promise to marry the prosecutrix. Considering the facts and circumstances in totality and other attending factors, prima-facie, it appears that the accused applicant has shown his inclination towards victim in order to satisfy his desire of lust. The grounds taken in the application reveal that many of them relate to disputed question of fact. This Court is of the view that the appreciation of evidence is a function of the trial court. This Court in exercise of power under Section 482 Cr.P.C. cannot assume such jurisdiction and put to an end to the process of trial provided under the law. It is well settled by the Apex Court in catena of judgments that the power under Section 482 Cr.P.C. at pre-trial stage should not be used in a routine manner but it has to be used sparingly, only in such an appropriate cases, where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceedings or where allegations made in First Information Report or charge-sheet and the materials relied in support of same, on taking their face value and accepting in their entirety do not disclose the commission of any offence against the accused. The defence of the accused cannot be taken into consideration at this

pre-trial stage, which can be more appropriately gone into by the trial court at the appropriate stage. At the stage of summoning the accused, the court below is not required to go into the merit and demerit of the case. Genuineness or otherwise of the allegations cannot be even determined at the stage of summoning the accused.

9- In **State of U.P. Vs. Naushad**, (2013) 16 SCC 651, Hon'ble Supreme Court has held that the consent by the accused under misconception of fact that the accused would marry her, is not a consent in law. The Court held as under:

"In the present case in view of the facts as mentioned above, we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law.

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

10-Further in the context of a promise to marry, Hon'ble Apex Court in the case of **Anurag Soni vs. State of Chhattisgarh**, (2019) 13 SCC 1, held 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 promise which is made in good faith but subsequently not fulfilled. Where the promise to marry is false and the intention of maker at the time of making the promise itself was not to abide by it but to deceive the women to convince her to engage in sexual relations, there is a "misconception of facts" that vitiates the women "consent" u/s 375 I.P.C

11-So far as judgments relied upon on behalf of the applicants are concerned, there is no dispute about the propositions laid down by the Apex Court, but the said judgments are distinguishable on the facts of the present case, hence, the same are not helpful to the applicants. In the case of **Shambhu Kharwar (Supra)**, fact of the case was entirely different. In that case victim was in consensual relationship with the accused from 2013 until December 2017 and during this period, the victim got married on 12 June 2014 with someone else. Her marriage ended with a decree of divorce on 17 September 2017. Relationship of victim with the accused was continued prior to her marriage, during subsistence of her marriage with someone else and after grant of divorce from her husband. Similarly, facts in **Pramod Suryabhan Pawar (Supra)** was that the accused expressed his reservations about marrying the victim on 31 January 2014. This led to arguments between them. Despite this, the accused and victim/complainant continued to engage in sexual intercourse until March 2015.

12-This Court is of the view that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion of two cases, because even a single significant detail may alter the entire aspect.

13-In view of the above discussions, this Court does not find that this case fall in a categories as recognized by the Apex Court for quashing the criminal proceeding of the trial Court at pre-trial stage. Considering the facts, circumstances and nature of allegations against the applicant in this case, the cognizable offence is made out. At this

stage it would not be appropriate to adjudge whether the case shall ultimately end in conviction or not. Only prima-facie satisfaction of the Court about the existence of sufficient ground to proceed in the matter is required. The impugned criminal proceeding under the facts of this case cannot be said to be abuse of the process of the Court. There is no good ground to invoke inherent power under Section 482 Cr.P.C. by this Court.

14-The relief as sought by the applicant through the instant application is hereby refused.

15-This application under Section 482 Cr.P.C. lacks merit and is, accordingly, ***dismissed***.

16-Copy of this order be sent to the complainant as well as to the trial Court for information.

Order Date :- 12.10.2023

Saurabh