

Court No. - 73

Case :- CRIMINAL MISC ANTICIPATORY BAIL
APPLICATION U/S 438 CR.P.C. No. - 11295 of 2023

Applicant :- Dilavar

Opposite Party :- State of U.P.

Counsel for Applicant :- Puneet Kumar Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Nalin Kumar Srivastava,J.

1. Apprehending his arrest in Case Crime No.604 of 2023, under Sections 376 IPC and 3/4 Dowry Prohibition Act, Police Station Najibabad, District Bijnor, the present anticipatory bail application has been moved by the applicant - **Dilavar** seeking anticipatory bail.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material available on record.

3. The prosecution story, as unfolded in the F.I.R., is that Deepak Kumar, husband of the prosecutrix, died in a road accident and her marriage was settled with her brother-in-law (devar), the present applicant, but a demand of dowry of Rs.5 lakh was also made by her in-laws. The prosecutrix continued to live in her matrimonial house where rape was committed against her by the applicant, which continued for a long time. Ultimately the applicant refused to marry with the prosecutrix and she was kicked out from her matrimonial house. F.I.R. was lodged on 10.9.2023 and investigation started, which is going on.

4. It is submitted by the learned counsel for the applicant that that applicant is innocent and he has apprehension of arrest in the above-mentioned case, whereas there is no credible evidence against him. He has been falsely implicated in this matter. Allegations levelled against the applicant are false. Investigation is going on into the matter. It is further submitted that the applicant is a married lady and it is a case of consensual relationship between two adult persons. Applicant never committed any rape against the prosecutrix and no physical relations were made by him with the prosecutrix of the case against her wishes or will or under any compulsion. It is further submitted that no date of any incident of rape has been mentioned in the F.I.R. It is further submitted that a

wrong state of facts has been narrated by the prosecutrix in her statements under sections 161 and 164 Cr.P.C. It is further submitted that the prosecutrix herself began to live in relationship with one Mahendra and a proceeding to take the custody of minor child was started by the parents of the applicant under Guardians and Wards Act and as a counter blast of the aforesaid custody case, the present F.I.R. has been lodged on the basis of false and fabricated facts. It is further submitted that the marriage of the applicant has been solemnized on 20.11.2022 and as such, there was no chance with him to marry with the prosecutrix of this case. It is further submitted that the applicant, who is having no criminal antecedents to his credit, has been cooperative during the course of investigation so far and as such, he is entitled for anticipatory bail. In support of his contention, learned counsel for the applicant has placed reliance on the decision of the Hon'ble Supreme Court in *Mandar Deepak Pawar Vs. the State of Maharashtra & Another* (Criminal Appeal No. 442 of 2022, order dated 27.7.2022)

5. Learned A.G.A. opposed the prayer for anticipatory bail and it has been submitted that on the false pretext of marriage, the applicant only to fulfill his lust, physically exploited the victim of the case and he had no intention to marry her since the very inception of the relationship between the two. The consent, if any, was obtained by playing fraud by the applicant.

6. Hon'ble Apex Court in **Pramod Suryabhan Pawar Vs. The State of Maharashtra & Anr., 2019 (9) SCC 608** has categorically held that there is a distinction between a false promise given on understanding by maker that it will be broken and breach of a promise which is made in good faith but subsequently not fulfilled.

In paragraph 14 of the aforesaid judgment, the Hon'ble Apex Court held that :

"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*, (2019) SCC OnLine SC 509, this Court held:

"37. 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 of the 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 Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

7. Similar observations were made by this Court in **Deepak Gulati v State of Haryana, (2013) 7 SCC 675 ("Deepak Gulati")**:

"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?"

Further, in paragraph 16 of the aforesaid judgment explaining the terms - misconception of fact, consent and breach of promise, the Hon'ble Supreme Court observed that :

"16. ... Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

"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; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite

having every intention to do so. Such cases must be treated differently.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

8. In **Sonu @ Subhash Kumar Vs. State of U.P. & Anr., 2021 0 Supreme (SC) 182**, in almost similar circumstances where the parties, who were adult and had been in consensual relationship for about a period of one and a half years, it was found that there was no allegation to the effect that promise to marry given to the victim was false at inception, benefit was given to the main accused.

9. In Criminal Appeal No.257 of 2023, **Naim Ahamed Vs. State (NCT of Delhi), 2023 LiveLaw (SC) 66** filed against conviction under Section 376 IPC, the Hon'ble Apex Court, reiterating the same principle, categorically observed that :

"20. ... The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause ? Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have

encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court."

10. In the present case, it reflects from the factual matrix of the matter that the consensual relationship between the prosecutrix and the applicant developed on the basis of a promise to marry on the part of the accused applicant, which continued for long time. They were in relationship for a long span of time.

11. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has held that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

12. In **Siddharth Vs. State of Uttar Pradesh & Another, (2022) 1 Supreme Court Cases 676**, the Hon'ble Apex Court has held that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation, then there is no compulsion on the officer to arrest the accused.

13. It appears to be a case of consensual relationship. Hence, considering the settled principles of law regarding anticipatory bail, submissions of the learned counsel for the parties, nature of accusation, role of applicant and all attending facts and

circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is a fit case for anticipatory bail to the applicant till the filing of police report under section 173 (2) Cr.P.C. before the competent Court.

14. The anticipatory bail application is **allowed**.

15. In the event of arrest of the applicant in the aforesaid case crime, he shall be released on anticipatory bail till the filing of police report under section 173 (2) Cr.P.C. before the competent Court on his furnishing a personal bond of Rs.50,000/- with two sureties each in the like amount to the satisfaction of Station House Officer of the police station concerned with the following conditions:-

(i) The applicant shall make himself available for interrogation by a police officer as and when required.

(ii) The applicant shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police office.

(iii) The applicant shall not leave India without the previous permission of the Court and if he has passport, the same shall be deposited by him before the S.S.P./S.P. concerned.

16. In case of default of any of the conditions, the Investigating Officer shall be at liberty to file appropriate application for cancellation of protection granted to the applicant.

Order Date :- 31.10.2023

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