

Court No. - 73

Case :- CRIMINAL MISC ANTICIPATORY BAIL
APPLICATION U/S 438 CR.P.C. No. - 11308 of 2023

Applicant :- Brijesh Sharma

Opposite Party :- State of U.P.

Counsel for Applicant :- Santosh Kumar Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Nalin Kumar Srivastava,J.

1. Apprehending his arrest in Case Crime No.389 of 2023 under Sections 406, 493, 376 IPC, Police Station Gorakhnath, District Gorakhpur, the present anticipatory bail application has been moved on behalf of the applicant - **Brijesh Sharma** seeking anticipatory bail.

2. Heard learned counsel for the applicant and learned A.G.A. for the State.

3. As per prosecution version, accused applicant developed physical relations with the prosecutrix on the false pretext of marriage and also borrowed some money from her and he also performed married in a temple with the prosecutrix, but subsequently the prosecutrix came to know about the marital status of the applicant, as he was a married man having two kids. F.I.R. was lodged on 26.6.2023 and investigation started, which is going on.

4. It is submitted by the learned counsel for the applicant that applicant is innocent and has been falsely implicated in this case. There is no credible evidence against him. Allegations levelled against the applicant are false. It is further submitted that no rape was committed with the prosecutrix of the case by the applicant. It is further submitted that the prosecutrix is a major lady and she, on her own accord and free will, developed physical relations with the applicant. It is further submitted that it is a case of consensual relationship and no cheating has been committed by the applicant. It is further submitted that the applicant never concealed his marital status from the prosecutrix of the case. She was very well known of the fact that the applicant is a married person, but she was living with him happily on her own free will and consent. It is further submitted that they had been living together since 2018. It

is further submitted that the essential ingredients to constitute the offence under section 376 IPC are lacking in this matter. It is further submitted that in her statement given to the I.O., the prosecutrix has herself stated that she had been in relationship with the applicant since 2014. It is further submitted that the prosecution story is highly improbable. It is further submitted that investigation into the matter is going on and the applicant is cooperating with the investigation. No offence is made out against the applicant on the basis of evidence available on record 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 Apex Court in **Sonu @ Subhash Kumar Vs. State of U.P. and Anr., 2021 0 Supreme (SC) 182.**

5. Per contra, learned A.G.A. opposed the prayer for anticipatory bail and it has been vehemently submitted that on the false pretext of marriage, the applicant taking benefit of the innocence of the prosecutrix, made physical relations with her against her will and thus committed offence of rape and subsequently the applicant refused to perform marriage with the prosecutrix. Since the very inception, the applicant never intended to marry with the prosecutrix and he was only fulfilling his lust. He very well knew this fact that he himself is a married man having two kids and family, but despite that he made physical relations with the prosecutrix on the false promise of marriage in order to fulfill his lust. It is further submitted that the prosecutrix has supported the prosecution version in her statement recorded under sections 161 and 164 Cr.P.C. Reliance has been placed on the decision of the Hon'ble Apex Court passed in Sonu @ Subhash (supra) on behalf of the applicant, but the facts of the aforesaid case differ from the present one and the same does not help the applicant in any way. Looking to the facts and circumstances of the case and the seriousness of the offence, the applicant is not entitled to get any relief by way of anticipatory bail by this Court and the present application is liable to be rejected.

6. The Hon'ble Apex Court in **Deepak Gulati v State of Haryana, (2013) 7 SCC 675** ("Deepak Gulati") held as under:

"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)

7. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the anticipatory bail application is maintainable and the same may be granted in a complaint case also, in the same law, 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.

8. In the present case, it reflects from the factual matrix of the matter that the accused applicant is a married man having two children and family, but this fact was concealed by him from the prosecutrix, which shows his fraudulent intention towards the victim of the case. Since the very inception, he never intended to marry with the victim and he was only fulfilling his lust. On the false promise of marriage, he made physical relations with the prosecutrix again and again. Exploiting the victim on the pretext of marriage and finally refusing to marry her are such tendencies growing in the society, which must be nipped in the bud. It is a serious offence against the society, hence the applicant is not entitled to any indulgence. The case of Sonu @ Subhash (supra) referred above does not help the applicant in any way as the facts of the aforesaid case differ from the present one.

9. 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 not a fit case for anticipatory bail to the applicant.

10. The anticipatory bail application is **rejected**.

Order Date :- 19.10.2023

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