

Court No. - 15

Case :- CRIMINAL APPEAL No. - 1688 of 2023

Appellant :- Anand Kumar Jaiswal

Respondent :- State Of U.P Thru. Prin Secy. Home Lko And Another

Counsel for Appellant :- Riyaz Ahmad, Hemant Kumar Pandey

Counsel for Respondent :- G.A.

Hon'ble Shamim Ahmed, J.

1. Case is taken up in the revise call.
2. Counter affidavit on behalf of the State-opposite party No.1 and rejoinder affidavit in reply to the counter affidavit filed on behalf of the State-opposite party No.1 both are on record.
3. This Court vide order dated 25.05.2023 issued notice of opposite party No.2.
4. As per the office report dated 24.08.2023 notice has already been served upon the opposite party No.2 but till date neither any counsel has appeared nor any counter affidavit has been filed on her behalf.
5. On 25.08.2023, this Court has passed the following order:-

"Learned A.G.A. has filed counter affidavit today in Court. In reply thereto, learned counsel for the appellant has filed rejoinder affidavit today in Court. The same are taken on record.

As per Office Report dated 24.08.2023, notice has already been served upon opposite party no.2, but till date neither anyone has put in appearance nor any counter affidavit has been filed on behalf of opposite party No.2.

As a last opportunity ten days and no more time is allowed to the opposite party No.2 to file counter affidavit. Three days, thereafter is allowed to learned counsel for the appellant to file rejoinder affidavit.

Put up this case on 21.09.2023."

6. Today also when the case is taken up, there is no one present on behalf of opposite party No.2 neither any counter affidavit has been filed, as such, it appears that opposite party No.2 is not interested in contesting this case. Since the matter pertains to bail and learned counsel for the appellant presses urgency in the

matter, therefore, this Court has no other option but to proceed for final arguments to decide the present appeal.

7. Heard Sri Riyaz Ahmad, learned counsel for the appellant, Sri Ashok Kumar Srivastava, learned A.G.A. for the State and perused the entire record.

8. This Criminal Appeal under Section 14-A (ii) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 15.05.2023 passed by Special Judge, SC/ST Act, Lucknow in Bail Application No.3864/2023, in Case Crime No.641/2022, under Section 376, 313, 504 and 506 I.P.C. and Section 3(2)(5) of SC/ST Act, Police Station-P.G.I., District-Lucknow, whereby the bail application of the appellant has been rejected.

9. Learned counsel for the appellant submits that the appellant has been falsely implicated in the present case due to enmity and rivalry. No such incident, as alleged by the prosecution, took place. He further submits that as per the version of the F.I.R., which was lodged by the prosecutrix herself, in which she has herself admitted her age to be 26 years and the F.I.R. was lodged on 02.11.2022 after three years of the alleged incident i.e. in the year 2019. He further submits that in the F.I.R. it has been stated that the complainant was a student in Dr. B.R. Ambedkar University, Lucknow from the period 2016 to 2021 and the appellant was also a student in the same University and they came in contact in the year 2019. It has been further alleged in the F.I.R. that the appellant after making some excuse forced the complainant to sit in his car and offered her liquor, she denied but on his insistence, she drank liquor, thereafter, the friend of the appellant took some obscene photographs and made some videos and the appellant started blackmailing her and made physical relation with the complainant several times. It has been further alleged that the appellant made false promise of marriage and kept on making physical relation with the complainant and the complainant got pregnant twice and the appellant forced her to abort the child on both the occasions.

10. Learned Counsel for the appellant further submits that the prosecutrix, who was aged about 26 years at the time of alleged incident and was in relationship with the appellant for the last three years, therefore, both the parties were consenting parties and were in love affair with each other. He further submits that there was some proposal of marriage but the appellant belongs to upper caste and the complainant belongs to lower strata of society and the marriage could not be solemnized because parents would not have accepted the proposal, therefore, they

dropped the idea of marriage.

11. Learned Counsel for the appellant further submits that the prosecutrix in her statement recorded under Section 161 and 164 Cr.P.C. almost reiterated the same version of F.I.R. He further submits that whatever allegations were leveled against the appellant of physical relation as made by the prosecutrix in her statements as well as in the F.I.R. got demolished as the Investigating Officer did not find any photographs or videos in this regard, this fact has been confirmed by learned A.G.A. for the State. He further submits that the prosecutrix denied her internal and external examination, this fact finds mention at page no.32 of the paper book, thus, the allegation of rape got demolished after perusing the statement of the complainant.

12. Learned Counsel for the appellant further submits that if this allegation is assumed to be true, that the appellant has made false promise of marriage and on pretext of this he has made physical relation with the complainant, the complainant was aged about 26 years and she completely knew the consequences very well that the appellant could refuse to marry at any point of time, thus, he submits that the parties were consenting parties, therefore, Section 376 I.P.C. is not attracted in the present case.

13. In support of his submissions, learned Counsel for the appellant has placed reliance on the judgment of Hon'ble Supreme Court in the case of **Pramod Suryabhan Pawar vs. State of Maharashtra, (2019) 9 SCC 608** and placed reliance upon paras 17 and 21, which are reproduced hereunder:-

"17. In Uday v State of Karnataka the complainant was a college going student when the accused promised to marry her. In the complainants statement, she admitted that she was aware that there would be significant opposition from both the complainants and accuseds families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accuseds promise to marry the complainant was not of immediate relevance to the complainants decision to engage in sexual intercourse with the accused, which was motivated by other factors:[(2003) 4 SCC 46].

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed

earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married (Emphasis supplied).

21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellants failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellants promise of marriage. Therefore, even if the facts set out in the complainants statements are accepted in totality, no offence under Section 375 of the IPC has occurred."

14. Thus, learned counsel for the appellant submits that in view of the judgment rendered by the Hon'ble Supreme Court, the promise of marriage made by the appellant to the prosecutrix was in good faith as per the case set up by the complainant and it does not amount to rape as there is a consent of the prosecutrix. He further submits that the prosecutrix herself has denied her internal and external examination and the age of the prosecutrix was 26 years, as such, allegation of rape levelled against the appellant is false and fabricated, therefore, the appellant is entitled for bail.

15. Several other submissions in order to demonstrate the

falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 24.01.2023 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

16. Learned A.G.A. opposed the prayer for bail, however, he is unable to dispute the contentions raised by learned counsel for the appellant and submits that prima facie offence is made out against the appellant, therefore, he not entitled to get any relief from this Court. He further submits that prosecutrix herself has refused her internal and external examination.

17. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that as per the version of the F.I.R., which was lodged by the prosecutrix herself, in which she has herself admitted her age to be 26 years and the F.I.R. was lodged on 02.11.2022 after three years of the alleged incident i.e. in the year 2019; there appears force in the argument of learned Counsel for the appellant that there was some proposal of marriage but the appellant belongs to upper caste and the complainant belongs to lower strata of society and the marriage could not be solemnized because parents would not have accepted the proposal, therefore, they dropped the idea of marriage, there also appears force in the argument of learned Counsel for the appellant that if this allegation is assumed to be true, that the appellant has made false promise of marriage and on pretext of this he has made physical relation with the complainant, the complainant was aged about 26 years and she completely knew the consequences very well that the appellant could refuse to marry at any point of time, thus, the parties were consenting parties, therefore, Section 376 I.P.C. is not attracted in the present case and also considering the fact that whatever allegations were leveled against the appellant of physical relation as made by the prosecutrix in her statements as well as in the F.I.R. got demolished as the Investigating Officer did not find any photographs or videos in this regard, this fact has been

confirmed by learned A.G.A. for the State and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another**, reported in (2018) 3 SCC 22 and **Pramod Suryabhan Pawar (Supra)**, this Court is of the view that the learned court below has failed to appreciate the material available on record. The order passed by the court below is liable to be set aside

18. Accordingly, the appeal is **allowed**. Consequently, the impugned order dated 15.05.2023 passed by Special Judge, SC/ST Act, Lucknow in Bail Application No.3864/2023, in Case Crime No.641/2022, under Section 376, 313, 504 and 506 I.P.C. and Section 3(2)(5) of SC/ST Act, Police Station-P.G.I., District-Lucknow is hereby **set aside** and **reversed**.

19. Let the appellant, **Anand Kumar Jaiswal** be released on bail in the Case Crime No.641/2022, under Section 376, 313, 504 and 506 I.P.C. and Section 3(2)(5) of SC/ST Act, Police Station-P.G.I., District-Lucknow with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) The appellant 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 from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(iii) The appellant shall cooperate with investigation /trial.

(iv) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(vi) In case, the appellant misuses the liberty of bail during trial, in order to secure his presence, proclamation under section 82 Cr.P.C. is issued and the appellant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(vii) The appellant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

20. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the prayer for bail and must not be construed to have any reflection on the ultimate merit of the case.

21. The trial court is also directed to expedite the trial of the aforesaid case by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

Order Date :- 30.11.2023

Piyush/-