

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 355 OF 2014

Nandan Sadanand Bendarkar,]
Residing at Urostar Communication Co]
Post Box No. 510098, Dubai,]
UAE, Permanent Address]
Madhali Ali, Devrukh,]
District : Ratnagiri.]..Applicant.

Versus

State of Maharashtra]
(At the instance of Kotharud police]
station, Pune Vide C.R.No.242/2013)]..Respondents.

Mr. A. A. Kumbhakoni, Senior Advocate with Mr. V. V. Purwant
for the Applicant.

Mrs. U. V. Kejriwal, learned APP for the State.

Mr. Rajiv Patil, Senior Advocate with Ms. Priyanka Thakur for
the Intervenor – original complainant.

Coram : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
Date : **May 6, 2015.**

Judgment (Per Ranjit More, J.):

1. This application is filed invoking the jurisdiction of
this Court under the provisions of section 482 of the Code of
Criminal Procedure, 1973 for quashing the proceedings of R.C.C.
No. 0400842 of 2014 [converted into Sessions Case No. 159 of
2014] pending on the file of Sessions Judge, Pune, which has

arisen from C.R.No. 242 of 2013 registered with Kotharud Police Station against the Applicant at the instance of Respondent No.2 for the offence punishable under sections 376 and 420 of the Indian Penal Code, 1860.

2. The allegations made by the Complainant – Respondent No.2 herein, which gave rise to the registration of C.R.No. 242 of 2013 are as under :

[A] The Complainant, a divorcee, was intending to get married and therefore registered herself with matrimonial portal www.shadi.com. While browsing the profiles on portal Shadi.com, she found the profile of one Ashwin Bairagi to be suitable. She, therefore, contacted him through e-mail in April 2012. He responded to the said email and contacted the Complainant and told her that he had come at Kandiwali, Mumbai and invited her for a meeting. The Complainant went to meet Ashwin Bairagi at his residence. At that time, he told his name to be Nandan Sadanand Bendarkar, Age 47. He also informed that his native place is Devrookh, District Ratnagiri and also informed that he has registered on the matrimonial portal in pseudo name. He further informed the Complainant that he was working with Urostar Communication in Dubai and residing at 204, AP.I.

Chambers, Al-Rafa, BarDubai, UAE, Post Box No. 233 256. He gave his contact numbers. He also gave information about his first marriage and informed that he has a son by name Shubhamkar aged 13 years from the first wife. He further told her that he has divorced his first wife and that he is intending to remarry. The Complainant thereafter gave her details, family background and her expectation about the spouse. After detailed discussion, she returned back to Pune.

[B] The Complainant and Bedarekar (the Applicant herein) had thereafter two meetings at Pune and Mumbai to discuss about their marriage prospects. The complainant and the Applicant considered themselves to be suitable partners. The Applicant thereafter went to Dubai. During this period, the Complainant and the Applicant kept in touch with each other through social media. On 23.5.2012, the Complainant went to Dubai to collect further information about the Applicant and his son. She could not meet the Applicant as he had come to Mumbai due to demise of his father.

[C] On 4/6/2012, the Applicant visited the house of the Complainant at Pune and had discussion with her parents and decided to get married to the Complainant.

The Applicant thereafter told the Complainant that he would be staying in Mumbai for couple of days and requested her to accompany him at Mumbai. The Complainant conceded to his request and went to the Applicant's flat at Kandiwali. After going to Kandivali, the Applicant told the Complainant that he is intending to marry the Complainant as early as possible and after obtaining the confidence of the Complainant entered into the physical relationship. The Applicant thereafter requested the Complainant to come to Dubai to collect the documents required for registered their marriage and also meet his son. The Complainant, as per the request of the Applicant, went to Dubai on 28/6/2012 and met the Applicant's son. She stayed at Dubai till 10/7/2012. The Applicant did not hand over the documents and asked the Complainant to return to Pune and promised to send the documents. She accordingly returned back to Pune.

[D] On 7/8/2012 the Applicant along with his son and uncle came to Pune at the Complainant's house and introduced the Complainant to his uncle as his fiencee.

[E] On 18/8/2012 the Applicant, his son, uncle and the Complainant went to Devrookh. The Applicant introduced the Complainant to his mother and other relatives as his fiancée. They stayed there for one day and

returned back to Pune and thereafter to the Applicant's flat at Kandiwali, Mumbai where the Applicant had physical relationship with the Complainant.

[F] The Applicant then sent documents required for registration of marriage through courier. The Complainant gave notice of marriage in the office of Registrar of Marriages on 24/8/2012 and accordingly informed the Applicant.

[G] On 3/10/2012, the Complainant had come to Mumbai at the Applicant's house for Shraddha ceremony. She stayed there till 5/10/2012. At that time the Applicant introduced the Complainant to his relatives as his fiancée. The Applicant and the Complainant thereafter had discussion about marriage and decided to register marriage on 11/12/2012. The Complainant had kept physical relationship with the Applicant during this period also.

[H] The Applicant thereafter went to Dubai. The Complainant was in touch with him through video chatting. They used to talk, however, the Applicant was avoiding the talks about marriage. The Applicant did not give any information about his first wife to the Complainant. As she objected to this, the Applicant was

avoiding the talks about marriage. Therefore, the Complainant with the help of relatives tried to convince the Applicant. However, he stopped talking with her. The Complainant thereafter met the Applicant in November 2012 at Dubai. The Applicant told her that they will begin the talks about marriage. The Complainant thereafter started talking with the Applicant. However, the Applicant asked the Complainant to cancel the marriage notice. The Applicant further told not to talk to him as he wanted to relax. The Complainant thereafter came to Pune. The Complainant waited for two months. However, the Applicant did not give any positive response. Therefore, the Complainant lodged a complaint on 5/2/2013 to Women Assistance Desk, Pune. At the time of meeting in respect of enquiry on her said complaint, the Applicant remained present on 19/2/2013 and made representation that he would come back, however, he did not return. Therefore, the Complainant went to Dubai. At that time, the Applicant told her to return back to Pune and he would come to Pune and would have discussion there in the presence of maternal uncle. However, he did not come and did not contact the Complainant. Therefore, the Complainant lodged complaint with the police, in pursuance of which the captioned C.R. is registered.

[I] In short, the allegations are that the

Applicant gained confidence of the Complainant by giving promise of marriage and kept physical relations with her from time to time and ultimately refused to marry her and thus cheated her.

3. At the outset, Mr. Kumbhakoni, the learned Senior Counsel appearing for the Applicant submitted that he will not refer any document whatsoever which is not part of the charge-sheet. He further submitted that even if the entire charge-sheet is accepted as it is, it does not make out any case whatsoever against the Applicant for commission of any offence muchless under section 376 or 420, as alleged. He relied upon the statements recorded in the FIR and emails exchanged between the parties. He submitted that if the entire charge-sheet is perused, it does not disclose any allegation against the Applicant that he kept the physical relationship with the Complainant against her will and without her consent. In support of his submission, in the present case, this Court shall exercise its extraordinary jurisdiction for quashing the above FIR and no offence is disclosed from the complaint, Mr. Kumbhakoni pressed into service following decisions :

- a] *Rishipal Singh v. State of UP [(2014) 7 SCC 215]*
- b] *Deelip Singh [(2005) 1 SCC 88]*
- c] *Uday v. State of Karnataka [(2003) 4 SCC 46]*
- d] *Deepak Gulati [(2013) 7 SCC 675]*
- e] *Hridaya Ranjan Prasad Verma vs. State of Bihar [(2000) 4 SCC 168]*

4. Mr. Rajeev Patil, the learned Senior Counsel appearing for the Complainant – Respondent No. 2 contested the petition very vehemently. He submitted that the conduct of the Applicant in depicting his profile name as Ashwin Bairagi and seeking information for marriage proposals is relevant in inferring the Applicant's intention. He submitted that the FIR specifically discloses that the Applicant had forced the Complainant to have sexual intercourse on the pretext of marriage. He also submitted that a statement of the father and mother of the Complainant also support that the Complainant was forced to have sexual relationship with the Applicant. He also submitted that whether the relationship established by the Applicant with the Complainant is against her will and without her consent will have to be decided at the stage of trial. He submitted that the charge-sheet discloses the commission of

both the offences by the Applicant and the evidence collected by the prosecution in this regard needs to be scrutinised in the trial and weightage and value of the evidence cannot be considered at this stage. Mr. Patil, lastly submitted that during the period from April 2012 to December 2013, the Applicant contacted various women from portal www.Shadi.com. In this regard he relied upon the login table of the Petitioner recovered by police from the said portal. He submitted that this fact at this stage is sufficient to infer the Applicant's intention to deceive the Complainant since inception. He lastly submitted that the application being without any merit, deserves to be dismissed. Mr. Patil in support of his submissions placed reliance upon relied :

- a] *Abasaheb v. State of Maharashtra [2008(2) Mh.L.J. 856]*
- b] *State of MP v. Awadh Kishore Gupta [2004 All MR (Cri). 824 (SC)]*
- c] *CBI v. Ravi Shanker [2006(7) SCC 188]*
- a] *K. Neelavai v. State [2010 Crim. L. J. 2819(SC)]*

5. Before entering into merits of the matter, let us discuss the scope and object of provisions of section 482 of the Code of Criminal Procedure, 1973. The Apex Court in plethora of

decisions has laid down the principles and guidelines with regard to the exercise of inherent jurisdiction by the High Court under section 482 of the Code. In State of Haryana v/s. Bhajan Lal 1992 SCC (Cri) 426, the Apex Court has listed the categories of cases when power under section 482 of the Code can be exercised by the High Court. These principles or guidelines have been reiterated by the Apex Court in CBI v. Duncans Agro Industries Ltd [(1996) 5 SCC 591], Rajesh Bajaj v. State [(1999) 3 SCC 259], Medchl Chemicals & Pharma v. Biological E. Ltd [(2000) 3 SCC 269] and Zandu Pharmaceuticals Works Ltd v. Mohd. Sharaful Haque [(2005) 1 SCC 122].

6. In Zandu (supra), the Apex Court has made following observations :

"The power under section 482 of the Code should be used sparingly and with circumspection to prevent abuse of process of Court, but not to stifle legitimate prosecution. There can be no two opinions on this, but, if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of Court, the power under section 482 of the Code must be exercised and proceedings must be quashed."

7. Recently the Apex Court in Rishipal Singh v. State of UP [(2014) 7 SCC 215] has taken the survey of its earlier decisions

with regard to the scope and object of section 482 of the Code and held that the object of section 482 of the Code is to prevent the abuse of the process of Court and to secure the ends of justice; the High Court needs to be circumvent and exercise power under section 482 in exceptional circumstances depending upon the facts of each case. It was further held that if the allegations leading to criminal prosecution, *prima facie*, do not disclose or constitute the offence, then, power under section 482 can be exercised. However, disputed questions of fact cannot be decided like a trial Court. It was further observed that frustrated litigant need not be permitted to vent vindictiveness through abuse of process of law and such proceedings are required to be stopped in early stages.

8. The decisions of the Apex Court referred to above, make it abundantly clear that the inherent jurisdiction of this Court under section 482 of the Code has to be exercised sparingly and in rare cases. We are also conscious of the principles that veracity or merits of the allegations made in the complaint cannot be gone into at the stage of quashing. We have to accept

the charge-sheet at its face value to see whether it discloses any case against the Applicant, as alleged.

9. The Applicant is being prosecuted for the offence of rape and cheating. It is alleged that during the period between 4/6/2012 and 5/10/2012, the Applicant kept physical relationship with the Complainant by giving promise to marry. The case of the Complainant appears to be that her consent to have physical relationship was obtained by giving false promise of marriage.

10. The Apex Court has made a sharp and clear distinction between "a false promise to marry" **and** "breach of promise to marry". The Apex Court in Deelip Singh v. State of Bihar [(2005) 1 SCC 88] has held that consent given by a woman believing the man's promise to marry her would fall within the expression "without her consent" only *if it is established that from the very inception the man never really intended to marry her and the promise was a mere hoax*. The observations of the Apex Court in paragraph 14, 15, 19, 27 and 28 of Deelip Singh (supra) have some bearing on the matter at hand, which read

thus :

“14. The last question which calls for consideration is whether the accused is guilty of having sexual intercourse with PW12 'without her consent' (vide Clause secondly of Section 375 IPC). Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible.

15. What then is the meaning and content of the expression “without her consent”? Whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the offence of rape? These are the questions which have come up for debate directly or incidentally.

19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the Court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.

27. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of Division Bench of Calcutta High Court in *Jayanti Rani Panda vs. State of West Bengal* [1984 Crl.L.J. 1535]. The relevant passage in this case has been cited in several other

decisions. This is one of the cases referred to by this Court in Uday (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

The discussion that follows the above passage is important and is extracted hereunder:

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other,

unless the Court can be assured that from the very inception the accused never really intended to marry her." (emphasis supplied)

The learned Judges referred to the decision of Chancery Court in *Edgomgtpm vs. Fotzmairoce* (1885) 29 Ch.D 459 and observed thus:

"This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: "There must be a misstatement of an existing fact. Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."

After referring to the case law on the subject, it was observed in *Uday*, supra at paragraph 21:

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the

question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda, supra which was approvingly referred to in Uday's case, (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end "unless the Court can be assured that from the very inception, the accused never really intended to marry her". In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu's case, supra (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never

amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

11. In the instant case, the material on record, prima facie reveals that the Applicant had entered into a physical relationship with the Complainant. The question, therefore, arises is whether the Applicant had entered into the physical relationship with the Complainant on a false promise to marry.

12. The undisputed facts of the case, which are borne out from the charge-sheet can be summarised as under :

- 1] The Applicant is 47 years old and the Complainant is 48 years old. Both are divorcees. The Applicant has one son, aged 13 years from first marriage and his ex-wife is remarried.
- 2] The Applicant is a chartered accountant by profession. The Complainant is also highly educated lady.
- 3] Both the Applicant and the Complainant were venturing to have a second chance at married life and were exploring the possibility of remarriage and both of them had registered themselves with matrimonial website Shadi.com.
- 4] The Applicant registered himself with the profile name "Ashwin Bairagi". The Applicant disclosed to the Complainant in the first meeting itself not only the fact that Ashwin Bairagi was his profile name but also everything

about his first marriage, his family background, that he had a son aged 13 years staying with him at Dubai.

- 5] The Applicant along with his uncle Vasant approached and met the parents of the Complainant at Pune with regard to the marriage proposal, which was accepted. The Applicant introduced the Complainant to his relatives including his mother, as his fiancée. The Applicant took the Complainant to his native place Devrookh, District Ratnagiri and during this visit also, he introduced the Complainant to his relatives as his fiancée. During Shradda ceremony held on 3/10/2012, the Applicant not only allowed the Complainant to participate in the ceremony but introduced her to all his relatives to be his fiancée.
- 6] After discussion between the two and their family members, the Applicant and the Respondent decided to marry each other. Accordingly, on 24/9/2012 notice was registered with the Marriage Officer, Pune disclosing that marriage was to be registered during the period 24/10/2012 to 24/12/2012.
- 7] The marriage was scheduled to take place on 11/11/2012.

13. On 18/10/2012, the Complainant sent an email to the Applicant, which reads thus :

“Dear Nandan,

After going through your mail and referring to our recent chats / phone conversation, I would like to make myself clear on following issues...

1. *I wish to stick to my role as your wife only to avoid further likely complications.*

2. I would be having friendly relations with Shubhankar, as I had when I was in Dubai.

3. It came as shocking information for the first time that Manisha keeps on coming to your house for whatever reasons, as now written in your mail and when you disclosed this during our Sunday morning chat for the first time, anyways...

4. I would not like as a wife, she ever coming to our house, for whatever reasons, also her relatives, in my presence or otherwise.

. You may be having cordial relations with her uncle / relatives, etc, which you can continue, without making me a compulsion for the same.

5. I had never ever expressed by any time , in any manner that Shubhankar should cut-off relations with his mother, and he is free to visit her.

6. I would certainly expect that there is no social, public appearances, celebrations with Manisha where she would accompany you. Exception school meetings, matters I will accompany and if at all she also insists, as you said during telecon, let her come on her own separately.

7. I was talking to you all these months after returning from Dubai to counsel Shubhankar, about our marriage and the adjustments expected of you both for our smooth living, e.g. Incidences like Shubhankar's insistence on bringing Manisha to your house could have been avoided.

. The things upto now, seem to be quite normal for you both, may not remain exactly the same upon me coming there as your wife, especially matters like mentioned above.

8. I expect you to maintain my social status and dignity as your wife in all respects and not to avoid me on Manish's account. My emotional security should be safeguarded by you as my husband.

9. Furthermore considering your busy schedule I certainly expect on weekends spending some quality time/ enjoyment with me as your wife, however, at times we both and Shubhankar may also enjoy time together in outings, Shopping, etc. I expect, together, we both spend good time for tours, and such other, enjoyable events.

10. I trust your commitment in respect of not having any relations with Manisha expect as may be required for the matters related to Shubhankar only and do expect complete transparency in this respect.

11. You have written about your fear about losing Shubnhankar, I do not know what act of mine or talk made you say so. Your apprehension of not entrusting me matters relating to Shubhankar immediately or after sometime is unfounded. U know that I love children and have been a Students' Counselor which seems to be a point overlooked by you nevertheless it is up to you to take decisions about up-bringing of your son. You know the qualities of Manisha better than me.

. I have expressed my feelings as far as I could without any reservations and without any ill will in my mind.

. In spite of my reminding you several times of finalizing the date of marriage and entire programme in respect thereof, however you have not come back on this very important issue, except at the time of our prolonged phone talk on 16th night you said "it is ok". I hope you will take all these matters in a positive spirit.
Sharmmila." [Emphasis supplied by underline]

14. The Applicant replied to the said email on 19/10/2012, which reads thus :

"Dear Sharmmila,
Thanks for your detail mail.
What we are trying to do here is to marry each other for life. Marriage is a long term relationship. Relationships are built on trust, love, sacrifice, patience, emotions and it takes years to build. Overnight success comes in about ten years.

I have always given importance in life to be a good human being. I have always treated every second person in life on equal terms irrespective of his status, caste, creed, sex, etc.

Reading your points reminded me of reading a partnership

deed where one partner is telling the dos and don'ts of the other partner. The tadka of live totally missing. It looks like an adjustments and I don't want to you adjust anything for my sake.

I have lived with a woman and treated her very fairly as a woman and as wife in spite of our problems. She (more importantly all her relatives including her dad) still maintains cordial relationship with me is an ample proof of that and I cherish that. That doesn't mean that I am still in love with her or wish to be united with her. At the same time I don't forget that she is a mother of our son and he still needs her. I take enough care to ensure that he gets that motherly love even at the cost of my happiness. And note that it doesn't mean he is pampered. He performs well in academics and sports; his general knowledge is above average; and most of all is very well behaved kid.

I know my duties of father and husband. At times in the past I have failed in both the duties, whatever may be the reasons. I won't say that it will not happen again!!! After all I am a simple human being trying to manage my job, my son, myself, friends, would be spouse and host of other things. What I can definitely do is to commit and keep my word. I have never promised you the sun and the moon!!! I have not hidden anything about my past. I believe in trust and building that trust over a period of time.

What I can't imagine is living under duress. What I cannot compromise is my freedom to do something or not to do something, or to do something because someone else is asking me to do so! what I cannot compromise is my relationship with bobo, his well being. He has already seen few things which he shouldn't have and definitely need to give him better impression of life. I know my son better than many people who have lived with him. I also know how he behaves when things are not to his likings.

Me being in Dubai and not married hasn't changed the status of my ex wife. My spouse wouldn't change that either. We don't move together either. At times we have attended functions separately. That may happen again. I will keep on interacting with her on issues relating to Bobo and it is limited to that.

only. Will that continue? Yes and Yes!!! We stopped talking about love and emotions about six to seven years ago.

Do all these things change anything in my life? No, not at all!!! Do they mean anything to me, not at all. Does she come to my house every day? No!! Will she come when I am married? May be yes may be no!! One can always manage the situation and get the desired result by reacting properly!!!

Three days ago I was all set to walk the path once again. I had started making preparations for new life ahead including some special designs from Nallis and so on which now I have canceled. Today I am not ready!!! Marriage on 11th November 2012 is definitely not on!!!

I will go back to my drawing board and reassess all the matters once again. I want you to reassess if there are any more objections, expectations, ambitions, you may have from this marriage and communicate with me clearly. I will try to visit Mumbai around 15th November when we can sit down and discuss things at length once again and see where life takes us.

Don't expect a point by point reply from me. I am not avoiding, but I don't feel it necessary. Also don't think I am philosophical and trying to be Baba Ramdev giving dose on life and marriage. This is my way of living my own life. I can accommodate or bend the rules but can't change or break the rules set by me. What I am looking in life is to enjoy and not stress in life. I don't need anybody in life who will give me anything other than pure joy. I am already enjoying my life to the fullest, if someone can add honey and sugar, the better it is. All of us will share that.

I know I don't have finances of Bills Gate or physic of Sylvester Stallone or looks of Richard Gere. What I know best is my limitations. What I have in abundance is the confidence, the attitude to do and get things done, a quality friend circle and humble relatives on whom I can fall back upon anytime without any hesitation. I can handle any situation on my own. I can carry people with me and I can be equally dangerous if someone tries my patience. I hate everyone who keeps on nagging me for things, be it my son or spouse. When I commit.

I do. If you haven't noticed that yet, too bad!! People say I am not serious in life. Why do you need to be? I eat well , I work hard, I sleep a lot, I read a lot and whatever I do, I enjoy. I don't like tensions in day to day life and definitely not in personal life. Office job gives me enough of those. Today my home is full of laughter, happiness, that unhappiness!! I will take utmost care to maintain that!!

See if you are willing to adjust to all this!!”

[Emphasis supplied by underline]

15. Father of the Complainant, as a rejoinder to the Applicant's email, has sent an email on 26/10/2012 by using the Complainant's email account, which reads thus :

“Dear Nandan,

It was mutually discussed and decided between you and Sharmmila to get married.

As such we had submitted a joint notice to the Registrar of Marriages here in Pune containing signatures of you both.

It was conveyed to you that suitable date in all respects would be 11th of November.

It was expected by we both parents and Sharmmila that you will respond positively to this date.

However, we would like to have a clarity about the matter as regards your ex-wife still coming to your house, which was not known to us so far. We do not find any positive assurance in this respect and no confirmation about the date of marriage (i.e 11-11-2012) has been communicated by you to us despite requests through telephonic and email communications by close relatives. Also it may please be noted by you that your Ex wife after the divorce decree being made absolute and her re-marriage has used your name as her husband on her website, This can be proved. As her (i.e Sharmmila's) parents we find this totally inappropriate.

In the event that the aforesaid date is not on and the wedding is to be postponed indefinitely (in the present time frame) then it would be in order to cancel it. Please give your confirmation in this respect.

*With best wishes,
your sincerely,
M.N.Aklujkar.”*

[Emphasis supplied by underline]

16. It appears from the aforesaid emails that Manisha – the ex-wife of the Applicant, was interacting with the Applicant even after their divorce and was visiting his house at Dubai in connection with the affairs of their son–Shubhankar. The Complainant, for justifiable or otherwise reasons, found the said limited relationship that the Applicant had continued with his ex-wife to be objectionable. The Applicant was not agreeable to the strict conditions that the Complainant and her family were imposing on him of not maintaining any relationship with his ex-wife or her relatives and kept the marriage on hold. As a result of this, the mutual plan of the Applicant and the Complainant to get married was frustrated. The above emails show that the Applicant has only postponed the marriage, however, decision to cancel the same has originated from the side of the Complainant and communicated to the Applicant by the father of the Complainant.

17. The above facts unequivocally do show that the Applicant was serious in getting married to the Complainant, however, the mutual plan could not get through due to strict conditions imposed by the Complainant, to which the Applicant was not agreeable. By no stretch of imagination, from the material on record, it can be said that the promise given by the Applicant to the Complainant to marry was false promise. In our considered view, this is also not the case of breach of promise. At the most it can be said this is a case of cancellation of marriage. In above circumstances, even if the case of the Complainant as disclosed in the entire charge-sheet is taken to be true, in that case also, in our considered opinion no offence under section 376 of the Indian Penal Code, 1860 is disclosed.

18. So far as the allegation of cheating is concerned, for sustaining such allegation under section 415 of the Indian Penal Code, 1860, it is prerequisite to show that the Applicant had a fraudulent or dishonest intention at the time of making promise. Distinction between breach of such promise and the offence of cheating, though fine one, is as clear as broad day-light. From the mere failure to keep-up promise, such a culpable intention

right at the beginning, i.e., when the promise was made, cannot be presumed. Reference in this regard can be made to proposition of law laid down by the Apex Court in Hridaya Ranjan Prasad Verma vs. State of Bihar [(2000) 4 SCC 168]. In this regard, paragraph 15 of the said decision is relevant, which reads thus :

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

19. We have already held that the Applicant was serious in getting married to the Respondent. All the arrangements therefor were made. Unfortunately, the mutual plan got frustrated due to disagreement between them. By no stretch of imagination, it can be said that the Applicant's promise to marry the Complainant was fraudulent or dishonest and that too at the time of making the promise. Therefore, the offence punishable

under section 420 of the Indian Penal Code, 1860 is also not disclosed.

20. This takes us to the submissions advanced by Mr. Patil, the learned Senior Counsel appearing for the Complainant. The submission is advanced that conduct of the Applicant in depicting his profile name as *Aswhin Bairagi* and seeking information for marriage proposals is relevant in inferring the Applicant's intention, which was nothing but to cheat. We do not find merit in the submission as the Complainant in her FIR itself has stated that in the first meeting itself the Applicant disclosed to the Complainant that his name is Nandan Bendarkar and his profile name is Ashwin Bairagi, he also gave information about his first marriage, his family background and that he has a son Shubankar aged 13 years from the first wife.

21. Another submission of Mr. Patil that the Applicant's intention to deceive the Complainant since inception is borne out from the fact that during the period April 2012 to December 2013, the Applicant contacted various women from the portal www.shadi.com., despite being the fact that they had finalised their marriage. To support this submission, during the course of

arguments, Mr. Patil produced the Login Table details of the Applicant's Shadi.com account obtained by the Complainant from the said portal. This submission is also without any substance. We have gone through the said record produced by the Complainant. The profile ID of the Applicant on the said portal is SH00183337. This table reveals that requests sent from this ID of the Applicant, which have been received by 19 IDs, are pertaining to the period 4th December 2012 onwards. This date is relevant. The marriage was cancelled from the side of the Complainant by sending an email on 26th October 2102. Thus, prior to the date of cancellation of marriage, there are no entries showing "sending" of expression of intention from the ID of the Applicant or any other ID receiving it from the Applicant's ID.

. This record produced by the Complainant herself shows that expressions of intention have been lodged into the INBOX of the Applicant, without the Applicant inviting and/or asking them, are shown under a subsequent / different table, with as many as 64 entries, heading as "sent by" which are from 23rd July 2012. The term "contacted" mentioned therein only means that the expression of interest shown by various IDs have

been merely “lodged” into INBOX of the Applicant's ID, it does not mean in literal sense “contacted” as understood in common parlance.

22. Before parting with the matter, we must make reference to the decisions relied upon by Mr. Patil. The Full Bench of this Court in *Abasaheb (supra)* has held that inherent powers under section 482 include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification, such powers can be exercised to secure the ends of justice, prevent abuse of the process of any Court and to make such orders as may be necessary to give effect to any order under this Court, depending upon the facts of a given case. In *Awadh Kishore (supra)*, pressed into service by Mr. Patil, the Apex Court held that power under section 482 is to be used in the rarest of rare cases; it is not an instrument handed over to the accused to short circuit prosecution and bring about its sudden death. The Apex Court also held that great caution is required while exercising this extraordinary jurisdiction, when complaint is lodged at Police Station and an offence is registered,

mala fides of informant would be of secondary importance.

23. There is no dispute about the law laid down in the above decisions. In fact the scope of powers under section 482 of the Code has been reiterated by the Apex Court number of times, including the latest pronouncement in Rishipal Singh (supra). In the conspectus of the present matter, we, however find that the entire material in the present case in the form of charge-sheet does not disclose any offence under section 376 or 420 of the Indian Penal Code, 1860. In such circumstances, the continuation of the prosecution of the Applicant would be an abuse of the process of Court. The prosecution is therefore required to be quashed. In the light of above discussion, application is made absolute in terms of prayer clause (a).

[SMT. ANUJA PRABHUDESSAI, J.]

[RANJIT MORE, J.]