

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 3578 OF 2016

Mr. Jayendra Vijay Ayare	}	
and Ors.	}	Petitioners
versus		
Miss. Priyanka Ankush	}	
Chavan @ Ruchira and Anr.	}	Respondents

Mr. Mahesh Vaswani with Ms. Manshi Mahanta and Ms. Dharini Nagda for the petitioners.

Mr. Omprakash Pandey for respondent no. 1.

Mr. F. R. Shaikh-APP for State.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.
DATED :- APRIL 27, 2017**

P.C. :-

1. By this petition under Article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, the petitioners are seeking the following reliefs:-

“A) This Hon'ble Court be pleased to issue a writ, direction or order under Article 226 of the Constitution of India, and in exercise of its inherent powers be pleased to issue a writ of mandamus and/or any other appropriate writ and/or order quashing the said First Information Report dated 18/04/2016, vide C. R. No. 192/2016 U/S. 420, 354, 509, 34 OF IPC at Vakola Police Station, Mumbai against the petitioners.

B) This Hon'ble Court be pleased to issue a writ, direction or order under Article 226 of the Constitution of India, and in exercise of its inherent powers be pleased to issue a writ

of mandamus and/or any other appropriate writ and/or order directing the Respondent No. 2-the Senior Police Inspector of Vakola Police Station, to stop all investigations against the Petitioners and also to quash the said First Information Report dated 18/4/2016, vide C. R. No.192/2016 Registered U/S. 420, 354, 509, 34 OF IPC at Vakola Police Station, Mumbai.”

2. On this writ petition, this court, after hearing the petitioners advocate on 14th February, 2017, passed the following order:-

“1. Not on board. Taken on board.

1 The learned counsel for the petitioners on instructions states that the petitioners have been informed that the charge sheet will be filed tomorrow. Perused the statement of the first respondent on the basis of which FIR is registered.

2 Issue notice to the second respondent returnable on 24th March, 2017. In addition to service of notice through Court, the Advocate for the petitioners to serve a private notice and file affidavit of service on or before 14th March, 2017. If affidavit of service is not filed on or before the said date, the petition shall stand dismissed for non prosecution without further reference to the Court. By way of ad-interim relief, we direct that charge sheet shall not be filed as against the petitioners.”

3. Since this order was continued for some time, but the matter was not being listed, on 4th April, 2017, the papers were produced before us. After hearing both sides, we passed the following order:-

“1. Mentioned. Not on Board.

2. The request of the petitioners' advocate is that there is an ad-interim order which is in force from 14th February, 2017. It was in force till today. From the *roznama*, we cannot presume that the order has been vacated or is not continuing. Be that as it may, we continue this ad-interim order, without prejudice to the rights and contentions of particularly the complainant, for a period of two weeks from today. We place the matter on 19th April, 2017. To be listed on the “Supplementary Board”.”

4. It is in pursuance of this order that we heard both sides at great length. We have also heard Mr. Vaswani appearing in support of this writ petition today and before passing the order.

5. Mr. Vaswani submits that the statement of the complainant and read as a whole would not disclose commission of an offence, much less punishable under section 354 of the Indian Penal Code, 1860. Mr. Vaswani would submit that this is a story or a version of the complainant, which even if taken at its face value, discloses that the complainant and one of the petitioners fell in love. There was a promise exchanged of marriage. During this period and when both of them went out, in the privacy of either a garden or such other public place, the acts attributed to petitioner no. 1 but by consent of the complainant have been committed. They would not disclose commission of an offence punishable under section 354 of the Indian Penal Code, 1860. Once the boy and girl were in love at one time, both are adults and by consent indulged in some acts as complained, then, this is not a case of outraging the modesty of the complainant, which is the essential ingredient of the offence punishable under section 354 of the Indian Penal Code, 1860.

6. As far as the other offence and punishable under section 420 of the Indian Penal Code, 1860 is concerned, there is no

cheating. There as well, the essential ingredients and element is hopelessly lacking. When two consenting adults disclose their relationship to their parents and there is a certain decision taken about their marriage, then, merely because at a later stage that assurance or promise allegedly given was not fulfilled, the amounts incurred as expenses and from the side of the girl can be recovered by appropriate proceedings. Surely, the ingredients of cheating and as necessitated in law are lacking. By itself, a broken promise of marriage cannot be said to be cheating.

7. Alternatively and without prejudice, it is submitted that all the acts are attributable to the boy and with whom the complainant had an affair. The parents could not have been roped in. Therefore, no case is made out for arraying respondent nos. 2, 3, 4 and 5 as accused.

8. Mr. Vaswani, in support of the above contentions, relies upon certain decisions of the Hon'ble Supreme Court of India. We set them out seriatim.

9. On the other hand, Mr. Pandey appearing for respondent no.1-original complainant and the learned APP both would submit that the offences alleged against the petitioners cannot be simplified and as suggested by Mr. Vaswani. The whole matter

cannot be approached so lightly and casually as is projected by the petitioners. The complaint is not just a complaint of physical touch, but, as pointed out, several acts, in which, the boy indulged of sending obscene and other messages to her from time to time. These messages have been sent from his mobile etc. and which would indicate that there was a clear intent to outrage her modesty. Thus, the allegations would have to be read and seen as a whole and in tune with the intention of the legislature. Even if it is assumed without admitting that this is a fallout of alleged breach of promise of marriage, yet, there is no licence to commit these acts. Therefore, all the essential ingredients of the offences are made out. As far as cheating is concerned, there as well, the FIR and other materials would disclose that in the meetings from December, 2015 certain arrangements were finalised, including fixation of the time and date of the wedding. There were expenses incurred for the engagement ceremony. These expenses were incurred on the footing that the wedding itself is finalised and the engagement would be held. It is in these circumstances but just not relying on the monetary expenses incurred that the offence of cheating is stated to have been committed. The meetings also refer to the presence of the other petitioners. In these circumstances, Mr. Pandey would submit that all these acts cannot be viewed in isolation but ought to be

seen in the backdrop of the willingness of the boy's family to finalise the matter. It is premised on their assurance that from inception every act was performed. This court's power under both, Article 226 of the Constitution of India and section 482 of the Code of Criminal Code, 1973 are to be sparingly exercised. They are exceptional in nature. For all these reasons, it is submitted that the petition be dismissed.

10. The learned APP, on instructions, states that all the investigations are complete and the charge-sheet is also ready. At this stage, this court should not interfere for the petitioners have several remedies available to them in law. They cannot presume that each one of them would be arrayed as accused and tried by the criminal court. Hence, all the more and supporting the complainant's argument, it is submitted that the petition be dismissed.

11. The principles enabling interference under Article 226 of the Constitution of India as also section 482 of the Code of Criminal Procedure, 1973 are too well settled to require any reiteration. Suffice it to say that certain tests have been laid down in the case of *State of Haryana and Ors. vs. Bhajanlal and Ors.*¹. The broad tests indicated and relied upon in this case are

¹ 1992 Supp (1) SCC 335

where the un-controverted allegations made in the FIR and the complaint and evidence collected do not disclose commission of an offence and make out a case against the accused, then, this court's powers as above ought to be exercised.

12. Eventually, the Hon'ble Supreme Court says, before the said tests are enumerated, that the power under section 482 of the Code of Criminal Procedure, 1973 can be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Thus, the facts and circumstances of each case ought to govern the exercise of the power.

13. In the first decision relied upon by Mr. Vaswani, namely, *Sujay Tushar Saha and Ors. vs. State of Maharashtra and Ors.*², decided on 22nd July, 2016, the Hon'ble Supreme Court found that the only allegation made against the appellants was that the complainant was compelled to incur expenses to the tune of Rs.1,55,000/- preceding the engagement ceremony between the complainant's daughter and appellant no. 1. Having enjoyed the hospitality of the complainant, the appellants had intentionally and deliberately broken the ensuing matrimonial alliance. Unfortunately, despite notices issued by the Hon'ble Supreme

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Court to the original complainant, none was present before it to controvert this version of the appellants. That is how in the facts and circumstances peculiar to that case and on the reasoning in para 33, finding that the essential ingredients of the offence of cheating are hopelessly lacking that the criminal prosecution was quashed. In the case of *A. P. Foam Pvt. Ltd. vs. Subhash Chandra and Ors.*³, the Hon'ble Supreme Court remitted the matter back to the High Court for fresh consideration simply because the High Court order was cryptic and did not set out full facts of the case. This is not a decision which can be relied upon for the propositions canvassed before us.

14. In the case of *Varinder Singh vs. State of Punjab and Anr.*⁴, the facts were that the appellant before the Hon'ble Supreme Court had gone as visitor to the Central Jail. On being searched, a mobile phone was recovered from his turban and a charger was recovered from his shoes. The FIR was registered alleging offences punishable under sections 42 and 45(12) of the Prisons Act, 1894. The charge was framed. It is in these circumstances, the appellant approached the High Court of Punjab and Haryana praying that the FIR be quashed. The High Court dismissed the petition by a final order, but by observing that the accused is at

³ (2002) 10 SCC 504

⁴ (2014) 3 SCC 151

liberty to take all pleas during the trial. It is in these circumstances and the nature of the offences that the Hon'ble Supreme Court held that even if the charge is framed, the power of the High Court under section 482 of the Code of Criminal Procedure, 1973 (inherent) is saved and it can be utilised to quash a criminal prosecution, particularly after the tests laid down in the case of *Bhajanlal* (supra) are satisfied. The High Court found that this is a clear case which falls in category no. 1 enumerated in the case of *Bhajanlal* (supra). All the allegations in the FIR even if taken at their face value, do not constitute an offence simply because on the date of the offence, mobile phone was not listed as one of the prohibited articles under the Punjab Prison Manual. The appellant was not a prisoner on the date of the offence. Therefore, he could not have committed a "prison offence" as defined under section 45 of the Act. That is how the powers under section 482 of the Code of Criminal Procedure, 1973 ought to have been exercised. The appeal of the appellant, therefore, was allowed in the peculiar facts and circumstances.

15. As far as the present case is concerned, we have perused the complaint, particularly the statement of respondent no. 1. That appears at page 22 of the paper book. She says that the first petitioner was her college friend. In October, 2015, on Face Book,

a request was sent by petitioner no. 1. Since petitioner no. 1 was in the college, the complainant recognised him. Thereafter, the request made on Face Book was accepted. Then, the exchange on the Face Book continued. The mobile number was also given by petitioner no. 1, after which, there was some conversation on the mobile. After the conversation, the friendship developed into a relationship. Thus, the complainant being an adult, she was approached by petitioner no. 1. The complainant states that she told him that she is elder to him in age and obese. Therefore, there is no point in keeping the relationship alive as it will never fructify into a marriage. The petitioner no. 1 allegedly had no objection about her being elder in age. It is allegedly her nature and her style of living, which impressed him. That is how the complainant informed her parents about the relationship. The boy continued to visit her at her residential place. She has specifically alleged that the messages sent by him on Whatsapp were indecent. She was shamed by such messages, but since a promise of marriage was given by him, she did not complain about the messages. Even during their visits to some parks and sites in Mumbai, physical contact in a open place embarrassed her and that is how she has alleged that her modesty was outraged. Thereafter, the further events have been narrated about meetings of the parents, the relationship being carried forward to the stage

of marriage and expenses incurred for purchasing jewellery and other items.

16. We have found from the statement, which is recorded by the concerned police station on 18th April, 2016 that there are amendments made to the Indian Penal Code, 1860 by Act 13 of 2013 with retrospective effect from 3rd February, 2013. Now the assault or criminal force to a woman with intent to outrage her modesty is one of the offences and several acts, namely, sexual harassment and punishment for sexual harassment (section 354A), assault or use of criminal force to woman with intent to disrobe (section 354B), voyeurism (section 354C) and stalking (section 354D), have been added. Several acts may outrage the modesty of a woman. Today, one cannot presume and when the investigations are underway that the statement as made and read as a whole does not disclose commission of any offence.

17. This is not a case where we can go into the merits of the charges or the allegations in further details. There would be a fullfledged trial only after the preliminary stages envisaged by law are fulfilled. Today even the charge-sheet has not been filed in the competent criminal court. We cannot presume that the police would, as complained, rope in all the petitioners. Suffice it to say that we are not in agreement with Mr. Vaswani's submission that this FIR and the statement of the complainant

read as a whole discloses commission of no offence. Mr. Vaswani's arguments are premised on the fact that there was no physical relation. The physical contact during the course of an affair between two consenting adults, according to him, does not spell out the offence. From the sections/provisions that we have perused, we do not see any such requirement being stipulated therein. Secondly, on facts, this is not the only allegation made. The first respondent has specifically referred to all the conversations on Face Book and mobile messages, which, *prima facie*, would reveal that there was an attempt to outrage the modesty once the consent was obtained in the garb of a permanent relationship. In these circumstances, given the increasing tendency of such crimes inflicted on women, we do not think that we should interfere in writ jurisdiction. We agree with Mr. Pandey that the allegations cannot be viewed in a isolated manner. As far as the offence of cheating is concerned, even the statement of the complainant refers to meetings over a passage of time. Involvement of all accused with specific names is also set out in the complaint. There was an assurance and promise since inception, which led to all the expenses being incurred, including booking of the venue, purchases for the girl such as jewellery etc. It is in these circumstances that we do not think that we should prevent any inquiry or further details being obtained by a process

known to law. Parties like the petitioners may allege highhandedness etc. by the police, but they ought to repose faith in the competent criminal court. Suffice it to further say that we cannot presume that the police would rope in all the persons as accused. Even if the charge-sheet is filed, it is not as if the petitioner are without a legal remedy. After the petitioners have been named as accused, it is not as if the court is bound to frame a charge against all. Even at that stage, the petitioners can request the trial court to drop the charges as far as the parents are concerned. If this is an apprehension and because certain ladies are also named as accused, then, we have no doubt in our mind that the trial court is not powerless to grant appropriate relief. All the more, therefore, with the above clarification and finding that this is not a case falling within any of the parameters and ingredients laid down in the case of *Bhajanlal* (supra), we proceed to dismiss the writ petition and vacate the ad-interim order forthwith. Our order shall not cause any prejudice to either parties as we clarify that the trial court should not be influenced by any observations in this order.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)