

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

ANTICIPATORY BAIL APPLICATION NO. 2471 OF 2019

Suresh Mohanlal Jain	...Applicant
Versus	
The State Of Maharashtra	...Respondent

**WITH
INTERIM APPLICATION NO.217 OF 2020
IN
ANTICIPATORY BAIL APPLICATION NO. 2471 OF 2019**

Miss. Anita Ghanashyam Shrivastav	Intervenor/ First Informant
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IN THE MATTER BETWEEN :-

Suresh Mohanlal Jain	...Applicant
Versus	
The State Of Maharashtra	...Respondent

Mr. Anish A. Desai a/w G. Lobo, C. Sawant, Advocate for the Applicant in ABA.

Ms. Prajakta N. Deshmukh, Advocate for the applicant in Interim Application.

Ms. Pallavi Dabholkar, APP for the Respondent – State.

CORAM	:	N. J. JAMADAR, J.
RESERVED ON	:	4 th DECEMBER, 2021.
PRONOUNCED ON	:	21 st DECEMBER, 2021.

PC :

1. The applicant, who has been arraigned for the offences punishable under Sections 376 and 420 of the Indian Penal Code, 1860 ("**the Penal Code**") in C.R. No.96 of 2019

registered with Malbar Hill Police Station, Mumbai, has preferred this application for pre-arrest bail.

2. The indictment against the applicant runs as under :-

The prosecutrix and the applicant studied together at Dr. Babasaheb Ambedkar Municipal School, Worli, Mumbai. In the year - 2006, by a chance call on the cellphone of the prosecutrix, the friendship revived. As the prosecutrix and the applicant frequently met, the friendship blossomed into a romantic relationship. They met at Priyadarshini Park Garden and the sea shore. The prosecutrix alleged that, for the first time in the year 2007, the applicant had physical relations with her while she was 19 year old, on the promise of marriage. Thereafter, the applicant had physical relations with her on multiple occasions, on the promise of marriage.

In the year - 2009, the prosecutrix started independent beautician's business. She earned sumptuous profit. When the prosecutrix inquired with the applicant about marriage, the applicant represented to her that he wished to start a new business and demanded a sum of Rs.45.00 Lakhs for the same and promised to marry her after the commencement of the said business. The prosecutrix claimed to have arranged the said

amount and paid it to the applicant.

The prosecutrix further alleged that, she and the applicant visited Surat, Mount Abu and Delhi and the applicant had forcible physical relations with her. The prosecutrix further claimed that the applicant made her to part with a total sum of Rs.1,12,00,000/- by making her to believe that he would solemnize marriage with her. She was made to avail loan of Rs.47 Lakhs from Bank of India and pay the amount in cash to the applicant.

In the month of June - 2017, the applicant represented to the prosecutrix that he was leaving for Delhi to run a business thereat and had decided not to keep in touch with anybody for one year and promised to marry the prosecutrix after the said period of one year and settle at Delhi with her and that he would also repay the loan which he had taken from the prosecutrix, till then.

In the month of July - 2018, when the officers of the Bank visited the prosecutrix's house to pursue the recovery of the loan amount, the prosecutrix contacted sister of the applicant, who apprised the prosecutrix that in the month of July-2017 itself, the applicant had solemnized marriage with another lady and was residing with the family at Delhi. Realizing the deception practiced by the applicant, the prosecutrix

approached Malbar Hill Police Station, Mumbai and lodged the report leading to registration of C.R. No.59 of 2019.

3. The applicant preferred application for anticipatory bail before the Sessions Court, Greater Bombay. By an order dated 18th November, 2019, the learned Additional Sessions Judge was persuaded to reject the application holding that the material on record, prima facie, indicated that the applicant, under the false pretext of marriage, sexually harassed the prosecutrix and also grabbed huge amount to the tune of Rs.1,12,00,000/- and, therefore, for recovery of the said amount and further investigation, custodial interrogation of the applicant was warranted.

4. By an order dated 15th November, 2019, this Court was persuaded to grant interim relief to the applicant and direct that he be released on bail, in the event of arrest, subject to certain conditions, opining that, prima facie, the FIR shows that the relationship between the applicant and the prosecutrix was consensual.

5. The prosecution has resisted the application on the ground that, after the applicant was granted interim relief, on 29th November, 2019 two sisters of the applicant accosted and intimidated the prosecutrix, in respect of which N.C. report was

lodged with N. M. Joshi Marg Police Station and even the applicant threatened and sexually harassed the applicant on 22nd December, 2020, in respect of which C.R. No.397 of 2020 came to be registered against the applicant at N.M.Joshi Marg Police Station for the offences punishable under Sections 354-A, and 506 of the Penal Code in which, after completion of investigation, charge-sheet has been lodged against the applicant.

6. It was further contended that to facilitate further investigation, custodial interrogation of the applicant is warranted. There is a strong possibility of tampering with evidence and threatening the prosecutrix, in the event the interim order is confirmed.

7. The prosecutrix has also taken out an interim application being Interim Application No.217 of 2020 for rejection of the prayer of pre-arrest bail.

8. I have heard Mr. Anish Desai, the learned counsel for the applicant and Ms. Pallavi Dabholkar, the learned APP for the state and Ms. Prajakta N. Deshmukh, the learned counsel for the prosecutrix at length. With the assistance of the learned counsels for the parties, I have also perused the material on record, especially the First Information Report, the copies of the

whats-app chats between the applicant and the prosecutrix, the N.C. report lodged by the prosecutrix against the sisters of the applicant and the FIR lodged by the prosecutrix against the applicant in C.R. No.397 of 2020 at N.M.Joshi Marg Police Station for the offences under Section 354-A, and 506 of the Penal Code.

9. Mr. Desai, the learned counsel for the applicant strenuously urged that, in the backdrop of the long standing relationship between the applicant and the prosecutrix, as is evident from the allegations in the FIR, no other inference than that of consensual relationship is plausible. Emphasis was laid on the fact that the relationship allegedly commenced in the year - 2007 and lasted till the year 2017. In the light of such long standing relationship, the allegation that the applicant had forcible physical relations with the prosecutrix on the false promise of marriage is simply unsustainable, urged Mr. Desai. As regards the allegations of duping the prosecutrix to the tune of Rs.1,12,00,000/-, Mr. Desai would urge that the allegations are not borne out by the record. It was further submitted that the real trigger for lodging the FIR, according to the first informant, is the discovery of the fact that the applicant allegedly solemnized marriage with another lady and was

staying at Delhi. In this view of the matter, the custodial interrogation of the applicant is not at all warranted, submitted Mr. Desai.

10. In opposition to this, the learned APP would urge that the allegations in the FIR are required to be read in their entirety, and if so construed, it becomes evident that the applicant not only sexually exploited the prosecutrix but also financially robbed her by taking undue advantage of the vulnerable position she found herself in, dishonestly. From this stand point, according to learned APP, the delay is of little significance. In any event, according to learned APP, the offence of Section 420 of the Penal Code is ex-facie made out and the custodial interrogation of the applicant is indispensable for recovery of the huge amount, which the prosecutrix was deceived to part with.

11. The learned counsel for the prosecutrix would urge that the conduct of the applicant, after the grant of interim protection by this Court, deserves to be taken into account. The applicant had indulged in sexual harassment of the prosecutrix and even threatened her out of her life. For this singular reason, the interim relief deserves to be vacated and the application rejected, urged the learned counsel for the

prosecutrix.

12. I have given a careful consideration to the aforesaid submissions. The allegations against the applicant are required to be considered in the light of the fact that the applicant and the prosecutrix, admittedly, shared relationship for almost ten years. The material on record indicates that initial friendship blossomed into romantic relationship, which further developed into business relationship. The applicant allegedly first exploited the prosecutrix in the year - 2007. There were physical relations between the applicant and prosecutrix till the year - 2017. The question which thus crops up for consideration as to whether the consent of the prosecutrix for the physical relations was vitiated on account of the misconception of facts, as the prosecutrix believed the promise of marriage allegedly given by the applicant.

13. The aforesaid question is required to be determined in the light of the position in life of the parties, the time lag and the attendant circumstances. The Court cannot lose sight of the distinction between the offence of rape and consensual sex between two adults. In the circumstances of the case, the long standing relationship between the parties and their situation in life renders it rather difficult to believe that the prosecutrix

laboured under the misconception of facts for almost 10 years, and, thus, the consent was vitiated.

14. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of **Dr. Dhruvaram Murlidhar Sonar vs. The State of Maharashtra and Ors.**¹ wherein the distinction between “rape” and “consensual sex” was expounded in the following words :-

“20] Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual

¹ AIR 2019 SUPREME COURT 327.

physical relationship between the parties would not constitute an offence under [Section 376 of the IPC.](#)

(emphasis supplied)

15. A useful reference can also be made to the judgment of the Supreme Court in the case of **Pramod Suryabhan Pawar vs. The State of Maharashtra and Anr.**² wherein, after reference to the previous pronouncements, the Supreme Court enunciated the legal position as regards the consent of woman for sexual act under misconception of fact as under

“ 18] To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to [Section 375](#) must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.”

(emphasis supplied)

16. If the facts of the instance case are considered through the prism of aforesaid pronouncements, prima facie, it

² AIR 2019 SUPREME COURT 4010.

would be difficult to draw an inference that the alleged false promise of marriage was of immediate relevance or bore a direct nexus to the prosecutrix's decision to engage in a sexual act.

17. Moreover, the question of consent under misconception of fact cannot be determined bereft of the proximity of allegations to the time of the occurrence. To put it in other words, misconception of fact to vitiate the consent ought to be proximate to the occurrence. The long standing relationship also bears upon the potency of allegations of sexual exploitation on a false promise of marriage. If a relationship continues for over 10 long years, it may be audacious to draw an inference that the consent was under a misconception of fact.

18. The aforesaid aspect of long standing relationship was adverted to by the Supreme Court in the case of **Maheshwar Tigga vs. The State of Jharkhand**³ wherein the Supreme Court laid emphasis on the element of proximity of time to the occurrence. The observations in para 14 are instructive and, thus, extracted below :

“ 14] Under [Section 90 IPC](#), a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to

3 AIR 2020 SUPREME COURT 4535.

the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her."

(emphasis supplied)

19. In the backdrop of the aforesaid exposition of law, reverting to the facts of the case, prima facie, I am of the view that the claim of the applicant that the relationship was consensual cannot be brushed aside lightly. Undoubtedly, the question as to whether the physical relations were consensual is a question of fact and is a matter for trial. However, on balance, I am of the considered view that the applicant has made out a prima facie case for grant of pre-arrest bail qua the allegations of rape.

20. As regards, the allegations of cheating, the learned APP and the learned counsel for the prosecutrix strenuously urged that there is material on record, in the form of whats-app chats between the applicant and prosecutrix, which indicates that the applicant had repeatedly demanded money from the

prosecutrix. Attention of the Court was also invited to the notice dated 30th November, 2017, addressed by Chief Manager, Bank of India, Mazgaon Branch, to the prosecutrix demanding repayment of the loan advanced to Anita Embroidery Enterprises. Cumulatively, according to learned APP and the learned counsel for the prosecutrix, these documents lend unflinching corroboration to the claim of the prosecutrix that she was made to part with huge amount on a false promise of marriage.

21. In contrast, it was submitted on behalf of the applicant that there is no material on record to indicate that the prosecutrix had advanced the amount and the applicant, in turn, acknowledged the same.

22. In the light of the relationship which the applicant and the prosecutrix shared, for 10 long years, the claim of the prosecutrix that she had advanced money to the applicant cannot be brushed aside for want of formal acknowledgment on the part of the applicant. However, the applicant claims to have advanced a huge sum of Rs.1,12,00,000/-. The quantum of amount advanced is essentially a matter for trial. On a proper construction, prima facie, even the notice dated 30th November,

2017 addressed by the Bank of India, seeking repayment of the amount, would indicate that the loan was advanced to the entity of the prosecutrix. It is indeed a matter of evidence as to whether the prosecutrix did, in turn, pay the loan amount so availed, to the applicant.

23. The submission on behalf of the prosecutrix that the whats-app chats lend support to the claim that the applicant had been pestering the prosecutrix to advance money, appears sustainable. To add to this, in the application itself, (ground "O"), the applicant conceded that the applicant had taken a friendly loan to the tune of Rs. 18 to 20 Lakhs from the prosecutrix and had every intention to repay the same.

24. When the learned counsel for the applicant was confronted with the said stand of the applicant, the learned counsel for the applicant, on instructions, made a statement that the applicant is ready to deposit the sum of Rs.18 Lakhs provided a time of 6 months was given to the applicant for the deposit of the said amount, in installments.

25. The situation which thus obtains is that, during the course of the relationship which the applicant and the prosecutrix shared, there were financial dealings. The question that wrenches to the fore is whether the applicant had

dishonest intention since the inception of the relationship. The applicant might not have been able to repay the amount as agreed. But the moot question is, was these an element of criminality ?

26. In the circumstances of the case, in my considered view, the answer, prima facie, seems to be in the negative. In any event, the custodial interrogation of the applicant does not seem warranted to facilitate investigation, qua the offence punishable under Section 420 as well.

27. So far as the aspect of the recovery of the amount, even if acceded to, a useful reference in this context can be made to the Constitution Bench judgment in the case of **Sushila Aggarwal and Ors. vs. State (NCT of Delhi) and Anr.**⁴ wherein “deemed custody” was held sufficient for the purpose of fulfilling the provisions of section 27 of the Evidence Act. Paragraph 92.8 of the said Judgment reads as under.

“92.8] The observations in Gurubaksh Singh Sibbia vs. State of Punjab regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of [Section 27](#), in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia (s) had observed that :

4 (2020) 5 Supreme Court Cases 1.

19. if and when the occasion arises, it may be possible for the prosecution to claim the benefit of section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. vs. Deoman Upadhyaya.”

(emphasis supplied)

28. Lastly, it must be noted that the allegations of threatening the prosecutrix levelled against the sister of the applicant and the sexual harassment and criminal intimidation levelled against the applicant are required to be appreciated in the context of the strained relationship between the parties. Nonetheless the concern of the prosecution, can be taken care of by imposing stringent conditions.

29. For the forgoing reasons, I am impelled to exercise the discretion in favour of the applicant. Resultantly, the interim order deserves to be confirmed, subject to the applicant depositing the amount of Rs.20 Lakhs in the Court of Session, Greater Bombay. Hence, the following order :-

ORDER

1. The application stands allowed.

2. The interim order passed by this Court on 15th November, 2019 stands confirmed, subject to the applicant depositing a sum of Rs. 20 Lakhs in the Court of Session, Grater Bombay, in four equal installments of Rs. 5 Lakhs each on or before 5th Day of each month, commencing from January - 2021.
3. The aforesaid deposit shall abide the order which may be eventually passed in the resultant prosecution by the jurisdictional Court.
4. In addition to the conditions imposed in the interim order dated 15th November, 2019, the applicant shall not either himself or through any other person contact the prosecutrix or any other person and/or shall not give threats or inducement to the prosecutrix or any other prosecution witness.
5. In the event the charge-sheet is filed, the applicant shall regularly attend the proceedings before the jurisdictional Court.
6. The applicant shall furnish his current address and contact numbers to the Investigating Officer.

7. The applicant shall surrender his passport if he holds, and if not, file an undertaking that he does not hold the passport, before the Court of Session and shall not leave the country without prior permission of the Court of Session.
8. In the event of default in complying with any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of the bail.
9. In view of the disposal of the application, interim application No. 217 of 2020 does not survive and accordingly stands disposed of.

(N. J. JAMADAR, J.)