

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.1111 OF 2022

Keshav Manikrao Panchal

Age : 28 years, Occu. Labour (carpenter)

R/o. Mirkhel, Tq & Dist. Parbhani

...Applicant

Versus

1. The State of Maharashtra
Through Tadkalas Police Station,
Dist. Parbhani.

2. XYZ
Age : 26 years, Occu. Household
R/o. Sadhunagar, Jawala Bazar,
Nahad, Tq. Aundha,
Dist. Hingoli

...Respondents

...

Mr. Mahesh Kalidas Bhosale, Advocate for the Applicant.

Mr. V.M. Kagne, APP for the Respondent-State.

Mr. Anand P. Bhandari, Advocate for Respondent No.2.

...

CORAM : S.G. MEHARE, J.

DATE: 27th SEPTEMBER, 2022

ORDER :-

1. Heard learned counsel for the applicant, learned APP for the State and learned counsel Mr. A.P. Bhandari for the complainant.

2. The FIR unequivocally reveals that the complainant and the applicant had a love affair even before the marriage of the complainant. The complainant married in the year 2013. The FIR reveals that her sister took her to her home on 25.10.2016 for the first Diwali festival after her marriage. There the applicant and victim met again. The applicant expressed his love for her and said he could not

live without her. He asked her to dissolve her marriage. He was ready to marry her. During her stay, the applicant was consistently promising her to marry. On 29.10.2016, the applicant called the complainant at his home and told her they would marry soon. He did sex with her though she was opposing him. The next day, again, they did sex. The applicant was going to her matrimonial home in the absence of her husband and keeping physical relations with her. In 2020, her husband learnt about their relationship; hence, he left her and went to another town. In 2022, the applicant took her to Aurangabad under the promise to marry her; however, he did not marry her; hence, she returned to her village. The applicant again went to her village and asked her to come with him, and she again went to Aurangabad. It has also been alleged against the applicant that he took her to one hotel and did sex with her. She got pregnant from the applicant; therefore, she asked him to marry her, but he avoided her. Hence, she lodged the report.

3. Learned counsel for the applicant has vehemently argued that the applicant never breached the promise to marry her. However, she got married in the year 2013. The applicant got married on 09.03.2021. The complainant knew about his marriage. He never did forceful sex with her. It was consensual sex. The complainant also had a relationship with her husband. False allegations have been levelled against the applicant that her pregnancy was from him. He

was paying her money; however, after his marriage, he stopped paying her money; therefore, she became annoyed and lodged the false report. On the day of lodging the report, she was not pregnant. Before it, she was aborted. The applicant never made the false promise. The complainant was married and was in force. The applicant never applied force, nor she resisted the sex. Therefore, it cannot be said that the sex was without her consent. He has referred to certain documents placed on record and argued that he never posed himself as her husband. False allegations have been levelled against him. She was annoyed by his marriage. In the circumstances, he may be granted anticipatory bail.

4. Learned APP has strongly opposed the application contending that the material collected by the investigating officer indicates that the applicant was posing him as her husband. She was aborted in the year 2021 and lastly in July 2022. In the abortion paper, the complainant is named as the wife of the applicant. The FIR is very specific that every time he had sex with her under the promise to marry her, it is not consensual sex, and she did not consent. The complainant had been aborted twice. She has no relationship with her husband as he left her long back in the year 2020. The offence is serious. Hence, he deserves no anticipatory bail.

5. Learned counsel Shri Bhandari appearing for the complainant, has vehemently argued that in the year 2022, she

aborted under compulsion. In the abortion paper, the applicant has been shown as her husband. All the while, he was with the complainant in abortion. He was regularly doing sex with her under the promise to marry. Due to the forceful relationship maintained by the applicant, she has spoiled her marital life. She has a child of five years old. The account statement shows that there were money transactions that corroborate the allegations of sex under the promise to marry. Whether the complainant was pregnant from him, his medical examination is most essential. Therefore, his custodial interrogation is required. At no point in time, the applicant denied the relationship with her nor objected to writing his name as her husband. Considering the facts of the case, it cannot be said that the victim/complainant had a free consent. She maintained the relationship with him since he promised her to marry him. One fine morning, he got married and breached his promise to marry there. The offence is serious and grave; therefore, the application deserves to be dismissed.

6. In reply, learned counsel for the applicant would submit that there were no proposals for four years of their relationship. It was the applicant who was every time proposing to her to marry, but she could not. Even prior to her marriage, the applicant was ready to marry her, but the reason best known to her is why she married another person. That time, she never resisted her marriage. She was

willingly keeping the relationship with the applicant. The applicant was consistently paying her money. She had knowledge of his marriage. He got married on 09.03.2021. False allegations have been levelled in the FIR that on the date of the FIR, she was pregnant and her statement is falsified by the documents filed by herself. He relied on various case laws, those will be discussed in the later part of the order. The bone contention of the applicant's counsel is that since the applicant stopped paying her money, she changed and took the aggressive step to lodge the report. She never objected to his marriage and relationship with him. Therefore, there is no force in the objection raised by her now.

7. As discussed above, it is not disputed that they had been in a relationship before and after her marriage. It is also not in dispute that till 09.03.2021, the applicant was unmarried. It is also not in dispute that her marriage is not dissolved, and she has a five year old child. The question has been raised is about her consent or whether the relationship she maintained is consensual or under the promise to marry. Explanation 2 of Section 375 of the Indian Penal Code has defined the term 'consent' which reads thus :

“Explanation -2 – Consent means an unequivocal voluntary agreement when the woman, by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

8. The words in the above definitions are explicit and relate to the unequivocal voluntary agreement, gestures or any form of verbal or non-verbal communication. However, physical resistance to the act of penetration has been excluded from the definition of the term ‘consent’ for sexual intercourse. Whether a woman had a consent for sex or not has to be gathered from the conduct of both parties and their inter se relationship. Herein the case, none of the parties has denied their relationship prior to and after the marriage of the victim as well as the applicant. Both of them were maintaining their relationship. However, the complainant has a complaint that the applicant obtained her consent under the promise to marry. The material fact that on 09.03.2021, the applicant got married is most relevant to determine whether she had consent or not. It is not the case that she was unaware of his marriage; however, the documents placed on record that as the bank statement shows that the applicant was continuously paying her money. After the marriage, he did not pay her money.

9. Considering the case of the prosecution that in the year 2021 also, she was aborted, the applicant was married at that time. It was the correct time for her to resist his marriage as he was going to breach the promise to marry her, but she kept silent. That apart, the

papers submitted by her show that lastly, she was aborted on 14.07.2022. At that time, she was seven weeks and five days pregnant. Her name was shown as the wife of the applicant. Soon after the abortion on 14.07.2022, something happened there, and on 20.07.2022, making allegations that she was pregnant from the applicant, she lodged the report against the applicant. It appears that the applicant and the prosecutrix were in a relationship for about nine years. It was the women's gesture. Society must have believed that they were living as husband and wife.

10. Learned counsel for the applicant relying on the case of Gulab s/o Laxman Meshram Vs. State of Maharashtra, 2022 ALL MR (Cri) 1137 has argued that there is no iota of evidence to show that promise made by the applicant was false or complainant engaged in sexual relations on the basis of this promise. There is also no evidence against the applicant that he promised to marry the complainant, it was done in bad faith and with an intention to deceive her. The record shows that the applicant has financially helped the complainant for a long period. She never resisted the applicant for marriage is the best circumstance to believe that the complainant knew that the applicant was not marrying her. Her silence speaks volumes. In the case of Gulab Laxman Meshram (cited supra), the Bombay High Court has observed that the applicant's failure to fulfil

his promise to marry cannot be construed to mean that promise itself was false.

11. The Hon'ble Supreme Court in the case of Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra and Ors, 2019 ALL MR (Cri) 771 (S.C.) has discussed the term 'consent'. It has been observed in the said case that Section 90 of the Indian Penal Code describes what is not 'consent'. Consent may be express or implied, coerced or misguided, obtained unwillingly or through deceit. If the consent is given by the complainant under the misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances. In the said case, it is also observed that there is a distinction between a mere breach of promise and not fulfilling a false promise. Where the prosecutrix gives consent out of her love and passion or where the accused fails to marry the prosecutrix due to some unforeseen reasons, consensual sex in such cases would not attract an offence under Section 376 of the Indian Penal Code. Herein the case, the factors are a little different, but their relationship was admittedly for about nine years. They had a relationship till the complainant got pregnant from him. The

complainant was maintaining the relationship with the applicant even after her and his marriage. She never resisted. It is beyond the imagination to accept the theory of promise to marry in peculiar circumstances that the complainant was married, and one could understand that the promise has been breached before the marriage, and one of the parties has turned from the promise. There is absolutely no evidence to believe that the applicant had sexual intercourse with the prosecutrix without her consent. The complainant was well aware of her marriage. The FIR reveals that the applicant never contacted her for three years after her marriage. She was living with her husband. The relationship was restored in 2016 and then continued. The complainant was well aware that she was married, and the applicant could not marry her.

12. The case of Sachin s/o Shantaram Potude Vs. The State of Maharashtra and Anr, 2018 ALL MR (Cri) 3816, relied upon by the learned counsel for the applicant in that case also, both the applicant and the prosecution were aware of the subsistence of their previous marriages. It has been observed that it was not expected of her to be in a physical relationship when she herself was a married woman. She had occasion to stop the relationship after her marriage. In the circumstance, the applicant had promised to marry her does not inspire confidence.

13. Considering the facts of the case, the law discussed above, the arguments of the learned APP and learned counsel Mr. Bhandari that it was not a free consent cannot be accepted. It is not in dispute that she was aborted twice. At the cost of repetition, it must be stated here that she had an opportunity to strongly oppose the marriage of the applicant, but the fact remains that she continued her relationship with the applicant even after his marriage. Considering the facts, the Court believes that the allegations of sex under the promise to marry appear incorrect or at least not acceptable at this juncture. The discussion made above laid this Court to conclude that the applicant has a good case for anticipatory bail. Hence, the following order :

ORDER

- I) Application is allowed.
- II) Interim protection granted to the applicant by order dated 24.08.2022 is confirmed on the same terms and conditions with an additional condition that he shall not contact the victim in any mode or manner till the conclusion of the trial.
- III) Needless to state that the observations are restricted to bail applications.

(S.G. MEHARE, J.)