

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION [APL] NO.495 OF 2022

Applicant : Devendra s/o Vikas Pawar,
Aged 29 yrs., Occu : Agriculturist,
R/o Chandsar, Tahsil Dharangaon,
District Jalgaon.

– Versus –

Non-Applicant : 1. State of Maharashtra,
through Police Station Officer,
Jaripatka, Nagpur.
2. XYZ, Crime No.840/2021,
P.S. Jaripatka, Nagpur.

Shri B.D. Sachdev, Advocate for the Applicant.
Shri S.S. Doifode, A.PP. for Non-Applicant No.1.
Shri C.F. Bhagwani, Advocate for Non-Applicant No.2.

CORAM : **SUNIL B. SHUKRE AND M.W. CHANDWANI, JJ.**
RESERVED ON : **23rd NOVEMBER, 2022.**
PRONOUNCED ON : **22nd DECEMBER, 2022.**

J U D G M E N T : (Per M.W. Chandwani, J.)

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

02] By this proceeding, the applicant invokes inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure

(hereinafter referred to as “Cr.P.C.” for short) praying to quash and set aside the criminal proceedings i.e. Special Case No.543/2022 for the offence punishable under Sections 376(1)(2)(f)(n) and 506 of the Indian Penal Code filed pursuant to First Information Report No.840/2021 registered at Police Station Jaripatka, Nagpur.

03] The facts germane to dispose of the application are as under :

Non-applicant No.2, who is a mother of two children aged about 16 and 14 years old, was residing separately from her husband. She came in contact with the applicant through social media. They developed friendship with each other. The applicant invited non-applicant No.2 to Jalgaon. On 30/09/2017, the applicant received her at Jalgaon Railway Station and took her at his friend's house. They had dinner there. After talking for some time, the applicant tried to have intercourse with non-applicant No.2, but she refused him. Anyhow, the applicant established physical relations with non-applicant No.2. When, non-applicant No.2 told to the applicant that she will lodge a complaint, the applicant promised to marry with her. Thereafter, many times consensual physical relations were established either at Nagpur or at Jalgaon. In the month of February, 2021. Non-applicant No.2 came to know that she is pregnant. At the instance of the applicant, she aborted foetus using pills. On

09/12/2021, when non-applicant No.2 went to the house of applicant, the father of the applicant did not allow her to enter in the house. Thereafter, she was threatened by two unknown persons not to lodge the complaint against the applicant. Ultimately, on 18/12/2021, she lodged complaint at Jaripatka Police Station, therefore, the aforesaid offences came to be registered against the applicant.

04] It is contended by Shri B.D. Sachdev, learned Counsel for the applicant that there is no offence is made out against the applicant, as it is the case of consensual sex. Non-applicant No.2 is a married woman and her first marriage is already in subsistence. Therefore, the question of promise of marriage does not arise. According to him, registration of F.I.R. is an abuse of process of law and the same is liable to be quashed. He submits that during pendency of these proceedings, charge-sheet came to be filed. The learned Counsel for the applicant submitted that the charge-sheet filed in pursuant to said F.I.R. is also required to be quashed by relying on the decisions of the Supreme Court in the cases of **State of Haryana and others vs. Bhajan Lal and others – 1992 Supp (1) SCC 335**, and **Pramod Suryabhan Pawar vs. State of Maharashtra and another – (2019) 9 SCC 608**.

05] *Per contra*, the learned A.P.P. Shri S.S. Doifode appearing for non-applicant No.1 State, as well as learned Counsel Shri C.F. Bhagwani appearing on behalf of non-applicant No.2 opposed to the contention of the learned Counsel for the applicant. According to them, the F.I.R shows that the consent was taken on false promise of marriage. The consent based on “misconception of fact” amounts to absence of “consent” under Section 375 of I.P.C. and therefore, the sexual acts committed by the applicant with non-applicant No.2 are amounting to rape. To substantiate his submission, the learned Counsel for non-applicant No.2 has placed reliance on the decisions rendered by the Supreme Court in the cases of Anurag Soni vs. State of Chhattisgarh – 2019 AIR (SC) 1857 and Dhruvaram Murlidhar Sonar vs. The State of Maharashtra and Ors. - (2019) 18 SCC 191.

06] We have given our anxious consideration to the rival submissions made by the learned Counsel for the respective parties and the circumstances of the case. The Supreme Court in the case of Pramod Pawar (supra) dealt with the aspect of consensual sexual relation and breach of promise to marry, and in paragraph 18 held as:

“18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect of 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”

07] Recently, in the judgment in a case of **Mandar Deepak Pawar vs. The State of Maharashtra and another** - (2022 LiveLaw (SC) 649), while considering the consensual physical relationship on an assurance of marriage, the Supreme Court relied on the case of **Pramod Pawar** (*supra*) and has held that –

“The parties chose to have physical relationship without marriage for a considerable period of time. For some reason, the parties fell apart. It can happen both before or after marriage. Thereafter also three years passed when respondent No.2 decided to register a FIR.

The facts are so glaring as set out aforesaid by us that we have no hesitation in quashing the FIR dated 16/12/2016 and bringing the proceedings to a close. Permitting further proceedings under the FIR would amount to harassment to the appellant through the

criminal process itself.

*We are fortified to adopt this course of action by the judicial view in (2019) 9 SCC 608 titled “**Pramod Suryabhan Pawar vs. State of Maharashtra & Anr.**” where in the factual scenario where complainant was aware that there existed obstacles in marrying the accused and still continued to engage in sexual relations, the Supreme Court quashed the FIR.”*

08] In view of the above settled law, let us turn to the facts of the present case. F.I.R. reveals that non-applicant No.2 is a married woman and having two children of 16 and 14 years old. Non-applicant No.2, a married woman all the way travelled alone from Nagpur to Jalgaon to meet the applicant in the evening and to stay overnight along with the applicant in isolated house and thereafter engaging herself in the sexual acts with the applicant. Non-applicant No.2 was involved in an active and reasoned deliberation towards the sexual act. Despite subsistence of earlier marriage, non-applicant No.2 thereafter on many occasions established sexual relations consensually with the applicant for more than three years. Though, non-applicant no.2 has branded initial sexual act as forceful act on behalf of the applicant, for aforesaid reasons, it does not stand to reason and is no less than an improbability. All these circumstances show the aforesaid initial acts of sexual

intercourse were consensual and with the consent of non-applicant no. 2.

09] This takes us to the issue of consent allegedly given by non-applicant no. 2 under the misconception of fact arising out of promise to marry, on which prosecution relies heavily. To appreciate arguments of respective counsel, it will be appropriate to refer to Section 375 of the Indian Penal Code, which reads thus:

“375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

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.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Consent is defined under Section 90 of the Indian Penal Code, which is reproduced as under :-

“90. Consent known to be given under fear or misconception - *A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or*

Consent of insane person – *if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he given his consent; or*

Consent of child – *unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”*

10] Thus, from aforesaid legal position, it is clear that even if sexual

acts are done with a consent of woman and the consent has been given under misconception of the fact, the consent will be vitiated and the sexual acts would amount to rape.

11] Indisputably, the marriage of non-applicant no.2 is still in subsistence. If that is so, the question of making the promise of marriage by the applicant does not arise. Further, perusal of F.I.R. shows that the alleged promise of marriage was not given before committing of the sexual acts by the applicant, it is stated to have been given by the applicant after physical relations were established. Thus, the alleged promise of marriage was not having direct nexus to non-applicant No.2's decision to engage in the initial sexual intercourse with the applicant. In view of this, the consent was not vitiated by a "misconception of fact" as has been held in case of **Pramod Pawar** (*supra*). That apart, it seems that from 30/09/2017 onwards, there were various instances of sexual intercourse between the applicant and non-applicant No.2 without any fuss. This continued for a considerable time and almost after more than four years, non-applicant No.2 decided to register F.I.R. Non-applicant no.2 is a married woman and her marriage is still in subsistence. Non-applicant no.2 was aware that there exists obstacle in marrying with the applicant. Having earlier marriage in subsistence and also

having tanagers children, still she continued to engage herself in sexual relations. All these factums lead to a conclusion that the alleged story of promise of marriage is inherently improbable.

12] The common thread running from the cases of **Dhruvaram Sonar** (*supra*) and **Anurag Soni** (*supra*) relied by non-applicant No.2 is that, if the accused makes false promise with sole intention to seduce the prosecutrix to indulge in sexual acts and only to satisfy his lust, such an act would amount to rape. In the present case, there is no material on record that the alleged promise was made by the applicant and non-applicant with sole intention to seduce the prosecution to indulge the prosecutrix in sexual acts, rather the F.I.R. itself goes to show that the alleged promise was made after the initial sexual intercourse took place. Therefore, these cases will not support the case of prosecution, rather, these cases support the contention of the applicant.

13] In the case of **Bhajan Lal** (*supra*), the Apex Court, in paragraph 102 of the judgment gave categories of cases by way of illustration, wherein power under Article 226 or the inherent powers of given under Section 482 of the Cr.P.C. could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, which read thus :

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding

against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

14] The case of the applicant is covered in guideline Nos.(1) and (5) mentioned in paragraph 102 in the judgment of **Bhajan Lal** (*supra*). In view thereof, we find that registration of F.I.R. in the present case is abuse of criminal process. The application, therefore, deserves to be allowed.

15] Charge-sheet filed against the applicant in Special Case No.543/2022 pursuant to F.I.R. No. 840/2021 registered for the offences punishable under Sections 376(1), 376(2)(f)(n) and 506 of the Indian Penal Code read with Section 3(1)(w), 3(1)(w)(2), 3(2)(va) and 3(2)(5) of the

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is quashed and set aside.

16] Rule is made absolute in the above terms with no order as to costs.

(M.W. CHANDWANI, J.)

(SUNIL B. SHUKRE, J.)

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