

THE HON'BLE SMT. JUSTICE LALITHA KANNEGANTI

CRIMINAL PETITION NO.602 OF 2022

ORDER:-

This petition is filed under Section 438 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") seeking pre-arrest bail to the petitioners/A.1 to A.4 in the event of their arrest in connection with Crime No.210 of 2021 of Kothagudem II Town Police Station, Bhadradi Kothagudem District, registered for the offences punishable under Sections 376(2)(n), 420 and 417 read with 109 of IPC and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

2. A report was lodged by the *de facto* complainant stating that her marriage was performed in the year 2011 and later in 2014 she got divorced. In 2019, she met A.1 in Saikatakam Honda Show Room and he informed that he loved her and marry her, by believing his words she is chatting with him. In the month of June 2019, when she alone, A.1 came to her house and said that if we met with each other, the family members will agree for marriage and forcibly enjoyed her. Later, she came to know that A.1 was married with some other lady, she asked A.1 and his family members, for that the accused persons agreed and promised her that they will perform the marriage. In the month June and July 2021, A.1 enjoyed with her many times. Later, A.1 informed her that his family members are not agreeable for their marriage. Basing on the report of the *de facto* complainant, the present crime is registered.

3. Heard Mr.D.B.Srinivasa Rao, learned counsel for the petitioners, and learned Assistant Public Prosecutor for the respondent-State.

4. Learned counsel for the petitioners submits that even as per the complaint, it is consensual relationship between A.1 and the *de facto* complainant. As such, Section 376(2)(n) or 417 or 420 of IPC have no application. Hence, it cannot be said that under mistake of fact, the *de facto* complainant has continued the relationship with A.1. He further submits that in the complaint, it is stated that *de facto* complainant came to know that A.1 is already married with some other lady and knowing the same, she has continued relationship with A.1. Learned counsel relied on the judgment of the Apex Court in **Maheshwar Tigga v. State of Jharkhand B** {2021(1) ALD (Crl.) 384 (SC)}, wherein it is observed as under:-

“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 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.

We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnized in

the Church or in a Temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.

The appellant has been acquitted of the charge under Sections 420 and 504 IPC. No appeal has been preferred against the acquittal. There is no medical evidence on record to sustain the conviction under Section 323 IPC. No offence is made out against the appellant under Section 341 IPC considering the statement of prosecutrix that she had gone to live with the appellant for 15 days of her own volition.

We have to hesitate in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from the involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behavior are permitted only to a person with whom one is deeply in love.”

Learned counsel submits that as contemplated under Section 15(3) of the Act and as per the orders passed by this Court, he has also taken out the notice to respondent No.2 – de facto complainant. Learned counsel submits that he has also filed proof of service, as such Section 15(3) of the Act is complied with. Learned counsel submits that entire family has been implicated in this case. He relied on the judgment of the Apex Court in *Pruthvi Raj Chauhan v. Union of India*¹ and submits that the present application is maintainable before this Court, hence, the case of the petitioners may be considered for grant of pre-arrest bail.

5. On the other hand, learned Assistant Public Prosecutor submits that there are allegations against the petitioners, as such, under the

¹ (2020) 4 SCC 727

mistake of fact that A.1 will marry her, he had continued the physical relationship and cheated the *de facto* complainant. He relied on the judgment of the Apex Court in **Anurag Soni v. The State of Chhattisgarh**² and submits that as A.1 has cheated the *de facto* complainant, who belong to S.C. community, the petitioners are not entitled for pre-arrest bail.

6. The Hon'ble Apex Court in **Pruthviraj Chauhan's** case (supra) observed that

“ concerning the applicability of provisions of Section 438 Cr.P.C. shall not apply to the Act. However, if the complainant does not make out a prima facie case for applicability of the provisions of the Act, the bar created by Section 18 and 18(A)(i) shall not apply.”

“ It would only add a caveat with the observation and emphasize that while considering any application seeking pre-arrest bail, High Court has to balance two interests i.e. the power is not so used to convert the jurisdiction under Section 438 of Cr.P.C., but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and if such orders are not made in similar cases, the result would inevitably be a miscarriage of justice or abuse of process of law. Therefore, I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.”

² (2019) 13 SCC 1

7. Taking into consideration the allegations made in the complaint, wherein it is stated that *de facto* complainant is having physical relationship with A.1 even after she came to know about A.1 married some other lady and later *de facto* complainant continued her relationship with A.1, it appears consensual relationship between the parties and in view of the precedent set out in **Pruthviraj Chauhan's case (1 supra)**, **Maheshwar Tigga's case**, this Court deems it appropriate to grant pre-arrest bail to the petitioners/A.1 to A.4.

8. Accordingly, the Criminal Petition is allowed. Petitioners/A.1 to A.4 shall surrender before the Station House Officer, Kothagudem-II Town Police Station, Bhadradi Kothagudem District, in connection with Crime No.210 of 2021 within one week from today and on such surrender and executing personal bonds for a sum Rs.20,000/- (Rupees twenty thousand only) each with two sureties for a like sum each to the satisfaction of the said Station House Officer, they shall be released on bail. It is made clear that no further extension of time will be granted.

Miscellaneous applications pending, if any, shall stand closed.

LALITHA KANNEGANTI, J

Date :08.02.2022

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