

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

CRIMINAL APPLICATION NO.785 OF 2021

Gautam s/o Prabhakar Khillare,
Age 25 years, Occu. Service (Military Man)
R/o Kasbe Dhawanda, Tq. Kalamnuri,
District Hingoli

... APPLICANT

VERSUS

- 1) The State of Maharashtra
through Akhada Balapur Police Station,
Tq. Kalamnuri, District Hingoli
- 2) X Y Z

... RESPONDENTS

.....
Mr. D.M. Shinde, Advocate for applicant
Mr. M.M. Nerlikar, A.P.P. for respondent No.1
Mr. Umakant B. Deshmukh, Advocate for respondent No.2.
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**CORAM : R.G. AVACHAT AND
SANJAY A. DESHMUKH, JJ.**

Date of reserving judgment : 10th August, 2023

Date of pronouncing judgment : 2nd November, 2023

JUDGMENT (PER R.G. AVACHAT, J.) :

Rule. Rule made returnable forthwith and taken up for final hearing at admission stage with the consent of learned counsel for the parties.

2. This is an application for quashment of F.I.R. bearing

Crime No.34/2021, registered with Akhada Balapur Police Station for the offence punishable under Section 376(2)(n) of the Indian Penal Code and the consequential criminal proceedings bearing Sessions Case No.51/2022, pending before the learned Additional Sessions Judge, Hingoli.

3. The F.I.R. has been lodged by the victim (respondent No.2) on 9/2/2021. It is her case that, she was resident of village Kasbe Dhawanda, Taluka Kalamnuri, District Hingoli. There was an engagement ceremony of a cousin of the applicant in 2018. She had attended the said function. She got acquainted with the applicant thereat. The acquaintance between the two developed into emotional relationship. There was exchange of cell phone numbers of each other between them. The applicant is serving in Indian Army. He would visit the village after every 8 – 9 months. There, however, used to be frequent telephonic conversations between the two. The applicant would tell her that he wanted to marry her. Parents of the respondent No.2 realised of intimate relationship between the applicant and her. They, therefore, enquired with the applicant as to whether he is really going to marry with their daughter. He responded positively and even requested to take her care. Meanwhile, the parents of the informant enquired with the parents of the applicant about marriage proposal. The applicant's parents turned down the same. Parents of the

informant, therefore, performed the informant's marriage with one Rajratan Khillare. The couple had a happy married life for about three months.

4. It is further the case of the informant that, the applicant had been to village on vacation. He obtained her husband's cell phone number. He befriended with him. Both used to dine and wine together. The applicant once informed her husband to have been emotionally involved with his wife. Rajratan, therefore, deserted the informant. She started residing with her parents. 1st August was birthday of the applicant. It was year 2019. The applicant asked the informant to join her in celebrating his birthday. Both of them, therefore, went to a hotel, "Punjab Lodge" at Balapur. The applicant made her consume alcoholic drink - "Imperial Blue" (I.B.). She felt giddiness. The applicant had sexual intercourse with her more than once in the said hotel room. Then he brought her back to Balapur and went to his village Yedki. The informant therefrom went to her village in a private vehicle. The applicant again called her to Balapur. It was about 8 or 10 days after 1st August, she joined him at Balapur. He took her to another hotel near Railway Station, Nanded. Again he made her consume alcoholic drink. He had sexual intercourse with her more than once. He again brought her back to her village. The parents of the informant realised everything. They started reprimanding her. The

informant, therefore, went to Aurangabad. She secured a job in a private Company. She started residing with a family of the applicant's friend – Satish. The applicant was constantly in contact with the informant.

5. It is further the case of the informant that, the applicant asked her to leave the job and prepare for competitive examinations. He assured to shoulder expenditure required therefor. He also asked her to first get her marriage dissolved so that he can marry her. The informant, therefore dissolved her marriage with Rajratan by executing a bond on 8/8/2020. The applicant then took a premises on rent for the informant's stay. When the informant consistently insisted him to marry her, only for her satisfaction he pretended to have married her on 12/8/2020. Both of them put on marriage costumes. Exchanged garlands. Both of them sported **Mundawale**. Photographs were snapped. The applicant on that day again had sexual intercourse with her. Since his leave was over, he returned to his work place on 17/8/2020. They continued to converse with each other as husband and wife. Once he told the informant that his parents wanted him to marry daughter of his maternal uncle. He too expressed his desire to fulfill wish of his parents. Disputes, therefore, arose between the two. Since the applicant refused to marry the informant, she lodged the F.I.R. On investigation of the

crime, the charge sheet has been filed.

6. Heard. Learned counsel would submit that, the averments in the F.I.R. undoubtedly indicate that it was a consensual relationship. The applicant never extended a false promise of marriage. It was the respondent No.2 who got married with someone else. In spite of having been married, she maintained relationship with the applicant. She knew that her marriage with the applicant was an impossibility until she gets her first marriage dissolved by decree of divorce. According to him, after having something went wrong between the two, the F.I.R. has been lodged only with a view to teach the applicant lesson. Learned counsel relies on the judgment of the Apex Court in case of **Pramod Suryabhan Pawar Vs. State of Maharashtra, 2009(9) SCC 608**, to ultimately urge for grant of the application.

7. The learned A.P.P. and learned counsel for respondent no.2 would, on the other hand, submit that, it was a case of false promise of marriage. Consent of the informant was obtained under misconception. Learned counsel relied on Section 90 and Section 375 of the Indian Penal Code. They also relied on the judgment of the Apex Court in case of **Sonu alias Subhash Kumar Vs. State of Uttar Pradesh, 2021 SCC OnLine SC 181** and the judgment of this Court in case of **Navneet Vs. State of Maharashtra & ors., 2022 ALL MR (Cri) 2095**. Our attention was also drawn to the

informant's statement under Section 164 of the Code of Criminal Procedure, entries in the Check-In register of Hotel Punjab, a document of dissolution of informant's first marriage, to ultimately submit that the applicant, after having sexually exploited the informant, refused to marry her. No mini trial can be conducted in a proceeding under Section 482 of the Code of Criminal Procedure. According to the learned counsel, there is prima facie material to proceed against the applicant. Both of them, therefore, urged for dismissal of the application.

8. Considered the submissions advanced. Perused the F.I.R. and all the investigation papers. Also gone through the authorities relied on. In criminal matters, a change of a fact here and there, makes authorities relied on inapplicable. Close reading of the F.I.R. would indicate that, both the applicant and the informant got acquainted with each other at an engagement ceremony. Their acquaintance developed into intimate relationship. The applicant was serving in Indian Army. He used to visit the village once or twice in a year, that too after a gap of not less than 8 – 9 months. There was exchange of cell phone numbers of each other. They used to converse with each other almost everyday. When the parents of the informant realised their daughter's intimate relationship with the applicant, they enquired with him as to whether he propose to marry her. He gave a nod. He even promised them

to marry her when he would be back to village on long leave. He asked her parents to take her care and not to trouble her. The informant's parents, therefore, enquired with the parents of the applicant about the proposed marriage of the two. The parents of the applicant turned down the proposal. The informant, therefore, got married with one Rajratan on 11/3/2019. Both of them had a happy married life for about 3 months. Whenever the applicant used to visit the village, he developed friendship with Rajratan. Both of them used to dine and wine together. Once he informed Rajratan to have intimate relationship with the informant. Rajratan, therefore, deserted her. True, there is material to indicate both of them had checked in a lodge, stayed therein. There was sexual relationship between the two many a time. There is also material to indicate the informant executed a bond in favour of Rajratan on 27/7/2020. Close reading of the said document would indicate that it was executed by her in favour of Rajratan. He (Rajratan) has been described as "लिहून घेणार". The same suggests the documents was executed by her at his instance/ demand. It has been narrated therein that both of them could not pull on together. There used to be differences between the two. Elders made efforts of conciliation between the two, but in vain. Both of them realised that it was difficult for them to pull on together as husband and wife. Rajratan, therefore, gave her customary divorce.

9. It has further been averred therein that, both of them would move a competent Court of law for obtaining a decree of divorce.

10. From the aforesaid document, it is just difficult to observe that the marital tie between the two had really come to an end. Be that as it may. The relationship between the applicant and the informant continued as before. It is true that there are averments in the F.I.R. that he made her consume alcoholic drink. The averments in the F.I.R. indicate that more than twice the informant took such drink. When her parents realised the same, they reprimanded her. She, therefore, left parent's house and went to Aurangabad. She stayed at the house of the applicant's friend. There her comfort was secured by the applicant himself. There is material to indicate that both of them put on marriage costumes, exchanged garlands. Both of them sported **Mundawale** . What else is required to have marital relationship inter-se. The photographs of the event have been on record. The photographs vouch the applicant to have married the informant. The informant may have her remedies to enforce her matrimonial rights, if any, against the applicant. From close reading of the F.I.R., there is nothing to indicate the applicant to have extended her a false promise of marriage. He desired to marry her. He expressed his desire to her parents. It was only on the applicant's parents turned

down the proposal, the parents of the informant contracted her marriage with Rajratan. In spite of subsistence of marital relationship, she continued to have intimate relationship with the applicant. The F.I.R. has been lodged 6 months after last meeting between the two.

11. In case of Pramod Pawar (supra), it has been observed in paragraph Nos.16, 17 and 18 as under :-

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

“21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. 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 misrepresentation

made to her by the 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 so. Such cases must be treated differently.

...

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

(Emphasis supplied)

17. In *Uday v State of Karnataka* (2003) 4 SCC 46 the complainant was a college going student when the accused promised to marry her. In the complainant’s statement, she admitted that she was aware that there would be significant opposition from both the complainant’s and accused’s families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused’s promise to marry the

complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance

that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married..."

(Emphasis supplied)

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."

12. The informant was of the age of understanding. It was intimate relationship between her and the applicant. The applicant wanted to marry her. There is nothing to indicate when the applicant's parents refused the marriage proposal, she insisted the applicant to marry her disregarding wish of his parents. In deference of wish of her parents, she got married with Rajratan. Still she continued to have relationship with the applicant. Many a time both of them met each other indoors and had sexual intercourse. The document suggesting the marital tie of the informant with Rajratan to have come to an end suggest that it was

executed by her at Rajratan's behest. It was agreed between the two that they would move a Court of competent jurisdiction to have their marriage dissolved with a decree of divorce. All these facts indicate that it was a consensual relationship. The applicant had never extended a false promise of marriage and induced the informant to give consent for sexual intercourse. In aforesaid factual backdrop, directing the applicant to stand trial would be an abuse of process of Court. We are, therefore inclined to allow the application.

13. The application, therefore, succeeds. The same is, therefore, allowed in terms of prayer clause (B) and (B-1). Rule made absolute in above terms.

(SANJAY A. DESHMUKH, J.)

(R.G. AVACHAT, J.)

fmp/-