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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.19 OF 2023

Parikshit Y. Kadam] .. Applicant
vs.
The State of Maharashtra & Anr.] .. Respondents

Mr.Praad Dhalwalkar, for the Applicant.

Mr.R.N. Gite a/w Rohit Gorade and Sunita Warang for Respondent No.2.

CORAM : BHARATI DANGRE, J

DATE : 28th August, 2023.

P.C.

1] The Criminal Revision Application is filed by the Applicant, arraigned as the original accused in Sessions Case No.41/2021 before the Sessions Court at Nashik, where he is facing charge under Section 376, 406 and 420 of the Indian Penal Code.

The charge was levelled against him, pursuant to a complaint filed by Respondent No.2, with Indira Nagar Police Station alleging that the accused had committed sexual intercourse with her by cheating her, as he had disclosed, that he is a divorcee and she was in search of a partner after obtaining divorce.

The accusations resulted into the investigating machinery being set into motion and on its completion charge sheet came to be filed.

2] The Applicant filed discharge application under Section 227 of the Cr.P.C. seeking discharge in the Sessions Case, which came to be rejected by order dated 30.11.2022, which is the cause for filing the present Revision Application.

3] I have heard the learned counsel Mr.Prasad Dhalwalkar for the Applicant, and the learned counsel Mr. R.N. Gite alongwith Rohit Gorade and Sunita Warang for Respondent No.2, the contesting respondent.

The learned counsel for the Applicant, by inviting my attention to the material compiled in the charge sheet has assertively submitted that no offence under Section 376 as well as 406 and 420 of the IPC is made out against the Applicant and therefore when he sought discharge, the learned Judge has failed to consider the material and concluded that the Accused was not a divorcee and this fact was well within his knowledge, but he promised to perform the marriage with the victim and since he has also failed to abide by the subsequent terms and conditions of compromise of Agreement, it cannot be said that there is no material to frame the charge and subject him to trial to face the charges.

4] Per contra, the learned counsel for the Respondent No.2 would support the impugned order and he has countered the arguments

advanced on behalf of the Applicant, by submitting that the consent of the Respondent No.2 was obtained under misconception of fact and the prosecution has compiled sufficient material in the charge-sheet to establish that, the Applicant from the very inception had no intention to live upto his promise and hence her consent is no 'consent' in the eyes of law.

He would place reliance upon the decision in the case of **State of Uttar Pradesh vs. Naushad, (2013) 16 SCC 651**, a decision of the Apex Court, as well as on another decision in case of **Anurag Soni vs. State of Chhattisgarh, (2019) 13 SCC 1**.

5] In order to appreciate the counter arguments advanced, it is necessary to refer to the brief sequence of events, which resulted into the accusations against Applicant.

As per prosecution, the informant, a resident of Nashik, is a business woman, running her e-publication business and she being divorcee was looking for an alliance and registered her profile over a website. The Applicant had also registered himself on the same website and on perusal of his profile, she forwarded a request and both of them exchanged contact numbers.

In the first meeting, they discussed the marriage and introduced to each other as divorcee and when the informant asked the Applicant to produce the divorce decree, he avoided to do so, by saying that the

papers are not carried by him and he would furnish the same on the next date of hearing.

The informant allege that despite repeated reminders, he never produced the same and in fact indulged her in starting business and accordingly a proprietary firm in the name of M/s.Kadam Engineering Solutions, was started in the year 2014. It is the claim of the Respondent that she invested a sum of Rs.70,000/- in the said business, whereas the rival claim of the Applicant is that the firm was registered in her name and she was in charge of day to day affairs of the firm, whose business was growing day by day.

6] As per the informant, when both of them visited Sangamner for the purpose of business, a room was booked in the hotel by the Applicant which was shared by her and physical relationship was established between them, by consent.

It is the accusation in the complaint that whenever she used to rake up the topic of marriage with the Applicant, he avoided to make any promise and since it was made known to her that he was in the process of obtaining divorce, the informant was convinced that she was cheated.

In the year 2016,the Applicant started an individual Concept Realty Company, without keeping her in loophole.

7] Upon a realisation that she has been cheated and since she was bothered about the future prospects of her child, a Memorandum of Understanding was signed between them on 25.01.2019, wherein, the Applicant agreed to make payment of Rs.30,000/- to her every month and also return her investment of Rs.70,000/- . Accordingly, from January, 2019 to April 2019, a sum of Rs.30,000/- was deposited by the applicant in her account, but thereafter, he failed to deposit the same.

According to the informant, an amount of Rs.1,45,000/- is due and payable to her and she accused him of cheating on two counts, first being despite his earlier marriage being subsisting, he promised to marry her and secondly on the ground of the investment in the business as she contend that it caused loss to her.

It is in this background facts, it is to be ascertained whether there is sufficient material in the charge-sheet, which would justify the trial of the Applicant, for the alleged offences.

8] The Respondent No.2, in the year 2019 lodged a complaint against the Applicant and at the relevant time she was aged 41 years. She had obtained divorce in the year 2007 and residing with her parents. Since she was interested in remarriage, she came in contact with the Applicant through a matrimonial website and it is her allegation that she was given an impression, that he had obtained

divorce, but for one or the other reason he continued to avoid production of the necessary document as proof thereof. It is her version that on meeting the Applicant, she found him to be compatible and, therefore, she agreed for an alliance between them.

As per the complainant, after they entered into a business transaction, the Applicant disclosed to her that he will marry her soon as the case against his wife for divorce was pending in the Court and that is when she realized that he is not a divorcee.

Despite having knowledge of this fact, when she met him in a hotel where a room was booked by the Applicant, she consented for establishing sexual relationship and it is not her case that, the consent was based on any misrepresentation.

Worth to note that the physical relationship was established at a time when she already had gained knowledge that the Applicant had not obtained divorce.

It is in this facts, the Applicant face an accusation that he forced her into physical relationship on the pretext that he will solemnize the marriage, which he never intended to perform.

9] The question that arises is, whether the consent, which the victim has accorded for establishing physical relationship, is free and voluntary.

Admittedly, consent based on 'misconception of fact' is not

consent in the eyes of law and in case of a women engaging in sexual relationship on false promise to marriage, if her consent is based on 'misconception of fact', then the sexual act will amount to rape.

However, a clear distinction needs to be drawn between a false promise and breach of promise. For an inference that the consent is not a free consent, it is necessary to establish that 'consent' was vitiated by 'misconception of fact', arising out of a false promise to marry.

In the case of **Pramod Suryabhan Pawar vs. State of Maharashtra, (2020) 2ALD(CRI)400 (SC)**, their Lordships of the Apex Court have clearly pronounced on the aspect of consent being accorded under misconception of fact, as contemplated under Section 90 of IPC.

By making reference to the said provision, it is categorically held that , where a woman does not 'consent' to the sexual act described in the body of Section 375 the offence of rape takes place and with reference to Section 90, it is held that 'consent' based on 'misconception of fact' is not consent in the eyes of law.

In Paragraph 12, their Lordships made the following pertinent observations :

“ 12. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and asset. Whether there was

consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

10] Drawing a distinction between a false promise given on the understanding by the maker that it will be broken and the breach of the promise which is made in good faith, but not subsequently fulfilled, the following observations of the Apex Court are very pertinent.

“14 In the present case, the “misconception of fact” alleged by the complainant is the appellant’s promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v.s State of Chhatisgarh*, this Court held :

“37. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.”

11] The decisive factor, therefore, would be the intention of the accused, and if the intention, right from the beginning was not bonafide and if the victim was completely misled by accused, who held up the

promise for marriage, this definitely cannot be treated as a 'consent' as there was no intention to fulfil the promise while the consent is obtained. Thus, whether the promise to marry is false and the intention of the maker at the time of making the promise itself was to avoid it and to deceive a woman and make her participate in sexual relationship, then such consent is vitiated.

However, where there is breach of promise, which remains unfulfilled, by relying upon the decision in the case of *Deepak Gulati v.s State of Haryana (2013) 7 SCC 675*, the following inference is drawn :

“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."

12] The legal position thus stands summarized by the authoritative pronouncement of the highest court to the effect that 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, two propositions must be established, "the promise to marriage must have been a false marriage, given in bad faith and with no intention of being adhered to at the time when it was given.

13] The thin line of distinction is, therefore, required to be drawn in assessing whether the consent is based on a false promise or there is a breach of promise.

When the above proposition is applied to the facts of the case, it is evident that Respondent No.2, is at an age of sufficient understanding having crossed 40 years and she has categorically stated that she found the Respondent to be compatible and she gained knowledge that he is yet to obtain divorce and the proceedings for obtaining the same are in progress in the competent Court and being conscious of this aspect, she agreed to physically indulge with the

Applicant. Hence, in no case the physical relations were maintained on a false promise to marry. Performance of marriage was a different aspect than maintaining the physical relationship in this case as it is her version that physical relationship was established between them by consent. This make me arrive, at a conclusion that if there was a promise to marry, it is breached, but definitely it is not a case where the consent obtained for physical indulgence suffered from 'misconception of fact'.

14] In case of **Anurag Soni** (*supra*) the decision which is relied upon by the learned counsel for the Respondent No.2, the facts involved were peculiar.

The family of the prosecutrix and accused were known to each other and there was a proposal of marriage and the accused continued to promise that he will marry her. When the accused expressed his wish to meet the prosecutrix she responded by visiting him and during her stay at his house for two days, physical relationship was established thrice. It is the specific case of the prosecutrix that she initially refused to maintain physical relationship, but the Appellant allured her with a promise to marry and hence she consented for the physical relationship. However, when she inquired about marriage, there was no response at his end and even thereafter the Appellant expressed willingness to marry the prosecutrix and even social

functions were scheduled, but did not take place, and thereafter, he informed the prosecutrix that he was married and there could be no marriage between them.

It is in this background facts that the Court drew a presumption that the prosecutrix did not offer consent for sex freely and by the subsequent events it is established that, from the very inception the promise given by him was a false promise, as there was no intention to marry and therefore her consent was said to be based on misconception of fact as per Section 90 of the IPC and his conviction for rape was confirmed.

The distinguishing facts before the Court distinguishes the ratio laid down therein.

15] As far as the case of ***Naushad*** is concerned, it was an extreme case of a young minor girl, who was lured into a false promise of marriage, which was followed by repeated sexual acts, making her pregnant and then there was refusal to marry.

Considering the gravity of the offence in committing the forcible sexual intercourse with a girl as a minor, the Apex Court held that the accused was guilty of offence of rape as he had obtained the consent of the prosecutrix fraudulently under misconception of fact and hence the sentence was maintained..

16] Here is a case, where both, the Applicant and the Respondent No.2 are matured persons, able to progress beyond merely reacting to life's options and they are capable of making decisions based on reason and experience rather than emotion, unlike the adolescents. They took a conscious decision to establish a relationship, firstly the business relationship and thereafter when the proximity grew amongst themselves, then physical relationship was established consensually.

This is not a case of misconception of fact, as the physical relationship was established at a point of time, when the informant had gained knowledge that he has not divorced his wife, but he was in the process. In the supplementary statement of the Prosecutrix, she reiterated that the physical relationship maintained between them in the hotel in Sangamner was consensual.

From her correspondence addressed to the concerned Police Station, it is clearly reflected that the relationship between them became sour as the Applicant is alleged to have used bad words against her and she suffered humiliation at his hands and there is every reason why she felt cheated as she formed an opinion that she was being used by the Applicant. However, it is a case at the most where it can be said that there was breach of promise to marry, but since the material in the charge-sheet do not indicate that the informant was under misconception of fact and therefore she consented for sexual

relationship, making the Applicant face the trial under Section 375, 420, would nothing but amount to abuse of process of law.

17] Here are the two matured individuals who were capable of understanding the consequences of their act and as regards the Memorandum of Understanding is concerned even as per the prosecutrix she had only paid sum of Rs.70,000/- for being invested in the business and in any case approximately sum of Rs.1,20,000/- has been returned to her.

The enforcement of the terms of Memorandum of Understanding is a matter, which would not fall within the purview of the Criminal Court as the contract cannot be enforced through the procedure envisaged for trial. In any case, the Respondent No.2 had received a sum of Rs.1,20,000/- and she is at liberty to file appropriate proceedings for enforcement of the Memorandum of Understanding.

The offence of Section 420 of the IPC also cannot be said to be prima facie made out as regards the amount alleged to have been paid by her as it is invested in a firm which carried business in her own name and ultimately it was her decision to invest into the said business. There is also no entrustment as contemplated under Section 406 of the IPC even going by the version of the informant.

18] It is a well settled position of law that while exercising the

jurisdiction under Section 397 read with 401 of the Cr.P.C. read with Section 482 of the Code, the Court is expected to examine whether the allegations set out in the complaint and on completion of investigation contained in the charge-sheet, would constitute an offence and if continuation of the proceedings would be an abuse of process of the Court, then in order to secure the ends of justice, this Court would be perfectly justified in exercising its power vested in it as the Court exercising supervisory jurisdiction over the subordinate court.

In the wake of above, since the material in the charge sheet do not justify the trial of the Appellant for the offence under Section 376, 420 and 406 of the IPC and the impugned order has failed to consider the said aspect, the same is liable to be quashed and set aside.

By setting aside the impugned order, the Applicant stand discharged of the charge levelled against him under Section 376, 406, 420 of the IPC in Sessions Case No.41/2021 arising out of CR No.337/2019.

Revision Application is allowed in the aforesaid terms.

[BHARATI DANGRE, J]