

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1358 of 2022

Zahangir Kabir

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Shamik Chatterjee,
Mr. Aditya Bikram Mahata.

For the State : Mr. Avishek Sinha.

For the Opposite Party No. 2 : None.

Hearing concluded on : 24.04.2024

Judgment on : 17.05.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding arising out of Charge Sheet bearing No. 754 of 2021, dated 25.12.2021 under Sections 493/376 of the Indian Penal Code, 1860 in connection with Kaliaganj Police Station Case No. 581 of 2021 dated 16.10.2021 under Sections 493/376/34 of the Indian Penal Code, 1860, now pending before the Court to Learned Additional District & Sessions Judge, 2nd Court, Raiganj, Uttar Dinajpur.
2. The present petitioner is aged about 52 years and he is presently working as an Assistant Teacher at Chirail Junior Basic School with utmost integrity and unblemished character.
3. **In spite of due service, there is no representation on behalf of the opposite party no. 2.**
4. **In the First Information Report it was *inter alia* alleged as follows:-**

“That on 16.10.2021, one Kohinoor Khatoon lodged a written complaint against 3 accused persons being the petitioner herein and two more who are the sons of the present petitioner alleging that for the last 5 years the de facto complainant had love affairs with the petitioner and as per the averment of the de facto complainant it has further been stated that there was promise to marry out of the love affair by and between the parties and it has been alleged that since there was no amicable settlement by and between the parties hence the complaint has been lodged. It has been further stated that on 10.10.2021 the present petitioner had forcibly entered the house of de facto complainant, wherein the accused persons have

assaulted the de facto complainant and also threatened her with dire consequences”

5. Only one person has been charge sheeted which is the petitioner herein thereby implicating him under Sections 493/376 of the Indian Penal Code.
6. Hence the revision.
7. Written noted of Argument has been filed by the petitioner along with a list of dates.
8. The State has placed the Case Diary, from wherein it appears that the medical report shows that the prosecutrix is aged about 25 years and that her hymen is ruptured.
9. The FIR was lodged alleging rape against the petitioner and his two sons of threat and assault.
10. The sons have not been charge sheeted.
11. The petitioner herein is aged about 52 years.
12. The specific allegations in the FIR includes that the petitioner herein being already married having two sons, on the false assurance of marriage (permitted under his personal law) co habited with the de facto complainant. The petitioner also kept the de facto complainant in a rented accommodation and allegedly did not provide her any food. She has further stated that the petitioner is not allowing her marriage with any other person and breaks all or any such proposal.

13. The Supreme Court in:-

1. **Mandar Deepak Pawar vs The State of Maharashtra & Anr.,**

Criminal Appeal No(s). 442/2022, On 27th July, 2022.

*“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. A distinction was made between a false promise to marriage which is given on understanding by the maker that it will be broken and a breach of promise which is made in good faith but subsequently not fulfilled. This was in the context of Section 375 Explanation 2 and Section 90 of the IPC, 1860.”*

2. **Shambhu Kharwar vs The State of Uttar Pradesh & Anr.,**

Criminal Appeal No. 1231 of 2022, on August 12, 2022.

“10. An offence is punishable under Section 376 of the IPC if the offence of rape is established in terms of Section 375 which sets out the ingredients of the offence. In the present case, the second description of Section 375 along with Section 90 of the IPC is relevant which is set out below.

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

[...]

under the circumstances falling under any of the following seven descriptions

Firstly ...

Secondly. – Without her consent.

[...]

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.

xxx

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...”

11. In *Pramod Suryabhan Pawar v. State of Maharashtra*, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in ***Sonu @ Subhash Kumar v. State of Uttar Pradesh***, observed that :

“12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action...”

[...]

14. [...] 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...

[...]

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...**

[...]

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.**

(emphasis supplied)”

3. Naim Ahamed vs State (NCT of Delhi), Criminal Appeal No. 257 of 2023, on 30.01.2023.

“20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court.”

- 14. The petitioner being a 52 years old person co habited with a 25 years old, with no intention of marrying her but only to satisfy his lust. He had also kept her in a rented accommodation and then**

not only refused to marry her but won't even let her marry any other person.

15. Though already married, his personal law permits another marriage, which thus gave assurance to de facto complainant.

16. CRR 1358 of 2022 is thus dismissed.

17. Interference by this Court a case of such nature shall be an abuse of process of law/Court.

18. The trial Court to accordingly proceed with the trial in the present case.

19. All connected applications, if any, stand disposed of.

20. Interim order, if any, stands vacated.

21. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

22. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)