

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CRR 2443 of 2022

**Debabrata Ghosh
Vs.
The State of West Bengal & Anr.**

For the Petitioner	:	Mr. Ayan Bhattacharjee Mr. Palash Mukherjee
For the State	:	Mr. Debasis Roy Mr. Saryati Dutta Ms. Trisha Rakshit
For the Opposite Party No.2	:	Mr. Dhananjay Banerjee
Heard On	:	05.09.2024
Judgment on	:	18.09.2024

Ajoy Kumar Mukherjee, J.

1. This is an application under section 482 of the Code of Criminal Procedure (in short Cr.P.C) wherein petitioner has prayed for quashing of the charge sheet filed in connection with Chandernagore P.S. case no. 153 of 2021 dated 17.07.2021, corresponding to G.R. case no. 982 of 2021, presently pending before learned Additional Chief Judicial Magistrate, Hooghly,

2. Petitioners contention is that *defacto* complainant/opposite party no.2 made a prayer before Jurisdictional Magistrate under section 156 (3) of the

Cr.P.C. for direction upon the concerned police station to start investigation against the petitioner herein under sections 420/406/417/376 of the Indian Penal code (in short IPC). In the said application *defacto* Complainant/opposite Party No. 2 herein alleged that she got acquainted with the petitioner/ accused through a matrimonial site. Thereafter on the promise of marriage and also on the pretext of a fake marriage, he made physical relationship with the complainant. It is further alleged that in the last quarter of 2021, the *defacto* complainant came to know that the accused is a married person having his child.

3. Mr. Ayan Bhattacharya learned counsel appearing on behalf of the petitioner states that from the averments made by the *defacto* complainant in the FIR, it is clear that the *defacto* complainant has used the allegations of inducements and/or coercion of physical relationship on the promise of marriage, just to justify her physical relationship with the petitioner in past. In this context he referred annexure relating to WhatsApp chat by which he pointed out that *defacto* complainant was all along aware that the petitioner is married to one Sutapa Ghosh. He further submits that inducement of physical relationship by promising marriage must have a clear nexus with the moment and the promise of marriage cannot be treated as inducement for engaging in physical relationship over a protracted and indefinite period of time.

4. In this context Mr. Bhattacharya further pointed out that breach of promise cannot be said to be a false promise. The *defacto* complainant all along had knowledge that the petitioner is married and has a child and as such no question of deceiving the *defacto* complainant by making false

promise arise. On the contrary *defacto* complainant during the continuance of her earlier marriage opened her profile in a matrimonial site and created trap to build up a relation with the accused/petitioner herein.

5. He further submits that regarding commission of offence under section 420/406 and 417 of the Indian Penal Code, the allegations levelled by the *defacto* complainant are same with that of the allegations made in her complaint case filed under section 138 of the Negotiable Instrument Act (in short N.I. Act) which is presently pending. He further submits multiple complaints by the same party against the same accused in respect of same incident is impermissible and since she has already initiated proceeding under section 138 of the N.I. Act, the present proceeding under sections 420/ 406/ 417 of IPC is not maintainable on the self-same cause of action. The present proceeding is absolutely *malafide* and has been instituted with some ulterior motive and also to make wrongful gain. The allegations as made in the charge sheet, on the face of it is wholly unfounded and absolutely untenable and misconceived. In fact the statements made by the present complainant in her written complaint and the statements made by her before the investigating officer are contradictory.

6. Mr. Bhattacharya further contended referring Apex Court judgment in ***Uma Shankar Gopalika Vs. State of Bihar and another*** reported in **(2005) 10 SCC 336** that it is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases, breach of contract would amount to cheating, where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case the materials available

so far, nowhere states that at the very inception either in respect of physical relationship or in respect of monetary transaction, there was any intention on behalf of the petitioner to cheat, which is a condition precedent to attract the alleged offences against the petitioner. On the contrary it appears from the FIR that the occurrence of the alleged offence started on 28.11.2019 whereas she got her final decree of divorce on 04.01.2021. Accordingly without getting her marriage dissolved and knowing fully well that without dissolving the existing marriage, she cannot marry some other married person, how she got acquainted with the petitioner and involved in sexual relationship. Accordingly such relationship if any, must be held to be consensual and not under any misconception of fact, since she indulged herself with the physical relationship with the petitioner, knowing fully well that her marriage has not been dissolved and that the person with whom she had indulged with physical relationship is a married person. In this context he also relied upon the Judgment of **Naim Ahmed Vs. State of Delhi** reported in (2023) 1 SCR 1061.

7. Petitioner therefore argued that any further continuation of the present proceeding would be a gross abuse of the process of the court. Referring **Bhajanlal's Case, 1992 supp (1) SCC 335**, he also contended that the allegations made in the complaint are so absurd and inherently improbable, on the basis of the same, no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the petitioner. Accordingly petitioner has prayed for quashing the present proceeding. Learned counsel for the Petitioner in this context relied upon following judgments;-

- a) ***Vineet Kumar and others Vs. State of Uttar Pradesh and another*** reported in **(2017) 13 SCC 369.**
- b) ***Kalyan Panda and others Vs. State of West Bengal and others,***
MANU/W.B 1902/2023
- c) ***Salib @ Shalu @shalim Vs. State of U.P and others*** reported in
(2023) 11 SCR 58.
- d) ***Pramod Suryabhan Pawar Vs. State of Maharashtra and another***
reported in **(2019) 9 SCC 608**
- e) ***XXXX Vs. State of Madhya Pradesh*** reported in **(2024) 3 SCC 496**
- f) ***Shivashankar @ Shiva Vs. State of Karnataka and another***
reported in **(2019) 18 SCC 204**
- g) ***Amitabh Pratap Singh Vs. State of Madhya Pradesh and others,***
MANU/M.P/0861/2024
- h) ***Naim Ahamed Vs. State of Delhi*** reported in **(2023) 1 SCR 1061**
- i) ***Manish Kumar Sharma Vs. State of Jharkhand and another***
reported in **2022 SCC OnLine Jhar1559**
- j) ***Uday Vs. State of Karnataka*** reported in **(2003) 4 SCC 46.**

8. Learned counsel appearing on behalf of the opposite party no. 2 contended that the petitioner failed to explain as to how a married man can have a martial profile in matrimonial site unless he has an intention to cheat and deceive the victim on false promise of marriage. He further submits that the WhatsApp chat as relied by the petitioner and annexed with the present application has been copied from the petitioner's, devise which is not trustworthy and from the said self-created WhatsApp chat, the court cannot come to a conclusion at this initial stage that the victim was

aware that the petitioner already got married with one Smt. Das. He further contended that during investigation no such WhatsApp chat was made available to the police and the said WhatsApp chat was never made part of the case diary. Police seized WhatsApp chat form the complainant's device which does not support petitioner's contention. Moreover though petitioner heavily relied upon reply given in the context of a proceeding under Section 138 of the N.I Act, but said proceeding has got no relevance in the present context. Accordingly petitioner's present prayer for quashing the said proceeding at its threshold is meritless and liable to be rejected in limine.

9. Mr. Debasis Roy learned counsel appearing for the State placed the case diary and submits that from the complaint and also from the statements recorded under Section 164 and 161 of the Cr.P.C and from all other material evidences, it has been well established that the consent of the petitioner was obtained by practicing fraud and such consent of the victim was an outcome of misconception of fact and thereby vitiated under Section 90 of the IPC. He further submits that the charge sheet has already been submitted against the present petitioner and as such the incriminating materials are required to be examined during trial and only at the conclusion of the trial, the truth will reveal. The prayer for quashing the present proceeding is not at all maintainable and this is not a fit case where the preceding is liable to be quashed invoking jurisdiction under Article 482 of the Constitution of India. In this context state has relied upon judgment reported in **2008 SCC Online Cal 274 (Sujit Kumar Pati Vs. Smt. Atasi Singha Mahapatra)**.

10. I have considered submissions made by both the parties.

11. While considering an application under section 482 of the Cr.P.C seeking quashing of the criminal proceeding, I must bear in mind the guidelines for quashing of a proceeding as laid down in **State of Haryana Vs. Bhajanlal** reported in **1992 Supp (1) SCC 335** which states that it is only when the petition of complaint does not disclose a prima facie cognizable offence or when the allegations in the petition of complaint or the FIR are inherently improbable or absurd, or when the petition of complaint or the FIR is *malafide* one intended to harass the opponent or when no evidence of legal character is available or when there is legal bar to the entertainability of the application, that a criminal proceeding should be quashed.

12. On perusal of paragraph 5 of written complaint it appears that the complainant specifically averred that it is only after the final obtainment of divorce that the inception of the love affair and courtship period commenced in between the complaint and the accused persons. She further alleged in paragraph 7 that the petitioner forced and lured her to gather an impression that she is the legally married wife of the petitioner. She also stated in para 11 that she was further spell bound to discover that the accused person got married long back and he has a child.

13. In her statement recorded under section 164 Cr.P.C., she also stated that she had involved physical relationship with the petitioner under an impression that the petitioner has married her and thereafter when petitioner stopped keeping contact with her, she had gone to petitioners house at Bhirbhum and also his office at Fort William, wherefrom she came

to know that petitioner is a married person and he has one child. In her statement recorded under section 161 of Cr.P.C she has also stated that she agreed to make physical relationship with the petitioner under a misconception of fact that she is the married wife of the petitioner.

14. Now so far as the whats app chats which the petitioner herein has made annexure of the present application and has placed heavy reliance, to that context, it can be said that this is not the stage to evaluate those materials and the court while dealing with an application under section 482 should not act on annexure to the petitions filed by the accused, which cannot be termed as evidence, without being tested and proved. In this context reliance has been placed upon **State of M.P. Vs. Audh Kishore Gupta and others**, reported in **(2004) 1 SCC 691**.

15. It is also well settled that the interference of the High Court under section 482 Cr.P.C is to prevent the abuse of process of any court or otherwise to secure the ends of justice and the evidence produced by the accused in his defence cannot be looked into by the Court except in very exceptional circumstances, at the initial stage of criminal proceeding. In this context reliance can be placed in the Judgment of **Rajib Kourav Vs. Baishab**, reported in **(2020) 3 SCC 317**.

16. Now let me deal with the contention of Mr. Bhattacharya which relates to his submission that petitioner without dissolving her marriage came in contract with the petitioner and she met her at different places and there are monetary transaction between the parties and not only that she had a visiting term with the petitioner and his family members and as such the

question of vitiating victims consent on the ground of misconception of fact does not arise.

17. In the present context it is not in dispute that both the prosecutrix and the petitioner/accused are adult. The allegation levelled against the petitioner in the FIR in substance is that she had love affair with the petitioner and they had co-habitated for a number of occasions as petitioner allured and promised to marry her.

18. Before going to further details about the present case, I need to state that the law on this issue is no more *res integra*. In ***Uday Vs. State of Karnataka*** reported in **(2003) 4 SCC 46**, Supreme Court held that 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 and 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.

19. In ***Yedla Srinivasa Rao Vs. State of A.P.*** reported in **(2007) 1 SCC (Cri) 557**, Apex Court held that consent obtained by making false promise to marry is not a consent and sexual intercourse on such false promise was the sexual intercourse without the consent of the victim and the said act falls in second category as enumerated in section 375 IPC and the conviction order under section 376 IPC was held to be justified.

20. In ***Dilip Singh Vs. State of Bihar*** reported in **(2005) 1 SCC 88** it was held that if on facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax,

the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of the second explanation to Section 375 IPC.

21. In *Kaini Rajan Vs. State of Kerala* reported in **(2013) 9 SCC 113** Supreme Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception to the fact. While applying such principle to a case arising under section 375 IPC, the court held that the consent given pursuant to a false representation that the accused intends to marry could be regarded as consent given under misconception of facts.

22. Accordingly in the present context, the entire case is to be examined on this aspect i.e. whether victim's consent was voluntary or she consented under a misconception of fact. It is well settled that a false promise is not a fact within the meaning of the penal code and for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, can only be decided after considering the evidence and surrounding circumstances of the case. It is also required to be adjudicated during trial by way of evidence, even if there was any sexual relationship on the promise of marriage, the petitioner never intended to marry the prosecutrix. Unless the case goes for trial, it is not possible to know what was in the mind of petitioner and the prosecutrix when she consented.

23. Since there is a dispute as to whether the prosecutrix was all along aware about the consequence of the physical relationship or not and as to whether physical relationship was made against her will and/or alluring her that their marriage has already taken place and the petitioner is her

husband, while alleged offence took place, it would not be just for the High court to go into such disputed question of facts or to appreciate the defence of the petitioner.

24. It is no doubt true that if during trial it is established that complainant/victim was aware that there existed obstacles in marrying the accused and still continued to engage in sexual relations, the decision might have gone in favour of petitioner but since there is a distinction between a false promise to marry which is given on understanding by the maker that it will be broken, with that of a breach of promise which is made in good faith but subsequently not fulfilled, the allegations and counter allegations are to be tested by way of trial. The same principle is also applicable for the other offences levelled against the petitioner. By way of trial it is further required to be tested as to whether there was any mistake of fact on the part of the victim and whether there was at all any reason to believe on her part that she already got married to the accused person to attract section 417 of the IPC.

25. From the allegations levelled in the complaint as well as on bare perusal of the statements made by victim during investigation, it cannot be said that there is no allegation in the FIR that when the petitioner promised to marry the complainant it was done in a bad faith or with the intention to deceive her. On the contrary the allegations in the FIR and the material in CD indicate that the complainant was not aware that there existed obstacles to marry the petitioner and that without knowing the same she continued to engage in sexual relation, which however is a disputed issue in the present context. In fact at this stage the court is not required to marshalling the

evidence and examine the charge on merit while considering the petitioners prayer for quashing the proceeding.

26. It is settled law in view of ***Pramod Suryabhan Power Vs. State of Maharashtra and another*** reported in **(2019) 9 SCC 608** that consent with respect to section 375 involves an active understanding of the circumstances, actions and consequences of the proposed act, in case a women engaging in sexual relation on false promise of marriage, her consent is based on misconception of fact and such sexual acts may amount to rape.

27. Therefore, considering the aforesaid facts and circumstances of the case it cannot be said that the criminal proceeding against the petitioner herein are in any way an abuse of process of law and/or the court. As I have stated above all the aspect of allegations and counter allegations are required to be considered at the stage of trial and not while considering the application under section 482 of Cr.P.C.

28. Investigation has already culminated into the chargesheet. In ***Rajib Thapar Vs. Madan Lal Kapoor***, reported in **(2013) 3 SCC 330** the Supreme Court has clearly held that this is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the complainant against the petitioner nor it is the stage for determining how weighty the defences raised on behalf of the petitioner are. Even if the accused is successful in showing some suspicion or doubt from the annexed documents, it would be impermissible to discharge the petitioner before trial because it would result in giving finality to the acquisitions levelled by the prosecution without allowing the prosecution to adduce evidence to substantiate the same. It was further held in the judgment that the converse is however not true

because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The petitioner herein would still be in a position to succeed by establishing his defence by producing evidence in accordance with law.

29. Having gone through the judgments cited by the petitioner herein, it appears that they are factually distinguishable.

30. For the reasons as stated above, I find that it would not be just and expedient for the cause of justice to quash the present proceeding against the petitioner, at it's threshold.

31. CRR 2443 of 2022 thus stands dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)