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CRAPLN 1757.23 R.odt

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

CRIMINAL APPLICATION NO. 1757 of 2023

Vinod s/o. Raosaheb Shinde,
age 32 ears, Occ. Labour,
R/o. Marwadi, Tq. Jintur,
Dist. Parbhani.

.. APPLICANTS.

VERSUS

1. The State of Maharashtra
through the officer in charge,
Bori Police Station,
Dist. Parbhani.
2. XYZ

.. RESPONDENTS.

Mr. K.P. Rodge, Advocate for applicant,
Mr. S.A. Gaikwad, APP for respondent
Ms. Mayuri Kasturkar Kulkarni, Advocate for respondent No.2

**CORAM : SMT. VIBHA KANKANWADI
& S.G. CHAPALGAONKAR, JJ.**

DATE : 4th SEPTEMBER, 2024.

JUDGMENT [PER S.G. CHAPALGAONKAR, J]:-

1. The applicant has approached this court under Section 482 of Cr.PC., thereby praying to quash and set aside the FIR in Crime No. 181 of 2017 registered with police Station, Bori, District Parbhani for the offences punishable under Sections 376 and 417 of IPC as well as to quash and set aside the consequential criminal proceeding, in Sessions Case No. 220 of 2022 pending before the Sessions Court at Parbhani.

2. On 26.9.2017, respondent No.2 filed report to police station, Bori, alleging that she resides with mother since she is deserted by her husband. She has a daughter out of her matrimonial relationship. The applicant/accused was residing with his family in same locality. He used to visit her maternal home, as such, she got acquaintance with him. Being deserted by her husband, the applicant under the pretext of performing marriage, induced her for sexual relation. He frequently called her and established sexual relationship. A month before festival of Nag Panchanami, applicant had sexual intercourse with her, consequently, she conceived pregnancy. Although applicant himself is married and having two daughters out of his matrimonial relationship, he assured her for taking care of child and also marry with her. On 11.8.2017, he fled away with his wife and two daughters causing mental trauma to her.

On the basis of aforesaid information, crime No. 181 of 2017 has been registered with Police Station, Bori. The investigation progressed and charge sheet has been filed against the applicant for the offences punishable under Sections 376 and 417 of IPC.

3. Mr. K.P. Rodge, learned advocate for the applicant submits that the respondent No.2 is a married woman having a daughter out of her matrimonial relationship. Her husband has deserted her. Therefore, she was residing at her matrimonial home. The applicant is her neighbour. He is also a married person having two daughters. During the passage of time, intimacy developed between the applicant and respondent No.2. They had consensual sexual relationship. However,

once the respondent No.2 conceived pregnancy, she lodged the report to police station. He would submit that from the contents of FIR or material in charge sheet, the offence of cheating or rape cannot be made out. He would, therefore, urge to quash and set aside the FIR and consequential criminal proceeding in Sessions Case NO. 220 of 2022 pending before the Sessions Judge at Parbhani.

4. Per contra, Mr. S.A. Gaikwad, learned APP and Ms. Mayuri Kasturkar, learned advocate appearing for respondent No.2, vehemently opposes the prayer in the application. They would submit that the applicant is a married person having two daughters. However, taking disadvantage of the fact that respondent No.2 who deserted by her husband, cunningly established sexual relationship with her under promise marriage. However, when she conceived pregnancy, the applicant disowned his responsibility. According to them, acts of applicant constitute cheating within the meaning of Section 417 of IPC as well as rape under Section 376 under false promise of marriage. They would submit that the charge sheet is already filed. The case is committed to Sessions Court. At this stage, there is no occasion to exercise inherent powers of this court.

5. We have considered the submissions advanced by learned advocates for respective parties. We have carefully gone through the contents of the FIR and material in the charge sheet. The factual matrix as stipulated in the FIR is not seriously controverted. Apparently, respondent No.2 is a matured lady having a daughter out of her matrimonial relationship. However, after desertion by the husband, she was residing at her maternal home alongwith her mother and daughter

for more than six years. The applicant is a neighbour of parental home of respondent No.2 and since December, 2016 he was on visiting terms with her mother. The acquaintance of respondent No.2 with applicant culminated into physical intimacy and frequent sexual relationship. Eventually, respondent No.2 conceived pregnancy.

6. Respondent No.2 alleges that applicant promised her to perform marriage. If the sequence of events narrated in the FIR is considered, it is discernible that applicant as well as respondent No.2 were already married and having children out of respective wedlocks. Admittedly they were residing in one and the same locality, they were aware about the marital status of each other. Despite knowledge of respective marital status, sexual relationship was developed between them and continued for more than 10 months. In this background, it is difficult to believe that the applicant induced respondent No. 2 for sexual relationship under the promise of marriage. When the respondent No.2 was aware about the subsisting marriage of the applicant and his family consisting of two children, it is difficult to believe that she maintained physical relationship with applicant in expectation of marriage. The narration in the FIR clearly stipulates that respondent No.2 visited applicant's home and had consensual sex with him and similar episodes continued for a period of 9 months. Perusal of the charge sheet suggests that the statement of witnesses are hear-say in nature and based on narration given by respondent No.2 only. There is nothing in the charge sheet, depicting significant facet in favour of prosecution case so as to bring home ingredients of Sections 417 and 376 of IPC.

7. At this stage, reference can be made to observations of

Supreme Court of India in case of ***Pramod Suryabhan Pawar vs. State of Maharashtra and others reported in (2019) 9 SCC 608***, wherein, the Supreme Court after considering the previous judgment in the subject matter, observed in para.18 as under :-

*“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.**”*

Similarly, in the case of ***Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others reported in (2019) 18 SCC 191***, the Supreme Court in para. 23 observed thus :-

“23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated

*differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. **The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.***

8. In light of legal position laid-down by the Supreme Court we find that unless women's decision to engage in the sexual relationship is oriented from man's bad promise of marriage with no intention or malafide motive to satisfy lust, offense under section 376 of IPC would not constitute. From the factual matrix of the present case, it can be gathered that the respondent No.2 had no reason to believe that the applicant would be marrying with her since she was well aware that the applicant had his own family consisting of his wife and two daughters. The intimacy was developed between the applicant and respondent No.2 due to constant visits of the applicant to her maternal home. She continued voluntary sexual relationship with the applicant. In this background, it is difficult to believe that the because of false promise of marriage, the respondent No.2 had consented for maintaining sexual relationship with the applicant. In that view of the matter, we are of the considered view that in facts of present case offenses under Section 376 and 417 cannot be made out from FIR or the material in the charge sheet. Hence, applying the principles of law espoused in the case of ***Chi. Bhajanlal vs. State of Haryana, AIR 1992 S.C. 604***, we find this to be fit case to exercise powers under Section 482 of Cr.P.C. accordingly, we proceed to pass the following order :-

O R D E R

[a] The application is allowed;

[b] The FIR in Crime No. 181 of 2017 registered with police station, Bori, Dist. Parbhani for the offences punishable under Sections 376 and 417 of IPC, charge sheet No. 58 of 2018 and Sessions Case No. 220 of 2022 pending before Sessions Court at Parbhani, is hereby quashed and set aside to the extent of applicant.

[c] Mr. Mayuri Kasturkar Kulkarni, learned advocate is appointed through legal aid to represent respondent No.2, her remuneration is quantified at Rs. 7000/- to be paid through Maharashtra Legal Services Authority, Sub-Committee, Aurangabad.

[d] The application stands disposed of.

[S.G. CHAPALGAONKAR, J]

[SMT. VIBHA KANKANWADI, J]

grt/-