

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4655 OF 2019

Duryodhan Sopan Aldar

...Petitioner

Versus

The State of Maharashtra & Anr.

...Respondents

....

Mr. Rajesh A. More a/w Mr. Soham Powar, Advocate for the Petitioner.

Mr. Harshvardhan G. Khambete, Advocate for Respondent No.2.

Ms. Rutuja Ambekar, APP for the Respondent No.1 – State.

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**CORAM : PRAKASH D. NAIK, &
N. R. BORKAR, JJ.**

DATE : 28th FEBRUARY, 2024.

P.C.:

1. The Petitioner invoked jurisdiction of this Court under Article 226 of the Constitution of India and inherent power under Section 482 of the Criminal Procedure Code, 1973 (for short “Cr.P.C.”) challenging the proceedings in Sessions Case No.628 of 2022 pending before the Court of learned Additional Sessions Judge, Pune.

2. The brief facts of the prosecution case are as under:

The complainant was acquainted with the accused.

They fell in love with each other. Their parents came to

know about their relationship. Since both of them were belonging to different castes, their family members were against such relationship. Somewhere in April-2015, the accused informed the complainant that his parents would not permit their marriage and they should elope and perform marriage by going to Pune. The complainant agreed and both of them met at Pune. They took rented premises and started residing together at Pune. The accused induced the complainant to have physical relationship, under the promise of marriage. Thereafter they started residing at Navi Mumbai. They maintained physical relationship. Subsequently accused arranged the premises for residence of the complainant and she started residing at Pune. The accused used to visit the said premises. He dodged topic of marriage and maintained physical relationship with her. He started avoiding her and refused to perform marriage with her. The FIR was lodged on 21.01.2018 for offences punishable under Sections 376, 376(2) and 420 of Indian Penal Code (for short "IPC"). On completing investigation, charge-sheet was filed.

3. Vide order dated 21.12.2022 notice was issued to Respondent No.2, for a long time the notice could not be served.

Subsequently, the report was received that notice issued to Respondent No.2 is received back with remark “the Respondent No.2 is not residing at given address and informed by telephonically, she refused to take notice”. Since Respondent No.2 was not present, vide order dated 28.11.2023 it was directed that intimation be given to Respondent No.2 through concerned Police Station about next date of hearing with indication that the matter would be heard finally at the stage of admission. The Police report dated 08.12.2023 about intimation of hearing of this Petition to Respondent No.2 was taken on record. Vide order dated 20.12.2023 it was observed that inspite of intimation, Respondent No.2 is not present in the Court. The High Court Legal Services Aid Authority was directed to appoint an Advocate to represent Respondent No.2. Hence, Advocate was appointed to represent Respondent No.2.

4. Learned Advocate Mr. More appearing for the Petitioner submitted as under:

- i) The FIR is false. It is based on concocted version of the complainant. It is filed with malafide intention to harass the Petitioner.
- ii) Assuming the allegations in the FIR to be true, no offence under Sections 376 & 420 of IPC is made out.

iii) There has been inordinate delay in lodging the FIR. According to complainant she was subjected to physical relationship since 2015 onwards. The FIR was lodged on 21.01.2018.

iv) The FIR itself indicate that both were in love with each other. Their parents were against their relationship. The marriage could not be performed on account of opposition of the family members which was to the knowledge of the complainant.

v) There is distinction between mere breach of promise or not fulfilling the false promise. It cannot be said that the promise to marry was false and the intention of maker at the time of making the promise was not to abide by it but to deceive the complainant.

vi) The relationship between the complainant and accused was consensual.

5. Mr. More has relied upon the decision of the Apex Court in the case of **Pramod Suryabhan Pawar Versus The State of Maharashtra and Another**¹.

¹ 2019 AIR (SC) 4010

6. Learned A.P.P. submitted that the grounds urged by the Petitioner could be urged during trial. The victim was induced to maintain physical relationship under the false promise of marriage. Consent was obtained under misconception of fact which would constitute the offences under Sections 376 & 420 of IPC.

7. Learned Advocate appointed to represent Respondent No.2 submitted that the victim was induced to have physical relationship by false promise of marriage. The accused did not perform marriage. Consent was obtained by false promise, which cannot be considered as consent for maintaining physical relationship. The proceedings cannot be quashed at this stage.

8. From the factual matrix emanating from the FIR and the charge-sheet it is evident that the accused and the complainant were introduced to each other in 2015. They developed friendship. It was culminated into love. They were belonging to different castes. Their relationship was not approved by Family members due to caste. Somewhere in April-2015, both of them went to Pune. They stayed together. There was physical relationship between them. Thereafter they shifted to another place. They engaged in physical relationship. Marriage could not be performed. The complainant alleges that false promise of marriage

was made and the accused maintained physical relationship with her. The facts as stated above would indicate that the relationship between accused and the victim was of consensual nature. They were together for more than three years. They had engaged in physical relationship on several occasions. Apparently the marriage could not be performed by opposition of the family members.

9. A breach of promise cannot be said to be a false promise. The false promise could be established if the maker of the promise had no intention of upholding his word at the time of giving it. The facts of this case would indicate that though both of them wanted to perform marriage there was opposition of family. They eloped. They stayed together. There was continuous physical relationship between them. It cannot be said that consent was obtained by misrepresentation, fraud or misconception of fact. The physical relationship between the accused and complainant existed for a long period of time.

10. In the case of **Deepak Gulati Vs. State of Haryana**² it was observed that 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 at an early stage a false promise of marriage by the accused.

² 2013 AIR (SC) 2071

11. In the case of **Yedla Srinivasa Rao Vs. State of A.P.**³, the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the Panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. In this factual background it was observed that the intention of the accused was right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her. The intention of the accused was not bonafide. 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

³ 2006 (11) SCC 615

upholding his work 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. There must be adequate evidence to show that at the relevant time 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. In **Uday Vs. State of Karnataka**⁴ the complainant was a college going student when the accused promised to marry her. In her statement she admitted that she was aware that there would be

4 (2003) 4 SCC 46

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 held 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.

13. In the case of **Pramod Suryabhan Pawar Versus The State of Maharashtra and Another** (supra) the complainant and the accused were known to each other. They used to regular speak on phone. Accused proposed marriage and assured that their belonging to different castes would not be a hindrance. The accused promised to marry the complainant after the marriage of his elder sister. The accused used to meet her and live with her. The complainant refused to engage in sexual intercourse with accused but on the promise of marriage he forcibly established corporeal relationship. The accused visited her on several occasions and they engaged in sexual intercourse. Subsequently the accused raised concern about marrying her on the ground of caste as it would affect his younger sister's marriage. The complainant visited the accused and there was physical relationship between them. She was pregnant. They

regularly engaged in physical relationship. The accused then got engaged with another woman. He performed marriage with another lady. The complainant registered FIR. The accused moved the High Court under Section 482 of Cr.P.C. to quash the FIR. The High Court rejected the application on the ground that though the relationship was with consent, it appears that there was a promise to marry and later on giving reason of caste of complainant, promise was not kept.

14. In the light of factual aspects as stated above, the Hon'ble Supreme Court in the above decision had observed that The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated. The Court has repeatedly held that consent with respect to Section 375 of 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. The "misconception of fact" alleged by the complainant is the appellant's promise to marry her. 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. 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 misconception of fact that vitiated the woman's "consent". On the other hand, a breach of 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 woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was on the basis of her choosing to engage in the said act". In Paragraph 18 of the said decision, the Hon'ble Supreme Court had summarized the legal position that emerges from various cases of the Apex Court with regards to "consent" of a woman with respect to Section 375 which is reproduced herein below:

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.”

15. From the facts of the present case which are described herein above it is evident that the victim and the accused were in love with each other and their relationship was known to their family members, who were opposed to it on account of their castes. Both of them voluntarily for a long period of time stayed together voluntarily there was sexual relationship between them. It is not possible to infer that the the promise to marry induced the victim to consent to having sexual relationship with the accused. The complainant was aware that their marriage was difficult on account of caste. The complainant was conscious that the marriage cannot take place despite promise by the accused. In 2015 they left their house and went to Pune and stayed together. There is reason to believe that the consent given by the victim was the result of their love for each other. It is not disputed that both of them were in love. They frequently met. There was sexual relationship between them which continued for a period of about three years. The allegations in the FIR do not indicate that the promise by the accused was false or that the complainant engaged in sexual relationship on the basis of this promise. It is not alleged in the FIR that when the Petitioner promised to marry the complainant, it was

done in bad faith or with the intention to deceive her. Thus, there is no reason to infer that the promise was false and the consent was obtained under misconception of fact or there was dishonest promise to marry to induce the victim to indulge in sexual relationship with the accused for a period of about three years. Hence, the impugned proceedings are required to be quashed and set aside.

ORDER

- i) Criminal Writ Petition No.4655 of 2019 is allowed;
- ii) The proceedings in Sessions Case No.628 of 2022 pending before the Court of learned Additional Sessions Judge, Pune arising out FIR No.59 of 2018 dated 21.01.2018 registered with Wakad Police Station, Pune, are quashed and set aside;
- iii) Writ Petition is disposed off accordingly.

(N. R. BORKAR, J.)

(PRAKASH D. NAIK, J.)