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11-crw-44-25

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

11 CRIMINAL WRIT PETITION NO. 44 OF 2025

**SOMESH PRAKASH GAIKWAD
VERSUS
THE STATE OF MAHARASHTRA**

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Advocate for the Petitioner : Mr. Suvidh S. Kulkarni
APP for Respondent / State : Ms. Ashlesha S. Deshmukh

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CORAM : Y. G. KHOBRAGADE, J.

DATE : 27.01.2025

PER COURT :

1. Heard Mr. Kulkarni, learned counsel for the Petitioner at length. The learned APP waives notice for the sole Respondent / State.
2. By the present Petition, the Petitioner/accused takes exception to the order dated 04.09.2024 passed by the learned Additional Sessions Judge, Jalna, below Exhibit 36 in Sessions Case No. 159/2022, whereby rejected the application for discharge of the petitioner for the offences punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code.
3. The learned counsel appearing for the Petitioner canvassed in vehemence that, the informant victim lodged a report on 30.06.2022

with Sadar Bazar Police Station, District Jalna alleging that, in the year 2019 she was introduced with the Petitioner through Social Media Facebook. First time, on 16.06.2019 at about 05.00 p.m., she was contacted by the Petitioner. The Petitioner/accused and victim developed love affair. The Petitioner had asked the victim to be in relationship, therefore, the victim had asked the accused that, whether he would perform marriage with her. Accordingly, the Petitioner/accused had promised to marry with her. Thereafter, the Petitioner called her at Burhannagar, Jalna, where he developed sexual /physical relations with the victim under the pretext of marriage. But prior to that the Victim had refused to have physical relations, unless the Petitioner marry with her but the Petitioner issued threat to commit suicide. Subsequently, the Petitioner asked the informant to visit at Hyderabad for performing the Court Marriage and stayed with her in the rented premises for 8 days. During said period, the petitioner developed physical relations with the Victim under the pretext of marriage but no marriage was performed. It is further alleged that, when the Petitioner had been to Jalna, the Petitioner had called her at Jamwadi and then took her at lodge. Thereafter the Petitioner and informant were caught by the victim's father and both of them were brought at police station. The Petitioner had promised to marry with the victim in presence of

Police personnel and victim's father but the Petitioner did not perform marriage with her and had sought 8 days. Lastly, on 26.06.2022, at about 05.00 p.m., she was called at tenanted premises of the Petitioner's friend and committed rape on her. On the basis of said report, a Crime No. 528/2022 registered with police station Sadar Bazar for the offences punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code.

4. The victim was referred for the medical examination. The accused was arrested and referred for the medical examination. Subsequently, the present Petitioner enlarged on bail. After investigation is over, a charge-sheet came to be filed against the present Petitioner/accused.

5. The Petitioner/accused filed Exhibit 36 an application and prayed for discharge mainly on ground that, he and victim both are major. Both of them indulged into consensual physical relations. Therefore, essential ingredients of Section 375 of IPC not established and the Petitioner has not committed rape. So also, the material produced on record not sufficient to constitute the ingredients of "Rape". Merely, the Petitioner gave false promise of marriage and developed physical relations with the victim it does not constitute

breach of promise and no offence constitutes for the offences punishable under Ss. 376, 376(2)(n), 506 of the Indian Penal Code.

6. The learned counsel appearing for the Petitioner further canvassed that, as per the report / F.I.R., the Petitioner gave promise of marriage in the Police Station when he and victim were brought from the Lodge. However, Investigation Officer has not recorded statement of relatives of the victim or any other independent witnesses.

7. Further, statement of Mr. Suresh Gangaram Gangasagare has been recorded, however, he is owner of the flat wherein allegedly physical relation lastly developed but Shri Parmeshwar Babanrao Kshirsagar had taken said flat on rent basis and no statement of the tenant recorded. As per the prosecution story, Shri Parmeshwar Babanrao Kshirsagar was running photo shop and when he came to know about visit of police and drawn panchanama, he asked Parmeshwar Kshirsagar as to what had happened, then he told that, on 29.06.2022, his friend Jai Daima had informed him about visit of his friend in that premises and after some time left said premises. Therefore, this witness came to know about visit of police persons for drawing of panchanama and visit of accused and victim on 29.06.2022 in said flat. Thereafter, the victim lodged Report.

8. The learned counsel appearing for the Petitioner submits that the story narrated by the victim is completely of consensual sexual intercourse, therefore, continuation of trial for the said offences amounts to abuse of process of law and no fruitful purpose will be served, hence, prayed for discharge of the accused. However, the learned trial court fail to consider the facts and circumstances of the case and declined to discharge the Petitioner, hence, prayed for quash and set aside impugned order.

9. In support of his submissions, the learned counsel appearing for the Petitioner relied on case of ***Pramod Suryabhan Pawar Vs. The State of Maharashtra and Ors., AIR2019SC 4010***, wherein the Honourable Supreme Court considered the various case laws and held that ;

*“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 women 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. In **Deepak Gulati** this Court observed:*

“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 Indian Penal Code 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.”*

19. The allegations in the FIR indicate that in November-2009 the complainant initially refused to engage in sexual relations with the Accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:

“(i) The complainant and the Appellant knew each other since 1998 and were intimate since 2004;

(ii) The complainant and the Appellant met regularly, travelled great distances to meet each other, resided in each other’s houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant; and

(iii) The Appellant expressed his reservations about marrying the complainant on 31 January 2014. This led to

arguments between them. Despite this, the Appellant and the complainant continued to engage in sexual intercourse until March 2015.

The Appellant is a Deputy Commandant in the CRPF while the complainant is an Assistant Commissioner of Sales Tax.

20. *The allegations in the FIR do not on their face indicate that the promise by the Appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the Appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The Appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the Appellant since 2008, and that she and the Appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the Appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the Appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under [Section 375](#) of the Indian Penal Code has occurred.*

21. *With respect to the offences under the SC/ST Act, the WhatsApp messages were alleged to have been sent by the Appellant to the complainant on 27 and 28 August 2015 and 22 October 2015. At this time, [Sections 3\(1\) \(u\)](#), (w) and [3\(2\) \(vii\)](#) of the SC/ST Act as it stands today had not been enacted into the statute. These provisions were inserted by the (Prevention of Atrocities) Amendment Act 2015 which came into force on 26 January 2016. Prior to the Amending Act, the relevant provisions of the statute (as it stood then) were as follows:*

“3. (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe. – “Amending Act”

(x) intentionally insults or intimidates with intent to humiliate a member of a Schedule Caste or a Scheduled Tribe in any place within public view;

(xi) assaults or uses force to any woman belonging to a Schedule Caste or a Scheduled Tribe with intent to dishonour

or outrage her modesty;

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed; ...”

10. It further relies on case of ***Sameer Amrut Kondkar Vs. State of Maharashtra and Ors., Manu/MH/1228/2023***, wherein the Co-ordinate Bench of this Court has observed in paragraph **Nos. 9 to 12** as under :

“9. While analysing the provision of Rape as contained in Section 375 of the Indian Penal Code and while interpreting the term “without her consent”, being explained in Explanation 2, appended to the Section, to mean unequivocal voluntary agreement, when the woman by words, gestures or any form of verbal or non-verbal communication, indicates willingness to participate in the specific sexual act.

Section 90 of the Indian Penal Code provide for a contingency where consent known to be given under fear or misconception is no consent in the eyes of law.

10. Their Lordships of the Hon’ble Apex Court made the following observation as regards ‘Consent’ in following paras :-

“12. Where a woman does not “consent” to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a “misconception of fact” is not consent in the eyes of the law.

13. 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."

14. 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. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

15. This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala :

"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 assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

11. In the present case, it can be clearly seen that for prolonged period of 8 years, the relationship between the two continued and it cannot be said that, only because she was under misconception that he is going to marry her, she had consented for sex. The prosecutrix is sufficiently of matured age to be conscious of the relationship, both physical and mental, and merely because, the relationship had now turned sour, it cannot be inferred that the physical relationship established with her, on every occasion, was against her will and without her consent. Since the couple used to meet in isolation, with no indication that on every occasion when the physical relationship was established, the promise of marriage was made, when she has unequivocally consented to the physical indulgence, without any grievance being made till she lodged the FIR on 17.02.2016, I do not think that sufficient ground exist to proceed against the Applicant by charging him under Section 376 of the IPC.

12. Moreover, the prosecutrix in her statement recorded under Section 164 of the Cr.P.C. on 26.04.2016 admit that on several occasions physical relationship was established between the couple and he was to get married to her. In the said statement she also state that, it was revealed to her that he has also established physical relationship with some other girl and that girl was staying with her as paying guest.

From the statement of the prosecutrix in the FIR and in the statement under Section 164 Cr.P.C. it cannot be inferred that there was failure to perform the marriage and the promise was not fulfilled. In any case, physical relationship maintained with the prosecutrix was not solely on the promise of marriage but since she was in love with the Applicant, she permitted him to indulge physically and this was repeated on several occasions, according to her own version.

As far as offence under Section 323 of the IPC is concerned, bare allegation is made to the effect that the prosecutrix was assaulted, without any details being furnished and the said allegation is as vague as it could be.”

11. Since the accused prayed for discharge u/s 239 of Cri. P. C. in Crime No. 528/2022 for the offences punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code, therefore, it would be appropriate to reproduce Sec. 239 of Cr. P. C., which reads as under:

“239. When accused shall be discharged.—If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.”

12. In the case in hand it prima facie appears that, initially the Petitioner and victim acquainted with each other through the Social Media Facebook. Both of them developed friendship relations. On consideration of Oral Report itself it shows that, first time on 16.06.2019, the accused called the victim at Saraswati Mandir and at that time, he disclosed his intention to live in relationship with the victim. But the victim asked him whether he would marry with her. Thereafter, the Petitioner promised her about performing marriage with her. Thereafter, the victim was called at Burhannagar, where the petitioner forcibly committed sexual intercourse because she had told the accused that she would not permit to develop physical relations unless he marry with her but petitioner issued threat to commit suicide and unless he is permitted to have sexual intercourse he would not marry with her. Thereafter, the Petitioner promised to marry with her and indulged into physical relations with her number of times. Therefore, at this juncture in absence of trial it can not be held the ingredients of offences punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code constitute or not.

13. On face of record it further appears that, the accused had

directed the victim to visit at Hyderabad for performing Court Marriage but no marriage was performed and he developed physical relations with the victim in the tenanted premises for the period of 8 days. Thereafter, the accused again visited at Jalna and called the victim at Jamwadi and then took her in the Lodge. Both them were caught in the Lodge by her father and they were brought at the Police Station, where the accused gave promise to marry with the victim but did not perform marriage. Again, on 29.06.2022, the accused allegedly committed sexual intercourse with the victim in tenanted premises and told her that he would not marry with her and let she do whatever she thinks. The material placed on record shows that, the Petitioner obtained consent of the victim under the duress, threat to commit suicide and under pretext of marriage and developed sexual intercourse.

14. In case of *Pramod Suryabhan Pawar* (cited *supra*) considered the cases of (1) *Kaini Rajan V. State of Kerala* , 2009 SCC 113, (2) *Deepak Gulati Vs. State of Haryana* (2013) 7 SCC 675 , *Vedla Srinivassa Rao V. State of Andhra Pradesh* 2006 11 SCC 615 and the case of *Uday Vs. State of Karnataka* (2003) 4 SCC 46 and held that “consent” of a woman with respect to Section 375 of I.P.C. 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 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 a immediate relevance, or bear direct nexus to the woman’s decision to engage in the sexual act. The allegations in the F.I.R. made by the victim itself shows that when she initially refused to have sexual relations but the accused had used force and also used threat to commit suicide and not to marry with her unless he is permitted to have sexual intercourse. Therefore, it appears that the said consent is not free consent but it was under the duress, threat to commit suicide. Therefore, the issue involved in the facts and circumstances of the present case whether the act of sexual intercourse was consensual or not can not be decided without putting the accused on trial. Therefore, to my view above cited case laws are not applicable to the facts and circumstances of the present case.

15. On 04.09.2024, the learned Additional Sessions Court passed the impugned order holding that, the recital of F.I.R. as well as the statements of the prosecutrix recorded under Section 164 of the

Cr.PC., prima facie shows that, the accused had promised to marry with the prosecutrix and under the pretext of false promise of marriage, victim was compelled to keep physical relations with him. Under these circumstance, whether there were a consensual sexual intercourse between the victim and Petitioner coupled with other facts cannot be decided without trial. The charges against the accused does not appear groundless. The learned Sessions Court passed the impugned reasoned order and rejected application for discharge of the Petitioner, which certainly appears justifiable, hence, no interference is called at the hands of this court to disturb said findings. Therefore, present petition deserves to be dismissed. Hence, the Writ Petition is dismissed.

16. The observations made by this Court shall not be legal impediment or any adverse impact on the trial.

(Y. G. KHOBRADE, J.)

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