



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

27 CRIMINAL APPLICATION NO.2335 OF 2023

Shaileshbhai Govindbhai Makwana,
Age 40 yrs., Occ. Service,
R/o B/55, Smruti Society, Katargam,
Surat, Tq. & Dist. Surat. (Gujarat State)

... Applicant

... Versus ...

1 The State of Maharashtra
Through Police Inspector,
Police Station, Tuljapur,
Tq. Tuljapur, Dist. Osmanabad.

2 XYZ

... Respondents

...

Mr. S.A. Deshmukh, Advocate for applicant

Mrs. Rashmi P. Gour, APP for respondent No.1

Mrs. Rashmi S. Kulkarni, Advocate h/f Mr. V.P. Raje, Advocate for respondent

No.2

...

CORAM : SMT. VIBHA KANKANWADI &
HITEN S. VENEGAVKAR, JJ.

DATE : 03rd SEPTEMBER, 2025

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed under Section 482 of the Code of Criminal Procedure, 1973 initially for quashment of the proceedings in Regular Criminal Case No.328/2021 pending before learned Judicial Magistrate First Class, Tuljapur, Tq. Tuljapur, Dist. Osmanabad, arising out of First Information Report vide Crime No.135/2021 dated 17.04.2021 registered with Police Station, Tuljapur, Tq. Tuljapur, Dist. Osmanabad, for the offence punishable under Sections 376(2)(n) and 377 of the Indian Penal Code, 1860.

2 Heard learned Advocate Mr. S.A. Deshmukh for applicant, learned APP Mrs. Rashmi P. Gour for respondent No.1 and learned Advocate Mrs. Rashmi S. Kulkarni holding for learned Advocate Mr. V.P. Raje for respondent No.2.

3 Learned Advocate appearing for applicant has taken us through the entire charge sheet and submits that respondent No.2 had initially filed First Information Report with City Police Station, Surat, however, it has been then transferred for investigation to Police Station, Tuljapur. From the First Information Report and entire charge sheet it can be seen that respondent No.2 – prosecutrix was married in 1998 and had son aged 15 and daughter

aged 21. Her petition for divorce against her husband was pending with Nashik Court, but then she states that she was residing separately since last about 8 to 10 years prior to First Information Report from her husband. Still she had registered her name for second marriage with two matrimonial applications in 2017 and applicant had also registered his name for second marriage. They came to know each other in 2017. His divorce petition from his first wife was also pending. She then states that they were chatting with each other and used to make video calls. At that time, she was residing at Tuljapur. He came to her house on 17.10.2017 and thereafter as he was looking after her and her children properly, she developed faith in him. He was giving promise to marry at that time. On the same day he woke her up and then had forcible sexual intercourse with her, gave her threat to kill her as well as her children if she fails to satisfy his lust. But, at the same time he was also promising to her that he would marry her. She then states that applicant has forced her to give amount of Rs.2,50,000/-, out of them the bank transfer is for the amount of Rs.10,000/- and Rs.1,100/-. All those incidents had taken place between 17.10.2017 to 09.02.2021.

4 Learned Advocate appearing for applicant has taken us through the entire charge sheet and submits that in her supplementary statement recorded on 13.05.2021 she has then stated that there is divorce between

herself and her husband, which was then contrary to her First Information Report. In First Information Report she has given a clear picture that her petition for divorce as well as the petition for divorce filed by applicant against his wife were pending and they had knowledge about the pendency of both cases. Still they engaged in sexual activities. Therefore, it amounts to consensual sex. He relies on the decision in **Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and others** [AIR 2019 SC 327], wherein it has been held that -

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

4.2 He further relies on the decision in **Pramod Suryabhan Pawar vs. The State of Maharashtra and another** [(2019) 9 SCC 608], **M.C. Ravikumar vs. D.S. Velmurugan and others** [2025 SCC OnLine SC 1498] and **Shambhu Kharwar vs. State of Uttar Pradesh and another** [2022 SCC OnLine SC 1032]. In all these cases it has been held that ingredients of Section 375 of the Indian Penal Code will not be attracted when there is consent and the parties

had the knowledge that they would not be able to marry immediately when they indulged in sexual acts. The learned Advocate for applicant further states that in her statement under Section 164 of the Code of Criminal Procedure respondent No.2 has stated that the petition for divorce is still pending before Nashik Court. That means, till the petition was pending she had registered herself on the matrimonial site for the second marriage. Her statement under Section 164 of the Code of Criminal Procedure gives more facts than she had stated in First Information Report. Naturally, this is the exaggeration. The call records have been produced, but it can be said that the fact is not in dispute that the applicant and respondent No.2 used to talk with each other on phone. As the ingredients of the offence have not been made out, it would be unjust to ask the applicant to face the trial.

5 Learned APP Mrs. Rashmi P. Gour for respondent No.1 and learned Advocate Mrs. Rashmi S. Kulkarni holding for learned Advocate Mr. V.P. Raje for respondent No.2 strongly opposed the application. They state that though informant had registered her name to the matrimonial site, that does not mean that she had intention to cheat anybody. She had stated that her divorce petition is still pending and she would have then married after the decision in the divorce petition. Applicant had come to Tuljapur, where the informant was residing on 17.10.2017 and he cannot deny the same. By

giving promise to marry he had extracted the consent of informant. By giving threats the further consent has been solicited and even he has extracted amount of Rs.2,50,000/- from informant. In fact, charge sheet came to be filed in present matter on 02.10.2021. The applicant's earlier Criminal Application No.2315 of 2021 was got withdrawn by applicant by order dated 23.06.2022. The withdrawal was unconditional. Of course, it appears that this Court was not inclined to grant any relief to applicant and, therefore, it was withdrawn and now again for the same relief applicant has approached this Court. Applicant is not remaining present before Judicial Magistrate First Class, Tuljapur and non bailable warrants have been issued against him. Because of non appearance of applicant, the case has not yet been committed to Court of Session and, therefore, applicant does not deserve to get remedy under the inherent jurisdiction of this Court.

6 At the outset, we would say that before going into merits, the fact which has come on record is that in the charge sheet, which was filed in the year 2021, the applicant has not appeared before the trial Court. It appears that Surat Police are not responding. In spite of having knowledge that charge sheet has been filed, applicant has not appeared before the concerned Court. Notice appears to have been issued to surety also, but it has not also been returned. Because of the non appearance of applicant the

case has not even been committed to the Court of Session. The person who is not responding and in spite of knowledge is not appearing before the Court of Law cannot ask for the relief which is of inhuman nature. Only on this count also the application deserves to be rejected with costs.

7 The cost is then required to be imposed on the second ground also, as the earlier application was withdrawn by applicant which was for the same relief. The applicant has not disclosed and explained about withdrawal of Criminal Application No.2315 of 2021 by him on 23.06.2022. The second application for the similar relief, though it is under Section 482 of the Code of Criminal Procedure, is not maintainable. Here, it is that too with suppression.

8 Now, as regards contents of First Information Report, supplementary statement and statement under Section 164 of the Code of Criminal Procedure, it is to be noted that informant had stated in the beginning that her divorce petition was pending, even the applicant had disclosed that his divorce petition was pending. But then applicant had gone to meet her on 17.10.2017. The sexual act was done. Though she says that it was against her wish, but she states about the other sexual acts of subsequent period and it is stated that those were by giving threats extracting money. In her statement under Section 164 of the Code of Criminal

Procedure more details have been given. It is stated that even it was told by applicant in Diwali of 2020 that divorce decree has been passed in his favour and, therefore, called her to meet his parents at Surat. Accordingly, she went to Surat, but applicant did not arrange for meeting between her and his parents. Even at the end of February, 2021 he kept his statement that he is ready to perform marriage with her, but his family members are not ready. His brother also gave threat that he would see that her marriage with the applicant will not happen. Thus, this appears to be not a clear case of consensual sex. The ratio laid down in all the authorities relied by learned Advocate for applicant are binding on this Court, however, the facts in the present case are different. We would like to rely on the decision in **Rajkumar vs. State of Karnataka** [2024 SCC OnLine SC 257], wherein taking into consideration the facts of this case, it was observed that they are accepting the view taken by the Co-ordinate Bench in **Shambhu Kharwar vs. State of Uttar Pradesh and another** [2022 SCC OnLine SC 1032], but differentiating the same, taking into consideration the facts, it was observed that “*a relationship may be consensual at the beginning but same state may not remain so far all time to come. Whenever one of the partners show their unwillingness to continue with such relationship, the character of such relationship as it was when started will not continue to prevail and, therefore, by taking the view that the relationship had not remained*

consensual, they rejected the prayer to quash First Information Report.”

Therefore, this is not a fit case where we should exercise our powers under Section 482 of the Code of Criminal Procedure.

9 In view of the fact of suppression of earlier criminal application and the present applicant is not appearing before the trial Court, we impose cost on the applicant. Hence, following order.

ORDER

- i) Criminal Application stands rejected.
- ii) Applicant to deposit costs of Rs.10,000/- (Rupees Ten Thousand only) to the High Court Legal Services Sub Committee, Aurangabad, within two months.

(HITEN S. VENEGAVKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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