

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 5300 OF 2024

Vivek Gabaji Shinde

.. Applicant

Versus

ABC & Anr.

.. Respondents

-
- Mr. Virendra V. Pethe for Applicant
 - Ms. Savita M. Yadav, APP for State
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 16, 2025

P. C.:

1. Heard Mr. Pethe, learned Advocate for Applicant and Ms. Yadav, learned APP for State.

2. Applicant has filed the present Application for regular bail under Section 436 of the Code of Criminal Procedure, 1973 (for short, "Cr.PC.") in connection with Crime No. 400/2024 registered with Kapurbawadi Police Station under Section 376 of the Indian Penal Code, 1860 (for short, "IPC").

3. Complainant lodged complaint on 17.04.2024 by stating that the occurrence of period of offence is from 01.01.2019 to 11.04.2024. *Prima facie* reading of the complaint which is appended to the FIR and the statement of the first informant which is appended at page No. 26 onwards of Application shows that admittedly since 01.01.2019 upto 11.04.2024, Applicant was residing along with complainant and her

two children in her house at Thane. According to complainant she befriended the Applicant after her husband's demise in 2017. Applicant was working as electrician at that time and used to regularly visit the complainant's house. According to complainant, there relationship blossomed into a love relationship. Complainant herself allowed the Applicant to reside along with her during the aforesaid period. Sometime in 2022 when complainant was appointed as leader of political group, it is alleged that Applicant started torturing and harassing her, however complainant has not lodged any complaint of the said incidents and therefore veracity of the said incidents cannot be established. *Prima facie* until 11.04.2024 Applicant was residing with complainant and her two children in her house is admitted by the complainant herself. On 11.04.2024 when complainant realized that Applicant was not present in her house and inquired with his friend about his whereabouts, she learnt that Applicant was getting married to somebody else, hence she lodged the FIR.

4. Mr. Pethe, learned Advocate for Applicant would draw my attention to the complainant's version stated in the FIR and her statement and would submit that relationship between parties *prima facie* as per the complainant's own version was undoubtedly consensual and therefore this Court take it into account and allow the Application. He would submit that complainant has also given

affidavit before the Sessions Court that she wants to compromise the matter and has given her no objection to grant him bail but Sessions Court rejected the Bail Application and therefore Applicant has been constrained to move this Court. On the allegations of false promise of marriage, Mr. Pethe would submit that the Court should consider the length of time during which Applicant was residing with the complainant in her own house and long passage of time and prolonged continuation of physical relationship and therefore it would be improper to assume that complainant who already had two children was unable to decipher the behaviour of the Applicant.

4.1. Mr. Pethe has placed before me a recent decision of the Supreme Court in the case of ***Mahesh Damu Khare Vs. State of Maharashtra & Anr.¹*** and would draw my attention to the observations and findings returned by the Supreme Court in that case having similar facts. No doubt the said decision *prima facie* appears to be on similar facts but it cannot be forgotten that each case is required to be determined on its own facts. In the said decision, Supreme Court was considering the case for granting bail of the accused therein who was also residing with the complainant in that case for a considerable period of 9 long years. In the context of those facts, Supreme Court in paragraph Nos. 26 to 29 held as under:-

1 2024 SCC OnLine SC 3471

"26. In the present case, the nature of relationship between the appellant and the complainant can be characterised by the following attributes:

- (i) The appellant and the complainant were acquainted with each other since 2008. The complainant herself admits that the appellant has been in physical relationship since then till 2017 without protest in spite of alleging that the appellant had done so without her consent.
- (ii) The physical relationship was going on routinely. But the complainant in her complaint states that after she got a rented room in Shirvane, Nerul Sector 1, Navi Mumbai, in December, 2010, the appellant used to come every day and had sexual intercourse everyday, though without her consent and by giving false promise of marriage.
- (iii) The complainant does not appear to be a naive and gullible woman who was susceptible to deceit while maintaining physical relationship with the appellant and the allegation of false promise surfaced only when the appellant refused to provide further financial and other assistance.
- (iv) The conduct of the complainant clearly shows that she is a mature person clearly capable of understanding the consequences of her acts and she was fully aware of the kind of illicit relationship she was maintaining with a married person.
- (v) The complainant was fully aware that the appellant was already married and had two wives, though one of them was not keeping well.

27. Thus, from the above it appears that it is more of an extra-marital affair during the aforesaid period without any insistence by the complainant for getting married to the appellant. The fact that the complainant continued to have a physical relationship for a long time without any insistence on marriage would indicate the unlikelihood of any such promise made by the appellant for marrying her and it rather indicates that the relationship was a consensual one.

In our opinion, the longer the duration of the physical relationship between the partners without protest and insistence by the female partner for marriage would be indicative of a consensual relationship rather than a relationship based on false promise of marriage by the male partner and thus, based on misconception of fact.

28. Moreover, even if it is assumed that a false promise of marriage was made to the complainant initially by the appellant, even though no such cogent evidence has been brought on record before us to that effect, the fact that the relationship continued for nine long years, would render the plea of the complainant that her consent for all these years was under

misconception of fact that the Appellant would marry her implausible. Consequently, the criminal liability attached to such false promise would be diluted after such a long passage of time and in light of the fact that no protest was registered by the complainant during all those years. Such a prolonged continuation of physical relationship without demurral or remonstrance by the female partner, in effect takes out the sting of criminal culpability and neutralises it.

29. It will be very difficult to assume that the complainant who is otherwise a mature person with two grown up children, was unable to discover the deceitful behaviour of the appellant who continued to have sexual relationship with her for such a long period on the promise of marriage. Any such mendacious act of the appellant would have been exposed sooner without having to wait for nine years. The inference one can draw under the circumstances is that there was no such false promise made to the complainant by the appellant of marriage by continuing to have physical relationship so as to bring this act within the province of Section 376 IPC and therefore, there was no vitiation of consent under misconception of fact."

5. Ms. Yadav, learned APP has vehemently objected for granting bail to the Applicant on the basis of prosecution case.

6. In the present case, it is seen that if any criminality is required to be attached to such a prolonged physical relationship between the complainant and the Applicant, it can have serious consequences. It is seen that complainant is having two grown up children and she allowed the Applicant to stay in her own house and they all resided together for almost five years which is substantially a long period. More specifically considering the fact that during the said period due to Covid-19 pandemic all citizens of this country were confined to their homes. *Prima facie* civil relationship was clearly established between the complainant and Applicant herein which can be ascertained from the above. Acquaintance of complainant and the Applicant is also accepted by the complainant. Complainant is not a

naive woman who shall be susceptible to any wrong doing or to deceit while maintaining physical relationship with the Applicant and more specifically on the allegation of false promise which has been alleged by the complainant for the first time in the FIR filed on 11.04.2024. It is borne out from the record that complainant is the head of some political group in Thane. *Prima facie* from the material placed on record, conduct of the complainant clearly shows that she is a matured person clearly capable to know the import and understanding of her actions and consequences thereto in respect of the illegal relationship she maintained with the Applicant.

7. In view of the above *prima facie* observations and findings, Applicant has made out a case for enlargement on bail. In view of the above, Application is allowed in terms of prayer clause (b) subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs. 15,000/- with one or two sureties in the like amount;
- (ii) Applicant shall report to the Investigating Officer of concerned Police Station once every month on the third Saturday between 10:00 a.m. to 12:00 p.m. for three months or as and when called;

- (iii) Applicant shall co-operate with the conduct of trial and attend the Trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for revocation of this order;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or change of residence or mobile details, if any, from time to time;
- (vii) Any infraction of the above conditions shall entail revocation of this order.

8. It is clarified that the observations in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case.

9. All concerned shall act on production of a server copy of this order and no authority shall insist on a certified copy of this order.

10. In view of the above directions, Bail Application stands allowed and disposed.

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[MILIND N. JADHAV, J.]

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