

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 209 OF 2025
WITH
INTERIM APPLICATION NO. 91 OF 2025
IN
BAIL APPLICATION NO. 209 OF 2025

Kinjal Kamlesh Desai

Applicant /
.. Accused

Versus

The State of Maharashtra and Anr.

.. Respondents

-
- Mr. Rajiv Patil, Senior Advocate a/w. Mr. Parth Sanghrajka, Advocate i/by Rajeev Sawant & Associates for Applicant.
 - Mr. Sukanta A. Karmakar, APP for the State.
 - Mr. Joseph Kelwadi, Advocate for Intervenor.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 20, 2025.

P.C.:

1. Heard Mr. Patil, learned Advocate for Applicant; Mr. Karmakar, learned APP for Respondent – State and Mr. Kelwadi, learned Advocate for Intervenor. Perused the record.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Bail in connection with C.R.No.746 of 2024 registered with MIDC Police Station.

3. I am hearing and deciding the Bail Application as also the Interim Application before me.

4. Brief facts of the present case are as under:-

4.1. First Information Report (for short “**FIR**”) is appended at page No.27 of the Bail Application. It is the case of Complainant that she is 37 years old and by profession a Software Developer residing in Katherine Place, Melbourne, Australia and presently in the Yoga Institute, Santacruz (West), Mumbai for the past one month. FIR is dated 15.11.2024.

4.2. Parents of Complainant are residing in Village Pachibigha, Taluka Hiswa, District Nawada, State Bihar. According to Complainant for the past 12 years, she is a resident of Australia and has been working in Australia in an IT Company called Control Track in Melbourne.

4.3. According to Complainant in 2022 she married her college friend called ‘Dhiren Vyas’ by a registered Marriage in Family Court Bandra, Mumbai. However, since 2023 the relationship with her husband was strained and she decided to separate from him. It is stated in the FIR that parents of Dhiren are both suffering from cancer and a few days prior to filing of FIR Dhiren’s father passed away and therefore Complainant desisted from discussing about her separation / divorce from Dhiren as he required emotional support.

4.4. Complainant has stated that in June, 2022 she came to stay in Vadodara. Thereafter she states that in July 2022 she came to

Mumbai to meet her friend Nikunj Barot. She has stated that she liked Nikunj Barot, but apart from friendship there was no relationship between them. Thereafter she stated that in August 2023 Nikunj Barot introduced her to the Applicant by giving her his phone number and from that date / time she and the Applicant started talking to each other on phone and exchanging messages on WhatsApp with each other. She has stated that they used to have regular chats on WhatsApp.

4.5. She has stated that on 01.09.2023 she met the Applicant in Peninsula Redwine Hotel, (Rodeo Drive) Andheri (East), Mumbai. She has stated that she and Applicant would regularly converse with each other on phone and WhatsApp chats and while doing so one day she discussed about her married life with Dhiren i.e. her husband. She has stated that she asked the Applicant whether he was single or not and if so whether he would like to take forward their relationship to the next level.

4.6. According to Complainant, Applicant informed her that he had an affair with one girl, but due to incompatibility they had a break up and he was single. Applicant is working in a Company called 'Bil Mart Fin Tech.' situated at Marol, Andheri (East), Mumbai as head of partnership firm as stated in the FIR and residing at House No.1, Acme Angan, Lala Lajpatrai Road, Vile Parle as informed to the Complainant.

4.7. Complainant has stated that on 14.09.2023 she came to Mumbai to meet the Applicant and stayed in room No.418, Suncity Hotel, Andheri (East). On that date, Applicant visited her at 06:30 p.m. in the evening and both of them chatted together for a long time. She has stated that he spoke to her emotionally about his mother's demise and father's bad health and thereafter kissed her and both of them thereafter got intimate with each other and had sexual intercourse. She has stated that she liked the Applicant and since he promised to marry her, she never objected to his advances. She has stated that they both went to Rude Lounge, Powai and after having a good time together returned back to Suncity Hotel at 11:30 p.m. and thereafter once again had sexual intercourse together after which Applicant left at about 01:30 a.m. Thereafter she has stated that on 20.10.2023 once again she came to Mumbai and stayed in Room No.418 of Suncity Hotel, Andheri (East), Mumbai and at about 07:00 p.m. in the evening Applicant came to meet her and thereafter he had sexual intercourse with her repeatedly.

4.8. She has stated that on 21.10.2023 she went to Australia and thereafter they both kept in touch with each other on the phone and WhatsApp chats and were emotionally involved with each other. She has stated that he developed emotional attachment with her. Thereafter she stated that on 30.09.2024 she met the Applicant at about 06:30 p.m. in the evening at a place called 'Quarter Pillar', Vile

Parle (West), Mumbai and on 01.10.2024 at about 08:00 p.m. they both went to Suncity Hotel, Andheri (East) and on that night they stayed together in the hotel and had sexual intercourse.

4.9. Thereafter she has stated that on 25.10.2024 she and Applicant met at Hotel Ginger and both of them had sexual intercourse on that date. At that time when the Applicant was in the bathroom she saw his Aadhar card and realised that Applicant was elder to her and she also got his residential address. Hence, on the following day i.e. on 26.10.2024 she visited his residential address and it is on that date she realised that he was married and his mother was alive and he also had one son. She has stated that she did not disclose her identity to his wife and told that she was a friend of the Applicant's friend.

4.10. Thereafter she has stated that she spoke with Applicant for quite some time and also checked his WhatsApp chats and Make-My-Trip Account and realised that he had undertaken several trips which were evident from his Make-My-Trip account. At that time, she stated that she realised that he was dating various other girls also and on seeing this she approached Applicant's wife called Aanal and informed her about the Applicant's activities.

5. On the basis of the above, it is Complainant's case that she has been duped by Applicant by giving a false promise of marriage which she believed. Applicant is indicted under Section 376 read with

Section 376(2)(n) of the Indian Penal Code (for short “**IPC**”). Invocation of Section 376(2)(n) is on account of the Applicant having committed repeated act of sexual assault on the same person.

6. Complainant has also alleged deceit, false promise and threats given by Applicant to her that he had her photographs etc. In so far as this issue is concerned, it stands addressed as the Applicant has participated in investigation and handed over all photographs and any other material qua the Complainant to the Investigating Officer who has confirmed the same.

7. Mr. Kelwadi, learned Advocate for the Intervenor – Complainant has invited my attention to the Interim Application. At the outset, I would like to record the submissions made by Mr. Kelwadi before I address the Applicant’s and prosecution case. According to Mr. Kelwadi, learned Advocate for the Intervenor – Complainant, FIR was filed within 20 days of the Complainant’s discovery about Applicant’s marital status. He would however in his usual fairness correct the record by informing the Court that Complainant’s correct year of marriage is 2017 and not 2022 as recorded in the FIR, which is because the Complainant is not familiar with Marathi language and she was unable to identify the discrepancy crept in at the time of filing the FIR. Next he would submit that Applicant has hidden his marital status all throughout during the relationship and it is only when

Complainant found out the same after visiting his residence she felt cheated.

8. He would submit that conduct of Applicant being married does not justify exploitation of the Complainant. He would submit that Complainant being married also does not justify the actions of Applicant which were clearly deceptive about hiding his own marital status especially when Complainant had expressed her intention to pursue a relationship only if marriage was possible between them in future.

9. He would submit that conduct of Applicant has shattered the trust of Complainant and deeply impacted her hopes of re-marriage after her divorce. He would submit that Applicant kept her in the dark and exploited her into committing into the relationship and ravished her repeatedly by taking advantage of her vulnerability due to her loneliness and her own dysfunctional marriage. He would submit that he has misled the Complainant into believing that he genuinely was interested in a long relationship due to which Complainant surrendered to Applicant and he took undue advantage subjecting her to repeated sexual and emotional exploitation. He would submit that concealment of marital status of Applicant and exploitation of Complainant is an act of deceit that violated Complainant's dignity. He would submit that had the Complainant known the fact that Applicant

was married she would never had pursued a relationship as she was seeking a committed and pure bond.

10. He would submit that Complainant valued devotion and single mindedness in a relationship even if the marriage between them would have occurred years later and circumstances would have made it possible.

11. The aforesaid submissions are etched out in the Interim Application of the Complainant.

12. Next, he would submit that there is substantial evidence available on record of Applicant's conduct by using similar *modus operandi* which has been given to the Investigating Officer and this Court should consider the same while deciding the Bail Application of Applicant. He would vehemently submit that if granted bail, Applicant would possess a significant risk of interfering with evidence and witnesses which could be influenced or silenced by him and that would severely affect investigation. He would submit that the nature of accusations in the present case requires a comprehensive and uninhibited investigation and granting bail to Applicant would impede the investigation process.

13. I have heard Mr. Kelwadi and perused the Interim Application. In paragraph No.12 of the Interim Application it is the case of the Complainant herself that she exploited financial aid from

the Accused i.e. Applicant to support in her trauma recovery after discovering his marital status. It is stated therein that Complainant has encashed Rs.50,000/- out of Rs.2,00,000/- which was discussed between Complainant and Applicant for not filing the FIR and that she had expressed clearly her willingness to return the money before filing the FIR, demonstrating no intent to exploit the Applicant. It is further stated in the paragraph under reference that Complainant admittedly received Rs.10,000/- from Applicant due to her international card being broken and the money was repaid to Applicant via Transfer-wise on the following day in the first week of October.

14. After hearing the learned Advocate for Complainant Mr. Kelwadi, I have heard Mr. Patil, learned Senior Advocate for Applicant. He has drawn my attention to the Bail Application which is based upon the FIR, which according to Applicant clearly shows that the parties had indulged in physical relationship on multiple occasions throughout the period and that they knew each other for approximately 13 months and 11 days.

15. He would submit that Complainant is a grown up lady, rather married lady and knows the consequences of her actions. He would submit that all details whatsoever have already been handed over to the Investigating Officer by the Applicant. He would submit that the WhatsApp chat which are appended from page Nos.24 to 60 of

the Interim Application are clearly evident of the fact that both the parties were attached to each other. He has particularly drawn my attention to page No.42 of the Interim Application where according to Complainant she has categorically stated in the WhatsApp chat that she had decided the final amount of Rs.2,00,000/- in order to not file any complaint against Applicant and she was backing out because she thought that Applicant was devoted to her in the past and according to Complainant Rs.2,00,000/- would be an amount which would enable her to take time to forget what has happened to her.

16. Record also clearly shows cheques of Rs.2,00,000/- were handed over by Applicant to Complainant out of which the Complainant has encashed one cheque of Rs.50,000/- and also admitted to the same in her own Interim Application. That apart, Mr. Patil has drawn my attention to the WhatsApp chats and more particularly Exhibit “8” – page No.45 of the Interim Application where it is seen that Applicant had gifted a diamond to the Complainant and she wanted to return the same since she would not like the energy and the diamond did not suit her.

17. I have heard Mr. Karmakar, learned APP for the State and would submit that the act of the Applicant cannot be dismissed by the Court as he has clearly acted with deceit to lure the Complainant into a relationship and ravished her by falsehood. He supports the

submissions made by Mr. Kelwadi and persuades the Court to reject the Bail Application.

18. After hearing learned Advocates and perusing the record, *prima facie* it is clear that Applicant and the Complainant on multiple occasions had physical relationship with each other. Considering peculiar facts in the present case, it cannot be *prima facie* contended that Complainant had physical relationship with Applicant which was against her wish and consent on the ground of Applicant making a false promise to her that he would marry her.

19. In the present case, it is seen that Complainant herself was a married woman. Therefore for the Complainant to plead that Applicant had given a false promise to marry her and subsequent deceit from the same and in that process exploited her cannot be countenanced for the simple reason that it is not a singular act between parties. It is seen that over a period of 13 months and 11 days parties met each other on multiple occasions in various hotels as delineated herein above in the FIR filed by the Complainant herself and they had physical relationship with each other.

20. In this regard and in the facts of the present case, the Supreme Court in a recent judgment decided on 26.11.2024 in the case of *Mahesh Damu Khare Vs. The State of Maharashtra and Ors.*¹

¹ 2024 (4) MLJ (Cri) 578

dwelling upon the provisions of Section 375 and Section 90 of the IPC in somewhat identical facts where there was a complaint filed about a promise by the Accused that he would marry the prosecutrix and therefore she consented to have physical relationship with the Accused on the misconception of the fact that he would marry her because of the promise made by the Accused and while doing so in paragraph Nos.18 to 24 has held as under:-

“18. It is the case of the complainant that the Appellant had engaged in sexual intercourse without her consent. She mentioned that there was a promise made by the Appellant that he would be marrying her. Thus, the contention of the complainant was that she consented to have physical relationship with the Appellant on the misconception of fact that he would marry her because of the promise made by the Appellant that he would ultimately marry her.

19. Section 375 of the Indian Penal Code clearly postulates that a person is said to have committed rape if he performs any of the sexual acts mentioned Under Sub-clauses (a), (b), (c) and (d) without the consent of the woman. As mentioned above, in terms of Section 90 of the Indian Penal Code, if the consent is given under a misconception of fact, such a consent is no consent in the eyes of law and cannot be considered to be wilful and voluntary consent.

20. Keeping this aspect in mind as to what amounts to consent with reference to Section 375 of the Indian Penal Code, this Court has examined and considered in a number of cases that if the person acts with an active understanding of the circumstances, actions and consequences of the act, it would indicate the presence of consent. It was observed in the case of Shambhu Kharwar v. State of Uttar Pradesh and Anr. MANU/SC/1011/2022 : 2022:INSC:827 as follows:

*11. In **Pramod Suryabhan Pawar v. State of Maharashtra** MANU/SC/1142/2019 : 2019:INSC:939 : (2019) 9 SCC 608, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in **Sonu @ Subhash Kumar v. State of Uttar Pradesh** (2021) 18 SCC 517, observed that:*

12. This Court has repeatedly held that consent with respect to Section 375 of the Indian Penal Code 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...

[...]

14. *[...] Specifically in the context of a promise to marry, this Court has observed that 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...*

[...]

16. *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 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...***

[...]

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.** (emphasis supplied)*

21. *The complainant had taken the plea that the Appellant had physical relationship with her against her consent by making a false promise that he would marry her. In this regard, it has to be considered whether making a false promise to marry amounts to an offence. If a false promise of marriage is made to a woman by a man, thus deceiving the woman leading her to*

engage in sexual relations, it may amount to misconception of fact, in which case the consent given by the woman may be vitiated. In this regard one may refer to the decision of this Court in Niam Ahmed v. State (NCT of Delhi) MANU/SC/0080/2023 : 2023:INSC:85,

20. *The bone of contention raised on behalf of the Respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the Accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause - Secondly of Section 375 Indian Penal Code. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the Accused. In case of false promise, the Accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the Accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence Under Section 376.*

22. *In our view, if a man is Accused of having sexual relationship by making a false promise of marriage and if he is to be held criminally liable, any such physical relationship must be traceable directly to the false promise made and not qualified by other circumstances or consideration. A woman may have reasons to have physical relationship other than the promise of marriage made by the man, such as personal liking for the male partner without insisting upon formal marital ties. Thus, in a situation where physical relationship is maintained for a prolonged period knowingly by the woman, it cannot be said with certainty that the said physical relationship was purely because of the alleged promise made by the Appellant to marry her. Thus, unless it can be shown that the physical relationship was purely because of the promise of marriage, thereby having a direct nexus with the physical relationship without being influenced by any other consideration, it cannot be said that there was vitiation of consent under misconception of fact.*

23. *It must also be clear that for a promise to be a false promise to amount to misconception of fact within the meaning of Section 90 of Indian Penal Code, it must have been made from the very beginning with an intention to deceive the woman to persuade her to have a physical relationship. Therefore, if it is established that such consent was given under a misconception*

of fact, the said consent is vitiated and not a valid consent. In this regard we may refer to the case of "Deepak Gulati v. State of Haryana" MANU/SC/0546/2013 : 2013:INSC:349 : (2013) 7 SCC 675, in which it was held as follows:

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the Accused 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 latter falls within the ambit of cheating or deception. 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. An Accused can be convicted for rape only if the court reaches a conclusion that the intention of the Accused was mala fide, and that he had clandestine motives."

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. (emphasis supplied)

24. It may be also noted that there may be occasions where a promise to marry was made initially but for various reasons, a

person may not be able to keep the promise to marry. If such promise is not made from the very beginning with the ulterior motive to deceive her, it cannot be said to be a false promise to attract the penal provisions of Section 375 Indian Penal Code, punishable Under Section 376 Indian Penal Code.”

21. What is held in paragraph Nos.22 and 23 herein above by the Supreme Court while recording findings in the case of ***Deepak Gulati Vs. State of Haryana***² is relevant to the facts of the present case also. The Supreme Court has clearly held that 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.

22. The Supreme Court states that consent is an act of reason accompanied by deliberation and it may be express or implied, coerced or misguided, obtained willingly or through deceit.

23. In view of the above and when juxtaposed with the facts in the present case it is clearly seen that Applicant has not given any promise to marry the Complainant. It is seen that parties had physical relationship on multiple occasions and they decided to keep the physical relationship as a matter of choice. *Prima facie* on perusing the record it does not appear from the record that Complainant was

² (2013) 7 SCC 675

either forced to keep sexual relationship or she was induced to such an extent that she had no other option but to keep the physical relationship with the Applicant.

24. Complainant is a highly educated girl and it shows that it was her conscious decision to keep physical relationship with the Applicant. *Prima facie* at this stage the case appears to be of a consensual relationship which cannot be denied. This coupled with the fact that WhatsApp chats which are appended to the Interim Application, however present a completely different picture. The reference to the WhatsApp chats and more specifically the amount of Rs.2,00,000/- out of which Rs.50,000/- having already been encashed by the Complainant is shocking to say the least. In the WhatsApp chat of 29.10.2024 the Complainant has called the Applicant to meet her finally at 08:30 a.m. on the next date and has stated that she has decided the final amount of Rs.2,00,000/- as that would be the amount because according to her she will take time to get over what has happened to her. Complainant has further stated on the said page No.42 that she will use the money and her intention is not to take the money but just to recover as her soul is shaken from inside and she may need to take lot of personal time to get to terms with reality and discover herself. However, WhatsApp chats dated 30.10.2024 on page No.43 are more shocking. The Complainant answers in the affirmative when Applicant tells to her to take the cash on that day because bank

would be closed for Diwali on the next day. This entire discussion is only before lodging of the FIR so as to dissuade the Complainant from lodging the FIR. If the Complainant indeed felt deceived due to the actions of the Applicant, she would not have entered into such WhatsApp chats with the Applicant for seeking money from him.

25. The aforesaid evidence is *prima facie* evidence placed before me which according to me entitles Applicant for the desired relief. The relationship between Applicant and Complainant over a period of 13 months and 11 days was undoubtedly consensual and when Complainant wanted to file FIR there was discussion in the form of WhatsApp chats between parties not to file FIR and take the money which the Complainant herself agreed.

26. The aforesaid discussion *prima facie* entitles the Applicant to be released on bail.

27. Application stands allowed on the following terms:-

- (i) The concerned Police Station / In-charge of the concerned Police Station where the Applicant is in police custody shall take cognizance of a server copy of this order and release the Applicant immediately on interim bail on following terms and conditions;

- (ii) Learned APP shall convey this order to the concerned Police Station Incharge for compliance;
- (iii) Applicant is directed to be released on bail on furnishing cash bail of Rs. 25,000/- for his release and file his undertaking that he will provide one or two sureties in the like amount of Rs. 25,000/- within a period of four weeks after his release from police custody, which shall be accepted;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) He shall deposit his passport, if any, with the Investigating Officer;
- (vi) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner;
- (vii) 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;
- (viii) Any infraction of the above conditions shall entail revocation of this order.

28. With the above directions, Bail Application stands allowed and disposed.

29. In view of disposal of Bail Application, Interim Application is accordingly disposed.

[MILIND N. JADHAV, J.]

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