



Niti

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.591 OF 2024 (F)**

Mr L (name withheld)
Aged about 32 years
Currently residing at A-207
Eye Star Dwellings
Fatorda Salcete Goa
And Permanent R/o. 214,
Nova Bhatt, Mudchell
Agonda Canacona Goa.

... PETITIONER

Versus

1. State through Public
Prosecutor, High Court of
Bombay at Goa.

2. The Police Inspector
Women's Police Cell,
Panaji, Goa.

3. Ms XYZ (Name withheld)
Aged about 38 years,
In FIR No.03/2024
Registered at Respondent No.2,
Police Station
Service through Investigative
Officer, Women's Police Cell,
Panaji, Goa.

... RESPONDENTS

Mr Arun Bras De Sa with Mr Kyle D'Souza and Mr Mark
Valadares, Advocates for the Petitioner.
Mr S.G. Bhole, Public Prosecutor for Respondent Nos.1 and 2.

Mr Rohan Desai with Mr Ashay Priolkar and Mr Pranav Pathak,
Advocate for Respondent No.3.

**CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ.**

Reserved on: 3rd SEPTEMBER 2024
Pronounced on: 9th SEPTEMBER 2024

JUDGMENT : (*Per M.S. Karnik, J.*)

1. Writ Petition No.546 of 2024 was wrongly tagged with Criminal Writ Petition No.591 of 2024(F). Detag Writ Petition No.546 of 2024 from Criminal Writ Petition No.591 of 2024(F). List the Writ Petition No.546 of 2024 on 18.09.2024.

2. seeks to quash and set aside FIR No.3 of 2024 dated 25.01.2024

and the Charge No.4 of 2024 dated

3. The petitioner is to be a reputed musician by profession. The complainant aged 38 years

petitioner As per the complaint

lodged by Ms omen's Police S alleged

that the petitioner committed offence punishable under
376 and of IPC. alleged that she met the

petitioner on 28 October at Inox Panaji when she had gone for show along with her friend. The petitioner was performing for an event at the October Since then they became friends and started chatting with each other on Instagram. On 07 the petitioner told the complainant that he wants to her grandmother front of the complainant the petitioner told her grandmother that he wants to marry the complainant but was not ready. complainant's grandmother told the petitioner regarding her past the petitioner said that past does not matter.

4. On 08.01.20 he petitioner took complainant for dinner at friend's restaurant. Since it was too late petitioner requested the complainant to stay at his flat he petitioner forcibly had sex with the complainant. The complainant was upset. The petitioner told her not to worry as he had promised her that he would marry her. The next day in the evening the petitioner drop complainant

5. The petitioner informed the complainant that he had told his mother regarding the relationship and that she would relationship. On 10 the petitioner and

the complainant went to complainant's relative
 The petitioner informed that he
 wants to marry her and even if his family does not support him,
 he will go ahead with the marriage. On 11 at 04.00
 when the complainant was at relative's
 petitioner came into her bedroom and with consent had a
 sexual relationship.

6. On 14 2024 at 23.00 the petitioner took the
 complainant to his flat and again with consent had sexual
 relationship. The complainant asked the petitioner whether he
 would marry her. The petitioner promised that he would marry
 the complainant. The petitioner had sexual relationship with
 the complainant on occasions on the
 marrying her.

7. Since 19 the petitioner started ignoring the
 complainant. He told her that his mother is not accepting their
 relationship. Since 23.01.2024, the petitioner had stopped
 talking to the complainant and was not receiving her calls. The
 complainant did pregnancy test on 25 2024 at around
 8.30 hours and found that she was pregnant. It is alleged
 the petitioner cheated the complainant and raped her under

t of marriage. The statement of the complainant was recorded under section 164 CrPC. The chargesheet came to be filed on 22.03.2024 for the offences punishable under Sections 376 and 420

8. petition is filed for quashing the FIR and the chargesheet. The complainant filed an affidavit in reply opposing the petition

9. Learned counsel for the petitioner, relying on the decision *Deepak Gulati V/s. State of Haryana*

tate of UP & Anr. Pramod Pawar V/s. State of Maharashtra & Ors. Dhruvaram Sonar V/s. State of Maharashtra XYZ V/s. State of Maharashtra & Ors.

Shri Mahendra Ladu Sawant V/s. State & Ors. submitted that the FIR deserves to be quashed and set aside. It is submitted that even if the allegation in the FIR and the materials in the chargesheet are taken at its face value, they are not accepted in entirety. The facts prima facie do not constitute any offence or make out a case against the accused. It is submitted

¹ 2013 SCC OnLine SC 477

² (2021) 18 SCC 517

³ 2019 SCC OnLine SC 1073

⁴ 2018 SCC OnLine SC 1073

⁵ 2023 DGLS (Bom.) 1327

⁶ WPCR No.3 of 2020

the FIR and the chargesheet disclose consensual relationship between two adults not on the pretext of marriage

10. learned Public Prosecutor for the and Mr Rohan Desai, learned counsel for the complainant opposed the petition. It is submitted that a chargesheet has been filed and therefore petitioner's remedy is now to approach the Trial Court seeking appropriate relief. It is further submitted that on a false promise to marry complainant, the petitioner took advantage of the complainant physical relationship with her. The petitioner always had an intention to cheat the complainant right from inception and therefore the ingredients of Sections 376 and 420 are clearly made out. Mr Desai relied upon a decision of the Hon ble Supreme Court *Yedla Srinivasa Rao V/s. State of A.P.* and that of this *Deepesh Bhaskar Arkashi & Ors. V/s. State of Maharashtra and Anr.* in support of submission that in the present case the petitioner made a false promise to marry the complainant which he never fulfilled. It is further submitted that the decisions relied upon by the learned counsel for the petitioner are after the

⁷ (2006) 11 SCC 615

⁸ 2024 SCC OnLine Bom 2362

conclusion of the trial and therefore even in the present case having regard to the materials on record the petition should be made to face the trial.

11. Heard learned counsel for the parties.

12. Before we proceed to consider submissions of learned counsel, it would be useful to refer to the judicial pronouncements on the subject. In *Pramod Pawar V/s. State of Maharashtra* (supra), Hon'ble Supreme considered the decisions in *Deepak Gulati V/s. State of Haryana* (supra) *Srinivas Rao V/s. State of A.P.* (supra), *Uday V/s. State of Karnataka* *Dhruvaram Murlidhar Sonar V/s. State of Maharashtra* (supra) and *State of Haryana V/s. Bhajan Lal*. Their Lordships consider the scope and Court's power under Section 482 CrPC and laid down as under:

Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court

⁹ (2003) 4 SCC 46

¹⁰ 1992 Supp (1) SCC 335

*is vested with a significant amount of discretion to decide whether or not to exercise them. The court could be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and reiterated by this Court. In **Inder Mohan Goswami** **State of Uttaranchal** , this Court observed:*

“23. This Court in a number of cases has laid down the scope and ambit of courts’ powers under Section 482 CrPC. Every High Court has inherent powers to act debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

- (i) to give effect to an order under the Code;*
- o prevent abuse of the process of the*
- (iii) to otherwise secure the ends of justice.*

13. *State of Haryana* **Bhajan Lal** (supra), conducted a detailed study of the situation where the court may exercise its extraordinary jurisdiction down a list of illustrative examples where quashing of FIR may be appropriate

¹¹ (2007) 12 SCC 1

juncture it would be pertinent to make a reference to some of the test in paragraph 102 which is relevant to the present

“102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

14. We must bear in mind that in deciding whether exercise jurisdiction under section 482, this court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The Limited question is whether on the face of the FIR and the materials on record even if accepted in their entirety constitute offence. A profitable reference needs to be made to the

observations in paragraphs 8 to 18 *Pramod Pawar V/s. State Maharashtra & Ors.* (supra) which read th

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar State of Maharashtra (

“13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers.”

The present proceedings concern an FIR registered against the appellant under Sections 376, 417, 504, and 506(2) IPC and Sections 3(1)(u), (w) and 3(2)(vii) of SC/ST Act. Section 376 of the IPC prescribes the punishment for the offence of which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 IPC is relevant and is set out below

375. Rape A man is said to commit “rape” if he under the circumstances falling under any of the following seven descriptions

Firstly

secondly. Without her consent.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not the reason only of that fact, be regarded as consenting to the sexual activity.”

90. Consent known to be given under fear or misconception A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or”

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.

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.

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 (supra), 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.”

This understanding was also emphasised in the decision of this Court in Kaini Rajan State of

¹² (2013) 9 SCC 113

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

This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1)(w) of the SC/ST Act also incorporates this concept of consent:

3(1)(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient’s consent;

Explanation. For the purposes of sub clause (i), the expression “consent” means an unequivocal voluntary agreement when the person by words, gestures, or any form of non verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall imply consent or mitigate the offence;"

*In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given e 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. In **Anurag Soni V/s. State of Chhattisgarh** Court held:*

. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

¹³ (2019) 13 SCC 1

Similar observations were made by this Court in Deepak Gulati v State of Haryana (

“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...”

In Yedla Srinivasa Rao State of Andhra Pradesh (supra) 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. Given this factual background, the court observed:

“10. It appears that the intention of the accused as per the testimony of PW 1 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 obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had

committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.”

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. In Deepak Gulati (supra), 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

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.” (Emphasis supplied)

In Uday State of Karnataka (supra) complainant was a college going student when the accused promised to marry her. In the complainant’s statement, she admitted that she was aware that there would be 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 observed 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:

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with

the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married ” (Emphasis supplied)

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. In the present case we have carefully examined the allegations in the FIR the statement of the prosecutrix recorded under section 164 of CrPC and the other material on record. We have to be mindful that we cannot judicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. We find that even if the allegation made in the complaint and the materials on record are taken at its face value what is revealed from the statement under Section 164 is that on the date of the complaint the complainant had gone out for dinner with the petitioner and it was late in the night the complainant stayed in the flat of the petitioner. In the middle of the night the petitioner entered the complainant’s bedroom and had forcible sexual intercourse.

with her. The complainant cried and asked him as to why he committed this act when he told her that he treats her like his wife and he promised to get married with her. On the next day after lunch the petitioner dropped the complainant home. From the allegations, it is seen that the prosecutrix did not consent to the sexual relationship. There was thus no consent the promise of marriage.

16. In the complaint, it is stated that on 11 2024 in the early morning at 4.00 am when they had gone to her relative's place, the petitioner came to her bedroom and had sexual relationship with consent

17. Learned counsel for the petitioner submitted that there are several improvements in the statement recorded under section 164. The complainant alleges that up to the petitioner had sexual relationship with the complainant on several occasions. The complainant stated that from 2024 the petitioner started ignoring her and saying that his mother is not ready for marriage on account of wherein a civil registration was done in the year 2013 with some other man which was cancelled after 5 6 years.

the petitioner told her that his mother is not ready for the marriage

18. On the basis of the allegations taken at its face value what transpire is that the petitioner had propose marriage. To our mind, the first instance of the sexual relationship was not on account of false promise to marry because it is the complainant's case that the petitioner had forcible sexual ionship with her and then convinced that, in any case, he is to marry her. Thus, there does not exist a situation where the consent was on the petitioner's false promise to marry the complainant.

19. In the complaint, it is then stated that on the subsequent occasions the sexual relationship was by consent. It is further material to note that the petitioner had indicated to the complainant that he had informed his mother regarding the relationship and that she would accept the relationship only on 19/01/2024 that the petitioner told the complainant that his mother was not accepting the relationship. Thereafter it is alleged that the petitioner started avoiding the complainant. Learned counsel for the petitioner submitted that there is a complete variance between what is stated in complaint and contents of the section 164 statement

may be so but it is not possible for us to adjudicate upon the veracity of the facts alleged

20. Hon'ble Supreme Court has observed in a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. It is pertinent to note that at the relevant time complainant was 38 years of age. The complainant had willingly accompanied the petitioner was 32 years of age to the location mentioned in the complaint

he petitioner had given her an assurance that he would marry her. On the first occasion it is stated by the complainant that the petitioner had forcible sexual relations with her against her wish. The complainant had in close proximity thereafter voluntarily accompanied the petitioner on several occasions

physical relations with consent complainant though in her complaint says that on several occasions the physical relation by con

section 164 statement she says that such consent was on the

that the petitioner would marry her. The complainant is sufficiently mature to understand the consequences of such relationship. The complainant says that the petitioner meeting her after informing the complainant that his mother is opposing the marriage on account of registration in 2013 with some other man which was cancelled

21. Section 9 provides that any consent given under a misconception of fact would not be considered valid so far as the provisions of section 375 are concerned and as such a physical relationship would be tantamount to committing rape. The physical relation between the parties had developed with the consent of the complainant and though she alleged that on the first occasion the petitioner had forcible sexual relation, she alleged that there were 7 instances when the petitioner and the complainant had sexual relation with her consent. The complainant voluntarily stayed with the petitioner and even travelled with him to different places. Thus, the complainant had adequate knowledge and significant maturity to understand the consequences associated with the act she was consenting to. The complainant is capable of understanding the complications and issues surrounding her relationship with the petitioner. The

petitioner informed the complainant that his mother was against the marriage where the petitioner stopped meeting her. In the facts and circumstances of the present case we fail to comprehend the circumstance of charge of rape levelled against the petitioner. In any case, we are satisfied that on a careful study of all the relevant circumstances and upon viewing the totality of the sequence of facts commencing with the incident on 08.01.2024 culminating in the last incident on 19.01.2024, appears to be a case of consensual relationship rather than forcible sexual relationship to constitute a charge of rape against the petitioner.

22. petition therefore succeed and is allowed he FIR No.3 of 2024 dated 25.01.2024

and the consequent chargesheet is quashed and set aside.

VALMIKI MENEZES, J.

M. S. KARNIK, J.