

Neutral Citation No. - 2024:AHC:161316

**HIGH COURT OF JUDICATURE AT ALLAHABAD**

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**A.F.R.**

**Judgement Reserved on 21.08.2024**

**Judgement Delivered on 01.10.2024**

**Court No. - 79**

**Case :- APPLICATION U/S 482 No. - 6789 of 2019**

**Applicant :-**

**Opposite Party :- State Of U.P. And Anr**

**Counsel for Applicant :- Irfan Hasan, Vijit Saxena**

**Counsel for Opposite Party :- G.A., Jagdev Singh**

**Hon'ble Anish Kumar Gupta, J.**

1. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Vijit Saxena, learned counsel for the applicant and Sri Jagdev Singh, learned counsel for the opposite party no. 2 and Mohd. Shoaib Khan, learned A.G.A. for the State-respondent.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of Charge-sheet dated 09.08.2018 in S.T. No. 826 of 2018 as well as the entire criminal proceedings in Case Crime No. 59 of 2018 under Sections 376 and 386 I.P.C., Police Station- Mahila Thana, District- Moradabad, pending in the court of Sessions Judge, Moradabad.

**FACTS**

3. The brief facts of the instant case are that on 21.03.2018, the opposite party no.2 had lodged an F.I.R. being Case Crime No. 0059 of 2018 for the offences u/S 376 and 386 I.P.C. at the Woman Police Station, District-

Moradabad. It has been submitted by the opposite party no. 2/ the informant that she is the resident of Mohalla H-9, Lajpat Nagar near Guru Govind Singh Park, Police Station-Katghar, District- Moradabad. It is alleged that her husband- Sanjay Goyal, was suffering from disease of sugar for last 15 years and was unable to move frequently and despite various treatments given the same could not improve his condition. In the meantime, her husband has introduced the applicant/Shrey Gupta, and told the informant that the applicant is a faithful person and he will take her care after him. Gradually, the applicant became very close to the informant and allegedly told the informant that her husband would be alive only for few more days, thereafter, both of them would marry. Taking the informant in his confidence and promising her to marry in future, he started to have physical relationship with the informant. The husband of the informant had ultimately died on 29.05.2017 and even after the death of her husband the applicant continued to visit the home of the informant and continued to have physical relationship with the applicant in the home as well as in hotels outside. The informant had many a time asked him to marry her, then, he avoided the marriage telling that first let her sister be married and thereafter he will marry her. Subsequently, the informant came to know about the engagement of the applicant with one other lady on 31.12.2017. Then, the informant told the applicant that he was continuously raping her on the pretext of promise to marry and now he has got engaged with some other lady.

4. Then, on 17.01.2018 at around 6:00 P.M. the applicant allegedly gave a phone call to the informant asking her to come to Rampur Doraha, where he will marry her in a temple and after marriage they will get the marriage registered in court. It is further alleged in the F.I.R. that on such assurance of the applicant herein the informant had reached at Rampur Doraha, then, the applicant told her to come with him and they will marry and thereafter, the applicant had taken her at a godown situated at Rampur Doraha and thereafter by putting a countrymade pistol on the head of the informant, he forcibly committed rape on her and also prepared a video clipping and

thereafter told that he will not marry her and if she tells about the incident to anyone else, her video clip shall be made public. Thereafter, the informant allegedly came back to her house and it is further alleged that thereafter the applicant has started demanding Rs. 50,00,000/- within 15 days and threatened that if his demand is not, fulfilled, then he will kill both her sons and make the video clip public.

5. On the aforesaid allegations the instant F.I.R. was registered against the applicant herein. Thereafter, the matter was investigated by the police official and after recording the statements of various persons, who have alleged that there was a financial dispute between the applicant and the informant with regard to an amount of Rs. 1,00,00,000/-, which is to be paid by the son of the informant to the applicant and the instant F.I.R. was lodged just to avoid the said payment of Rs. 1,00,00,000/-. Son of the informant has also admitted the fact that the applicant herein was working with his father and also used to visit his home but he is not aware about any relationship of the applicant with the informant.

6. During the investigation the Call Detail Records (C.D.R.) reports were also received and wherefrom the Investigation Officer has concluded that the place of incident as alleged in the F.I.R., the C.D.R. report of applicant and the opposite party no.2 are negative and it was further stated that the informant is a fifty years old woman, who has two sons of 27 years and 25 years of age and the applicant herein is also aged about 26 years and after the death of the husband of the informant her son was running the business of his father and he was liable to make a payment of Rs. 1,00,00,000/- to the applicant and the medical report has also not supported the incident of rape.

7. On the basis of the aforesaid, the Final Report dated 06.05.2018 was prepared by the earlier IO. However, the aforesaid Final Report was cancelled by the Senior Superintendent of Police and further investigation was directed on the following points:

(i) What was the relationship between the informant and the applicant and since when and on what basis they came and became intimate to each other ? ;

(ii) The authentication of the 16 photographs, which were produced by the informant during her 161 and 164 Cr.P.C. statements and out of which, in photograph nos. 2, 5, 7, 9, 12, 15 & 16, where parties are looking in objectionable conditions are required to be verified;

(iii) The details of the hotels and record of their arrival and departure from the hotel, where and when the applicant, the informant had gone on which hotel after the death of the husband of the informant;

(iv)The Marriage Certificate issued by Arya Samaj Mandir, Amritpuri B (Reg.) New Delhi, which was found to be a false certificate are required to be reinvestigated and who had prepared the same and for what purpose. Was there consent between the the parties? If yes, then what was the object of obtaining such marriage certificate?;

(v) Subsequently, it came to the knowledge of the informant that on 31.12.2017 the applicant had got engaged with one other lady. When she talked to him he told that he had got engaged due to the pressure from the family but he would marry the informant. Thereafter, on 17.01.2018, the applicant had allegedly called her at Godown in Rampur Doraha, where he bluntly refused to marry her and thereafter had forcibly raped her while keeping pistol on her head and has also prepared video clip of such rape and thereafter he demanded Rs. 50,00,000/- else threatened to defame her and her family and will also to kill the entire family:

(vi) With regard to the other allegations that is on 17.01.2018 at 6:00 P.M. the applicant had allegedly called the informant at Rampur Doraha and had taken her to the godown, where he had committed rape after keeping the countrymade pistol on her head, for which the

appropriate CDR reports are required to be examined and location of the applicant and the opposite party no. 2 is required to be verified.

(vii) By which vehicle the informant had gone to Rampur Doraha, the driver of the vehicle should also be enquired;

(viii) The guards situated at Rampur Doraha are also required to be examined and with regard to the person who came on the relevant date at the godown;

(ix) If any CCTV footage is available with regard to the godown situated at Rampur Doraha, the footage of the same be procured;

(x) With regard to the allegation of the informant that the applicant had prepared a video clip, thereby had demanded Rs.50,00,000/- and if not given he will kill both her sons, in this connection firstly the video clip should be obtained and if there is possibility of relationship, the mobile should be taken into possession and data should be recovered;

(xi) The final report has been prepared on the basis of there being dues towards the opposite party no. 2 to the tune of Rs. 1,00,00,000/- but when and for what purpose the said amount was given by the applicant, the evidence in this regard be collected; and

xii) With regard to amount of Rs. 1,00,00,000/-, the statement of Munshi Kaish Alam has been obtained whereas the informant has also given the affidavit of the said Kaish Alam, which has been alleged to have been obtained by the informant forcibly, therefore, whatever interrogation of said Kaish Alam was done, the videography of the same must be prepared in presence of the witnesses. During the investigation, the video recording in presence of the witness must be prepared.

**8.** On the basis of such directions of Senior Superintendent of Police the investigation was taken over by the SHO- Rajini Dwivedi, who has subsequently filed the charge-sheet dated 09.08.2018 and vide order dated

28.09.2018, the trial court has taken cognizance on the aforesaid charge-sheet and warrant was prepared under Section 209A Cr.P.C. against the applicant herein against which the instant application has been filed by the applicant herein.

**9.** After the cognizance was taken by the trial court, the applicant has approached this Court by filing Criminal Miscellaneous Bail Application No. 38272 of 2018 (Shrey Gupta vs. State of U.P.), which was disposed of vide order dated 09.10.2018 and the bail application of the applicant herein was allowed. While granting bail this Court has taken into consideration the long-standing acknowledged relationship between the informant and the applicant including physical relationship stretched across period of 12-13 years, as mentioned in the statement of the prosecutrix under Section 164 Cr.P.C. statement and the inherent nature of allegations regarding the incident dated 17.01.2018, delay in lodging the F.I.R. and the immediate cause for the prosecutrix to act upon learning that the applicant had been engaged to a younger woman and has committed breach of promise to marry the informant and the alleged Whatsapp messages from the informant to the applicant taken on their face value.

**10.** In her 164 Cr.P.C. statement, the informant has categorically admitted that the applicant herein became a family friend in the year 2005, as her husband was ill since last 15 years and in relation to the said business of her husband the informant used to go alongwith the applicant to bank and office etc. and she has developed a love relationship and in these 12-13 years they had continuous physical relationship number of times. It is further stated by the informant that during this period the applicant has established his own business with the help of the informant and also by some misappropriation of money. Ultimately, the husband of the informant had died on 29.05. 2017. Thereafter, the informant has asked the applicant to marry her, which was avoided by the applicant on the pretext of his DIL case.

**11.** In the medical examination, which was conducted at District Hospital, Moradabad, on 26.03.2018, no alive or dead spermatozoa was found and as

per the medical report no definite opinion about rape committed on the informant was given. There was no external injury on the body of the victim.

**SUBMISSIONS BY APPLICANT**

12. Learned Senior Counsel for the applicant submits even if the allegations made in the F.I.R. as well as in the statement under Sections 161 and 164 Cr.P.C., coupled with the medical report and the entire material available on record, it is crystal clear that the informant was having a continuous consensual physical relationship with the applicant for about 12-13 years. Even when her husband was alive and she was also having the children near the age of the applicant herein. Therefore, learned counsel for the applicant submits that by no stretch of imagination such an alleged continuously consensual physical relationship would amount to rape within the meaning of Sections 375 and 376 I.P.C.

13. In support of his submissions learned Senior Counsel for the applicant has relied upon the judgements of Apex Court in ***Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608, Dhruvaram Murlidhar Sonar vs. State of Maharashtra : (2019) 18 SCC 191, Maheshwar Tigga v. State of Jharkhand, (2020) 10 SCC 108, Naim Ahamed v. State (NCT of Delhi), 2023 SCC OnLine SC 89, State of Karnataka v. L. Muniswamy, (1977) 2 SCC 699, Anand Kumar Mohatta v. State (NCT of Delhi), (2019) 11 SCC 706, R.K. Vijayasathy v. Sudha Seetharam, (2019) 16 SCC 739, Rashmi Chopra v. State of U.P., (2019) 15 SCC 357*** and the judgements of this Court in ***Jiyullah v. State of U.P., 2023 SCC OnLine All 858*** and ***Aruni Mittal v. State of U.P., 2023 SCC OnLine All 3961***, therefore, prays for quashing of the entire proceedings of the instant case against the applicant herein.

**SUBMISSIONS BY INFORMANT**

14. *Per contra*, learned counsel for the opposite party no.2 submits that even if the lady was having a consensual physical relationship for long a period of time, however, that does not give a license to forcibly establish physical

relationship against her *will*. When such relationship between the parties becomes estrange and if such physical relationship is established at the gun point against the *will* of the informant, that will amounts to rape. It is further submitted by learned counsel for the opposite party no.2 that since from the beginning, the relationship of the informant started with the applicant only on the basis of his promise to marry the informant after the death of the husband of the informant. Had there been no such promise on the part of the applicant, the informant would not have entered into such a relationship with the applicant herein and the applicant has continuously exploited the informant for a long period of time on the pretext of marriage and subsequently he has refused to marry the informant and has got engaged with some other lady and subsequent thereto, had forcibly raped the informant. Therefore, a clear case of rape, committed by the applicant is made out against him. Subsequently, the applicant has also prepared a video clip of such physical activity and on the pretext of the same he has started blackmailing the informant and had demanded Rs. 50,00,000/- from the informant and has threatened the informant to kill her sons and also defame her and kill her entire family. Therefore, the allegation as made are fully established and it cannot be said that no case whatsoever is made out against the applicant herein. Therefore, learned counsel for the opposite party no.2 submits that no interference is called for in the instant matter and allegation that the instant F.I.R. has been lodged just to avoid the payment of dues of Rs. 1,00,00,000/-, is a subject matter of trial and at this stage no definite opinion can be formed. Thus, he seeks dismissal of the instant application filed by the applicant herein.

#### **SUBMISSIONS BY STATE**

15. Learned A.G.A. submits that though from the facts as narrated in the F.I.R. as well as in the statements under Sections 161 and 164 Cr.P.C. it is clear that the applicant and the informant were having the continuous consensual physical relationship, however, despite such relationship it does not give him implied license to commit rape at any point of time against the



*will* of the informant. On 17.01.2018, allegedly applicant has committed rape at the gun point, which has been alleged in the F.I.R. and also in her 164 Cr.P.C. statement, therefore, a *prima facie* offence under Section 376 I.P.C. is made out against the applicant. Further, allegations with regard to extortion of money is concerned there are sufficient allegations that a video clip was prepared and thereafter the applicant had tried to extort an amount of Rs. 50,00,000/- from the informant, failing which he has threatened her to kill both her sons and defame the informant if his demands are not fulfilled, by circulating the said video in public. Therefore, learned A.G.A. submits that there are sufficient allegations as well as the material available on record to establish the aforesaid offence against the applicant herein. Therefore, no interference is called for while exercising the jurisdiction under Section 482 Cr.P.C.

#### **CONSIDERATION BY COURT**

**16.** Having considered the rival submissions made by learned counsel for the parties, this Court has carefully gone through the record of the case. Undisputedly, the admitted fact in the instant case are that the informant, at the time of lodging the F.I.R. was aged about 49 years as is reflected from her statement under Section 164 Cr.P.C. and the applicant herein was much younger than the informant. In the instant case though the charge-sheet was filed for the offences under Section 376 as well as 386 I.P.C., learned Magistrate has taken cognizance against the applicant only for the offence under Section 376 I.P.C. Therefore, before proceeding further it would be relevant to note the provisions of Sections 375 and 376 I.P.C., which reads as under:

**"Section 375. Rape-**

*A man is said to commit "rape" if he—*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

under the circumstances falling under any of the following seven description:-

**Firstly- Against her will.**

**Secondly.- Without her consent.**

**Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.**

*Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

*Fourthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.*

*Sixthly.- With or without her consent, when she is under eighteen years of age.*

*Seventhly.- When she is unable to communicate consent.*

### **Explanations**

1. For the purposes of this section, "vagina" shall also include labia majora.

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 by the reason only of that fact, be regarded as consenting to the sexual activity.*

### **Exceptions**

1. A medical procedure or intervention shall not constitute rape.

2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

### **Section 376. Punishment for rape.**

1. **Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.**

2. Whoever—

(a) being a police officer, commits rape,

- i. within the limits of the police station to which such police officer is appointed; or
- ii. in the premises of any station house; or
- iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
- (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
- (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
- (g) commits rape during communal or sectarian violence; or
- (h) commits rape on a woman knowing her to be pregnant; or
- (i) [\*\*\*\*\*]
- (j) commits rape, on a woman incapable of giving consent; or
- (k) being in a position of control or dominance over a woman, commits rape on such woman; or
- (l) commits rape on a woman suffering from mental or physical disability; or
- (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- (n) commits rape repeatedly on the same woman,

*shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.*

3. *Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:*

***Provided*** that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

***Provided further*** that any fine imposed under this sub-section shall be paid to the victim. "

**17.** From the plain reading of Section 375 I.P.C., if a man commits the activities described in Clause (a), (b), (c) & (d), against the *will* of a woman and without her *consent* or with her *consent*, when such consent is obtained by putting her or any person, in whom she is interested, in fear of death or hurt, is said to have committed rape on such woman. The *consent* has been defined in *Explanation 2* to Section 375 I.P.C. and the consent means an unequivocal voluntary agreement when the woman by words, gestures or form of verbal or non verbal communication, communicates willingness to

participate in any sexual act. However, mere non resistance of a woman could not be regarded as she consented to sexual activity and any person who commits rape on a woman, which is not covered under sub-section (2) of Section 376 I.P.C., would be punishable for a term, which shall not be less than 10 years, but may extend to an imprisonment for life.

### **CONSENT**

**18.** Section 90 of the I.P.C. further defines the consent if given under fear or misconception is no consent. Section 90 of the I.P.C. reads as under:

*"S.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*

*Consent of insane person.- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*

*Consent of child. - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."*

**19.** In ***Dhruvaram Murlidhar Sonar (supra)***, the Apex Court has held that an inference as to consent can be drawn only based on evidence or probabilities of the case. Consent is also stated to be act of reason coupled with deliberations. It denotes an act, will of mind of a person to promote the doing of the act complaint of.

**20.** In ***Pramod Suryabhan Pawar (supra)***, the Apex Court has held that where a woman does not consent to the sexual act, described in the main body of Section 375 I.P.C., the offence of rape has occurred while Section 90 I.P.C. does not define the term consent. A consent based on misconception of fact is not consent in the eyes of law.

**21.** In ***Kaini Rajan v. State of Kerala, (2013) 9 SCC 113***, it has been held by the Apex Court, which reads as under:

*"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 and 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. "*

*(Emphasis Supplied)*

22. Thus, for the purpose of the offence under Section 375 I.P.C., the consent needs the voluntary participation of the prosecutrix in the physical relationship with the accused. The consent of such physical relationship would only be vitiated when it was given under some misconception of fact or under fear of injury to the victim or any person in whom the victim was interested.

23. In the instant case, at the time of initiation of the physical relationship with the applicant the prosecutrix, her husband was alive. Therefore, the allegation that the applicant had promised her to marry was of no consequence as prosecutrix herself was not having any capacity to marry with the applicant at the relevant time and such consensual physical relationship between the applicant and the prosecutrix had continued for about 12-13 years without any objection on the part of the prosecutrix. Thus, in the considered opinion of the Court the aforesaid physical relationship between the applicant and the prosecutrix was a long-standing consensual adulterous physical relationship, which would not amount to rape within the meaning of Section 375 I.P.C.

#### **PROMISE TO MARRY**

24. In **Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1**, the Apex Court has held as under:

*"12. 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 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 Section 375 IPC and can be convicted for the offence under Section 376 IPC."*

*(Emphasis Supplied)*

25. In **Deepak Gulati v. State of Haryana, (2013) 7 SCC 675**, the Apex Court has held as under:

"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)

26. In **Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615**, the Apex Court has held as under:

"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 the 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....."

(Emphasis Supplied)

27. In **Uday v. State of Karnataka, (2003) 4 SCC 46**, where the complainant was a college going student, when the accused promised to marry her, the complainant in statements submits that she was aware that there will be

significant opposition from both the complainant and accused family to their marriage, knowing fully well she engaged in sexual intercourse with the accused, however, kept such relationship secret from her family. In such circumstances the Apex Court has observed that the accused promised to marry the complainant was not of immediate relevance to the complainant's decision created in sexual intercourse with the accused, rather, it was motivated by her sexual desires and other factors. The Apex Court has observed as under:

*"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 at 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. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.*

*(Emphasis Supplied)*

28. In *Pramod Suryabhan Pawar (supra)*, on the facts where the complainant and the accused were known to each other for sufficiently long time and were also engaged in intimate relationship and they travel regularly together and reside in each other's house on multiple occasions and were engaged in sexual intercourse regularly over a course of five years and when the accused expressed his reservations about marrying the complainant after about 10 years of such continuous, consensual physical relationship, the Apex Court has held that subsequent failure of the accused to fulfil his promise of marriage made earlier, cannot be construed to make the promise itself was false, therefore, no offence of rape is made out, in which the Apex Court has observed as under:

*"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:*

*19.1. The complainant and the appellant knew each other since 1998 and were intimate since 2004.*

*19.2. 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.*

*19.3. The appellant expressed his reservations about marrying the complainant on 31-1-2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015.*

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

*21. 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 IPC has occurred."*



*(Emphasis Supplied)*

29. Thus, from the aforesaid judgements it is apparent that each and every promise of marriage would not be considered as a fact of misconception for the purpose of consensual sexual intercourse unless it is established that such promise of marriage was a false promise of marriage on the part of the accused since the beginning of such relationship. Unless it is alleged that from the very beginning of such relationship there was some element of cheating on the part of the accused while making such promise, it would not be treated as a false promise of marriage. Once, a promise was made in good faith and subsequently after change of circumstances when the relationship between the parties went wrong for various other reasons, such breach of promise would not be treated as misconception for the purpose of consent of establishing physical relationship. When a woman of competent age, who has sufficient understanding of the physical activities in which she is involving herself on the basis of such promise of marriage, understands the risk of such physical relationship as there is big difference between marriage and promise of marriage.

30. In the instant case, the prosecutrix was a lady of matured age and was having two sons of matured age, equivalent to that of the applicant herein and at the time of initiating the physical relationship the prosecutrix has her husband alive, therefore, the promise of marriage as alleged in the instant case by the prosecutrix was of no consequence at all as the prosecutrix was herself incompetent to marry at the time of initiation of such relationship. Therefore, the prosecutrix herself involved the applicant in the physical relationship out of her own lust and cannot blame the applicant for breach of promise as the promise itself was not non-est at that time of beginning of the relationship between the applicant and the prosecutrix.

#### **EXERCISE OF POWERS U/S 482 Cr.P.C.**

31. In *L. Muniswamy (supra)*, the Apex Court has held as under:

*"In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue*

would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

(Emphasis Supplied)

**32. In *Anand Kumar (supra)* the Apex Court has held as under:**

"15. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 CrPC and that this Court is hearing an appeal from an order under Section 482 CrPC. Section 482 CrPC reads as follows:

**"482. Saving of inherent powers of the High Court.**—Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636, para 7 : 2000 SCC (Cri) 513. Umesh Kumar v. State of A.P., (2013) 10 SCC 591, para 20 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237] . Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

(Emphasis Supplied)

**33. In *R.K. Vijayasathy (supra)*, the Apex Court has held as under:**

"8. The primary question before this Court is whether the High Court has erred in rejecting the plea of the appellants for quashing the criminal proceedings against them. The question at the heart of the present dispute is whether the averments in the complaint disclose the ingredients necessary to constitute an offence under the Penal Code.

9. Section 482 of the Code of Criminal Procedure saves the inherent power of the High Court to make orders necessary to secure the ends of justice. In *Indian Oil Corpn. v. NEPC (India) Ltd.* [*Indian Oil Corpn. v. NEPC (India) Ltd.*, (2006) 6

SCC 736 : (2006) 3 SCC (Cri) 188] , a two-Judge Bench of this Court reviewed the precedents on the exercise of jurisdiction under Section 482 of the Code of Criminal Procedure 1973 and formulated guiding principles in the following terms : (SCC p. 748, para 12)

“12. \*\*\*

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v)”

10. The High Court, in the exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, is required to examine whether the averments in the complaint constitute the ingredients necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence under the Penal Code. The complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence under the Penal Code."

(Emphasis Supplied)

34. In **Rashmi Chopra (supra)** the Apex Court has held as under:

"21. The criminal prosecution can be allowed to proceed only when a prima facie offence is disclosed. This Court has observed that judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. If the High Court finds that the proceedings deserve to be quashed as per the parameters as laid down by this Court in *State of Haryana v. Bhajan Lal* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , the High Court shall not hesitate, in exercise of its jurisdiction under Section 482 CrPC to quash the proceedings."

(Emphasis Supplied)

35. In *Dhruvaram Murlidhar Sonar (supra)*, the Apex Court has held as under:

"8. It is well settled that exercise of powers under Section 482 CrPC is the exception and not the rule. Under this section, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including procedural law and not otherwise.

9. This Court in *State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426]*, has elaborately considered the scope and ambit of Section 482 CrPC. Seven categories of cases have been enumerated where power can be exercised under Section 482 CrPC. Para 102 thus reads : (SCC pp. 378-79)

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(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) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is

*instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.*

*(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.”*

**10.** *In Rajesh Bajaj v. State (NCT of Delhi) [Rajesh Bajaj v. State (NCT of Delhi), (1999) 3 SCC 259 : 1999 SCC (Cri) 401] , this Court has held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. If the factual foundation for the offence has been laid in the complaint, the court should not hasten to quash criminal proceedings during the investigation stage merely on the premise that one or two ingredients have not been stated with details.*

**11.** *In State of Karnataka v. M. Devendrappa [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , it was held that while exercising powers under Section 482 CrPC, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It was further held as under : (SCC p. 94, para 6)*

*“6. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.”*

*(Emphasis Supplied)*

**36.** *In Vineet Kumar v. State of U.P., (2017) 13 SCC 369, the Apex Court has held as under:*

*“41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. ... Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. ... the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings.*

*It is clear that for quashing the 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 the inherent powers.”*

*(Emphasis Supplied)*

### **RAPE/CONSENSUAL SEX**

**37.** Further, in ***Dhruvaram Murlidhar Sonar (supra)***, the Apex Court has held as under:

*"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC."*

*(Emphasis Supplied)*

**38.** In ***Maheshwar Tigga (supra)***, the Apex Court has held that the misconception of the fact about promise to marry has to be in proximity of time to occurrence and cannot be spread over for long period of time. The Apex Court has observed as under:

*"13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eye of the law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury."*

*14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The*

prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

.....

.....

.....

**18.** We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to be solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her."

(Emphasis Supplied)

**39.** In *Naim Ahamed (supra)* the Apex Court has held that it would be folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376 I.P.C., the Apex Court has observed as under:

**"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 IPC. **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. As stated earlier, each case would depend upon its proved facts before the court.**

**21.** In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such

*allegations as 'rape' by the appellant, would be stretching the case too far. The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him during the subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loins of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr. P.C. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC."*

*(Emphasis Supplied)*

**40.** In *Jiyaullah (supra)*, this Court has held as under:

*"18. The expression "against her will" would ordinarily mean that the intercourse was done by man with a woman despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation.*

*19. In the instant case, from the F.I.R. as well as from the Statements u/S 161 and 164 Cr. P.C., the following undisputed facts emerged that the relationship between the applicant herein and the opposite party no. 2 was of a consensual nature:*

- (i) Parties were known to each other for more than 15 years;*
- (ii) They were in active physical relationship with the approval of parents of opposite party no. 2, since more than 8 years. Therefore, there was an active and considered consent by the victim, with the approval of her parents and the physical relationship with her was not against her will;*
- (iii) Subsequently, the applicant herein has broken his promise to marry and refused to marry the opposite party no. 2 which resulted in the registration of the F.I.R. against the applicant herein;*
- (iv) From the allegations made, it is apparent that the promise to marry by the applicant herein was not false from its inception. Due to later developments, the applicant has denied to marry the victim.*

*20. Thus, from the proposition of law as enunciated in the above cited judgments, this Court is of the view that even assuming that all the allegations made against the applicant herein are true for the purposes of considering the application for quashing u/S 482 Cr. P.C., no offence u/S 376 is established as the relationship between the parties was of consensual nature and which has an approval of the family as well and the initial promise by the applicant herein was not false. It is*



*only after subsequent developments between the parties, the applicant herein has refused to marry the applicant herein. Since, the relationship between the parties was longstanding and the victim as well as her family members knew the consequences of the relationship, therefore, any subsequent breach of such relationship would not amount to the offence of rape u/S 375 I.P.C."*

*(Emphasis Supplied)*

**41. In Aruni Mittal (supra), this Court has held as under:**

*"17. Thus, from the survey of the aforesaid case laws, the legal position in this regard is very clear that there is a distinction between the rape and consensual sex. In case of rape, besides other categories, there is absence of will and consent with regard to the sexual activities. Consent should always be free and voluntary in case of consensual sex. If consent is obtained under the misconception of fact in that case, consent cannot be considered to have been giving freely and voluntarily. There is a distinction between false promise to marry and breach of promise to marry. In the latter case, does not amount to a case of rape, if the circumstances were in the knowledge of the prosecutrix and were beyond the control of the accused. A false promise to marry amounts to the case of rape, if there has been a false promise from the inception not to marry. Two tests are laid down under the law to establish whether the consent is vitiated by misconception of fact, arising out of a promise to marriage; (i) The promise of marriage must have been a false promise, given in a bad faith and with no intention of being adhered to at the time it was being given. (ii) 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. The misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of nine years.*

*18. From bare and plain reading of allegations made in the FIR as well as statements recorded under Sections 161 Cr. P.C. and 164 Cr. P.C. of the prosecutrix, the picture emerges, of which the salient features are as follows:—*

- (i) Prosecutrix (first informant) is a major lady and an active member of BJP and indulging in political activities;*
- (ii) Prosecutrix (first informant) has met the applicant no. 1 in the year 2003-2004 at the Oxford Institute while taking tuition together with him and, thereafter, she was in love till 2011;*
- (iii) Prosecutrix (first informant) has not stated that there has been a false promise to marry since beginning/inception.*
- (iv) Prosecutrix herself has admitted that both, she and applicant no. 1 have accepted themselves as wife and husband before the presiding deity in Balaji Mandir, Meerut and she took vow before the deity as a wife of the applicant no. 1. and established physical sexual relationship.*
- (v) She was aware and had knowledge that their relationship was strongly objected and opposed by the family members of the applicant no. 1.*
- (vi) She mounted pressure for solemnizing the valid marriage but the applicant no. 1 could not manage valid marriage and kept physical and sexual relations till 28.12.2019. Thereafter, he maintained distance resultantly hot-talks occurred between them.*
- (vii) Applicant no. 1's family members misled him against her and her sister Rashmi Mittal, particularly, created atmosphere against her by stating that prosecutrix is a political lady and meetings will be held with other boys,*

*if she gets married with her brother and she tried to tarnish and destroy her political image.*

*(viii) Prosecutorix visited different hotels over a period of time and established sexual relationship.*

*(ix) The physical and sexual relationship between the prosecutorix and applicant no. 1 remain active for a period of nine years.*

*(x) Prosecutorix never resisted or opposed the sexual relationship with the applicant no. 1 and there has been a consensual sex between the parties, though allegedly under the conception of fact.*

*19. Considering the facts and circumstances of the case and perusal of records, it is apparent that allegations in the FIR do not on their face value, indicate that promise by the applicant no. 1 was false or that prosecutorix engaged in sexual relationship on the basis of that promise only. Relationship between them has been activated and prompte by love and affection also. There is no allegation in the FIR that when the applicant no. 1 accepted her as his wife before the deity in the temple, it was done in bad faith or with the intention to deceive her. The applicant no. 1's failure in 2019 to fulfill his promise made in 2011 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the prosecurtorix was aware that there existed obstacles to marrying the applicant no. 1 since beginning as applicant no. 1's family members were strongly against their relationship particularly, his sister was creating atmosphere against the prosecutorix, despite all this, the prosecutorix and applicant no. 1 continued to engage in sexual relations over a long period of time i.e. nine years, after their getting married had became a disputed matter. Even thereafter, the prosecutorix travelled to visit several hotels and remained there with the applicant no. 1 and had established sexual relations there. The allegations in the FIR belie the case that the prosecutrrix was deceived by the applicant no. 1's promise of marriage. Therefore, even if the facts set out in the prosecurtorix's statements are accepted in totality, no offence under Section 375 of IPC is made out, as such, the present criminal proceedings against the applicants is nothing but an abuse of process of law, which is liable to be quashed.*

*(Emphasis Supplied)*

**42.** Therefore, from the aforesaid line of judgements, it is crystal clear that if the parties were having long-standing continuous consensual physical relationship without there being any element of cheating from the inception, such relationship would not amount to rape.

**43.** In the instant case, the prosecutrix who herself was a married woman having two grown up children and also having her husband alive, had entered into a physical relationship out of love, lust and infatuation towards the applicant herein due to incapacity of her husband, due to his illness and for a period of about 12-13 years she continuously remained in such an adulterous physical relationship with the applicant and the prosecutrix had entered into such relationship knowing fully well that she has no capacity of marriage, when she started such relationship with the applicant. Therefore,

the allegation that the promise of marriage was made which was dependent on the death of the husband of the prosecutrix, was a lame excuse given by the prosecutrix. Even if the applicant had promised to marry after the death of the husband of the prosecutrix, it was a no promise in law and the prosecutrix was a matured lady, having two adult children, had deliberately and consciously entered into such a relationship with the applicant herein. Admittedly, the applicant is much younger in age to the prosecutrix and was an employee in the business of the husband of the prosecutrix. Thus, she was having undue influence over the applicant, whereby she had forced the applicant into physical relations with her. From the facts of the case it is apparent that the prosecutrix had allured the applicant herein due to subordination of the applicant, as he was dependent financially on the family of the prosecutrix and due to the aforesaid dependency the prosecutrix had allured and forced the applicant to enter into such a relationship, which was with the clear and categorical consent and *will* of the prosecutrix, therefore, by no stretch of imagination such relationship would amount to rape within the meaning of Section 375 of the Indian Penal Code. As per her own statement recorded under Section 164 Cr.P.C., the prosecutrix herself has helped the applicant to establish his own business so that she can stay with the applicant in future. Admittedly, the prosecutrix was in a dominant position over the applicant herein and there is no allegation of any use of force or cheating by the applicant to allure the prosecutrix at the time of inception of the relationship between them. The further story is that on 17.01.2018 the applicant had put a country-made pistol on her head and had forcibly raped her and prepared the video clip. From the record neither the video clip is recovered nor the said country-made pistol has been recovered from possession of the applicant or on the indication of the applicant herein.

**44.** From the record, it is apparent that initially the Final Report was prepared having categorically found that the call details of both the person did not match on the place of occurrence as alleged in the F.I.R. and the subsequently the charge-sheet has been filed without establishing the fact

that the parties were present at the place of occurrence and no material has been concluded with regard to non-existence of the financial dispute between the parties, which was categorically alleged by the witnesses in the first round of investigation, as was directed by the Superintendent of Police.

**45.** Therefore, this Court is of the considered opinion that in the instant case no offence of rape is made out against the applicant herein and the instant F.I.R. has been lodged by the prosecutrix being annoyed with regard to the engagement of the applicant with some other lady and she was not willing to leave the applicant, therefore, the subsequent incident of forcible rape has been concocted by the prosecutrix only for the purpose of lodging the F.I.R., which is not substantiated during the investigation.

**46.** Therefore, the instant application is ***allowed*** and the entire proceedings of the Charge-sheet dated 09.08.2018 in S.T. No. 826 of 2018 as well as the entire criminal proceedings in Case Crime No. 59 of 2018 under Sections 376 an 386 I.P.C., Police Station- Mahila Thana, District- Moradabad, pending in the court of Sessions Judge, Moradabad, are hereby ***quashed***.

**Order Date :-** 1st October, 2024

Shubham Arya

**(Anish Kumar Gupta, J.)**