HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 12TH DAY OF JULY 2024 / 21ST ASHADHA, 1946

CRL.MC NO. 9538 OF 2023

CRIME NO.453/2017 OF North Paravur Police Station, Ernakulam

SC NO.956 OF 2018 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

PETITIONER/ACCUSED:

SUJITH
AGED 40 YEARS
S/O. SIVADASAN, SUJITH BHAVAN,
PATTANAKKAD, CHERTHALA, ALAPPUZHA,
PIN - 688531.

BY ADVS.
C.P.UDAYABHANU
NAVANEETH.N.NATH

RESPONDENTS/STATE & COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.

2 XXX
XXXX

SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 12.07.2024 ALONG WITH CRL.MC.NOS.9546/2023 & 9561/2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

2024:KER:52247

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE A. BADHARUDEEN**

**FRIDAY, THE 12TH DAY OF JULY 2024 / 21ST ASHADHA, 1946**

**CRL.MC NO. 9546 OF 2023**

**CRIME NO.453/2017 OF North Paravur Police Station, Ernakulam**

**SC NO.955 OF 2018 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM**

**PETITIONER/ACCUSED:**

**SUJITH**
**AGED 40 YEARS**
**S/O. SIVADASAN, SUJITH BHAVAN,**
**PATTANAKKAD, CHERTHALA, ALAPPUZHA, PIN - 688531.**

**BY ADVS.**
**C.P.UDAYABHANU**
**NAVANEETH.N.NATH**

**RESPONDENTS/STATE & COMPLAINANT:**

1 **STATE OF KERALA**
**REPRESENTED BY PUBLIC PROSECUTOR,**
**HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.**

2 **XXX**
**XXXX**

**SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 12.07.2024 ALONG WITH CRL.MC.9538/2023 & CRL.MC.9561/2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

2024:KER:52247

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE A. BADHARUDEEN**

**FRIDAY, THE 12TH DAY OF JULY 2024 / 21ST ASHADHA, 1946**

**CRL.MC NO. 9561 OF 2023**

**CRIME NO.453/2017 OF North Paravur Police Station, Ernakulam**

**CP NO.37/2023 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, NORTH PARAVUR**

**PETITIONER/ACCUSED:**

**SUJITH**
**AGED 40 YEARS**
**S/O. SIVADASAN, SUJITH BHAVAN,**
**PATTANAKKAD, CHERTHALA, ALAPPUZHA, PIN - 688531.**

**BY ADVS.**
**C.P.UDAYABHANU**
**NAVANEETH.N.NATH**

**RESPONDENTS/STATE & COMPLAINANT:**

1 **STATE OF KERALA**
**REPRESENTED BY PUBLIC PROSECUTOR,**
**HIGH COURT OF KERALA, PIN - 682031.**

2 **XXX**
**XXXX**

**PUBLIC PROSECUTOR SRI M.P.PRASANTH**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 12.07.2024 ALONG WITH CRL.MC.NO.9538/2023 & CRL.MC.NO.9546/2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

2024:KER:52247

*"C.R"*

***A. BADHARUDEEN, J.***

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*Crl.M.C.Nos.9538, 9546 and 9561 of 2023*

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*Dated this the 12th day of July, 2024*

***C O M M O N  O R D E R***

Crl.M.C.No.9538/2023, is one filed under Section 482 of the Code of Criminal Procedure (`Cr.P.C' for short hereafter), by the petitioner/sole accused, to quash S.C.No.956/2018 on the files of the Special Court for trial of offence against women and children (Protection of Children from Sexual Offences Act (PoCSO Act), Ernakulam, arising out of Crime No.453/2017 of North Paravur Police Station, Ernakulam. Crl.M.C.No.9546/2024 also is at the instance of the same petitioner, where quashment of S.C.No.955/2018, arising out of Crime No.453/2017 of North Paravur Police Station, Ernakulam, sought for. Prayer in Crl.M.C.No.9561/2023 also is for quashment of C.P.No.37/2023 pending before the Judicial First Class Magistrate Court-I, North Paravur, arising out of the above same crime.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor in detail. Perused the prosecution records.

3. The prosecution case in S.C.No.955/2018 is that the accused,

who was the driver of a Tempo Van used by the defacto complainant along with family for a tour programme to Kodaikanal, during the month of April, 2005, made intimacy with her through mobile phone and other means and thereafter with intention to commit rape on her at about 3 p.m on 17.07.2005 taken her to the tempo van bearing Registration No.KL 7A 6037 and subjected her to rape on the back seat of the tempo van. In the meanwhile, he also photographed the visuals and thereby her modesty was outraged. Accordingly, the prosecution alleged commission of offences punishable under Sections 376 and 342 of the Indian Penal Code (`IPC' for short hereafter) as well as 66E of the I.T Act.

4. Coming to S.C.No.956/2018, the same defacto complainant would allege commission of rape by the same accused on 16.11.2011, who took the defacto complainant in a car bearing Registration No.KL32C 1986 to room No.109 of IV Cottage Lodge, Munnar. Repeated rape thereafter also alleged. The same also was recorded by the accused.

5. In C.P.No.37/2023 also the defacto complainant and the accused are one and the same and the allegation is that on 17.10.2015, the accused herein brought her in a car bearing Registration No.KL32C 1986 and subjected her to sexual intercourse by threat at a home stay lodge near Munnar. On 30.09.2016 also the accused took her to a home stay lodge near Marayoor Gramapanchayat and repeated forceful sexual intercourse.

6. The learned counsel for the petitioner argued at length to convince this Court that on no stretch of imagination it could be held that the accused herein committed rape on the defacto complainant in the facts of the given case. It is submitted that initially there was consensual relationship as on 17.07.2005. No complaint lodged till 2011 with regard to this occurrence. After a long gap of 6 years, again in the year 2011 the defacto complainant travelled in a car along with the accused and had sexual intercourse. Similarly, in 2015 also there was sexual intercourse in between the defacto complainant and the accused. According to the learned counsel for the petitioner as the materials would *prima facie* show that the relationship between the defacto complainant and the petitioner/accused in the above cases was purely consensual, the same would require quashment and the quashment in such cases also is legally permissible in view of the decision in ***Gian Singh*** *v.* ***State of Punjab and Another*** reported in [(2012) 10 SCC 303 : 2012 KHC 4530 : 2012 (4) KLT 108 : 2012 (9) SCALE 257 : 2012 CriLJ 4934 ]. Similarly, he has placed another decision ***Narinder Singh and Ors. v. State of Punjab & anr.*** [2014 KHC 4195 : 2014 (3) KHC SN 44 : (2014) 6 SCC 466 : 2014 (2) KLD 167 : 2014 (4) SCALE 195 : ILR 2014 (2) Ker. 85 : 2014 (2) KLJ 252 : 2014 CriLJ 2436 ], to buttress the said point.

7. Whereas the learned Public Prosecutor would submit that whether the relationship is consensual or not is a matter of evidence.

Therefore, quashment of the proceedings, denying opportunity to the prosecution to adduce evidence in support of the prosecution case, cannot be considered.

8. In this connection it is relevant to refer the relevant decisions in paragraphs (I) to (X) dealing with the consensual sex and vitiation of consent on the ground of misconception of fact:

(I) A two Judge Bench of the Apex Court reported in [(2003) 4 SCC 46], ***Uday v. State of Karnataka*** is relevant in this connection, where the Apex Court dealt with a case in which was alleged by the prosecution that the prosecutrix was subjected to rape by the accused on repeated promise of marriage with assurance of marriage, wherein the Apex Court held in paragraphs 24, 25 and 26 as under :

> *"24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.*
>
> *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.*

*26. In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 fourthly and fifthly, or whether consent given under a misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC."*

(II) In another 2 Judge Bench decision of the Apex Court ***Deelip Singh v. State of Bihar***, [2005 LJC 189 : 2005 (1) KLT SN 20 : 2005 (1) SCC 88 : AIR 2005 SC 203], the Apex Court dealt with a case where the victim girl lodged a complaint to the police on 29-11-1988 i.e. long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the

version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the victim to establish the marital tie failed and therefore she was constrained to file the complaint after waiting for some time. The Apex Court in paragraphs 17-20 observed as under:

> *"17 The Indian Penal Code does not define "consent" in positive terms, but what cannot be regarded as "consent" under the Code is explained by S.90. S.90 reads as follows:*
>
> *"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; ..."*
>
> *18. Consent given firstly under fear of injury and secondly under a misconception of fact is not "consent" at all. That is what is enjoined by the first part of S.90. These two grounds specified in S.90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.*
>
> *19. The factors set out in the first part of S.90 are from the point of view of the victim. The second part of S.90 enacts the*

*corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of S.90 which is couched in negative terminology.*

*20. S.90 cannot, however, be construed as an exhaustive definition of consent for the purposes of the Indian Penal Code. The normal connotation and concept of "consent" is not intended to be excluded. Various decisions of the High Court and of this Court have not merely gone by the language of S.90, but travelled a wider field, guided by the etymology of the word "consent".*

(iii) It was held in paragraph 28 as under:

*"28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of S.90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of S.375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda (1984 CriLJ 1535 : 1983 (2) CHN 290 (Cal)) which was approvingly referred to in Uday case (2003 (4) SCC 46 : 2003 SCC (Cri) 775 : 2003 (2) Scale 329). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p.1538, para 7) -- "unless the court can be assured that from the very inception the accused never really intended to marry her". (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case (ILR 1913 (36) Mad. 453 : 15 CriLJ 24) (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has*

*laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case (2003 (4) SCC 46 : 2003 SCC (Cri) 775 : 2003 (2) Scale 329) as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."*

(III) In the decision reported in [2006 KHC 1927 : 2006 (11) SCC 615 : AIROnLine 2006 SC 40], ***Yedla Srinivasa Rao v. State of A.P***, the Apex Court dealt with a case where the prosecution allegation was that prosecutrix (PW1) used to attend cooking in her sister's (PW 2) house in day time, as her sister was attending to agricultural operations. The accused used to visit the house of PW 2 during day time between 11.00 a.m. and 12.00 noon regularly while PW 1 was alone and persuaded her to have sexual intercourse by telling her that he would marry her. PW1 resisted for this for sometime but later on one day, the accused came to the house of PW 2 in her absence, closed the doors and committed forcible sexual intercourse with PW 1 against her will and consent. When she protested as to why he spoiled her life, accused promised that he would marry her. Subsequently, the process continued for some time. Accused used to come in the noon and had sexual intercourse with PW 1. When she became pregnant she informed the accused and he gave tablets for abortion in order to get rid of pregnancy which did not work. Subsequently, PW 1 insisted the accused to marry her. The accused informed

PW1 that as his parents were not agreeing for the marriage, he would not marry her. PW1 brought this fact to the notice of her sister - PW 2. Thereafter, the matter was reported to the Panchayat. The accused accepted the guilt and promised to marry PW 1 but subsequently, he absconded from the village. Since the persuasion could not fructify, PW 1 lodged a report against the accused to police and, therefore, the police registered a case as per the prosecutrix report for the offences punishable under S.376 and S.417, IPC. After completion of investigation, police filed a challan against the accused. The accused denied the charges. Prosecution in support of its case examined PW 1 - Prosecutrix, PW 2 sister of Prosecutrix and other witnesses. Prosecutrix was sent for medical examination and PW 9 - Smt. G. Pushpavalli examined PW 1. She found that PW 1 was pregnant at the time of examination and the age of pregnancy is 20-22 weeks. She was also examined by Dr. Y. Jagannadha Rao - PW 10 who was working as a Professor of Forensic Medicines. He confirmed about the pregnancy. He also examined the age of the prosecutrix and on the basis of X Ray examination and other physical features opined that the age of PW 1 was not less than 15 years and not more than 17 years at the time of examination. (ii) Summarising the legal position, the Apex Court observed in paragraphs 9 and 10 as under:

> *"9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of S.375of IPC as mentioned above. It is clear that the prosecutrix had sexual*

*intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. S.90 of the Indian Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be valid consent. S.90 reads as under:*

*"S.90 - Consent known to be given under fear or misconception. - A consent is not such a consent as it 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.*

*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 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 persuaded 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. In this connection, reference may be made to a decision of the Calcutta High Court in the case of* ***Jayanti Rani Panda v. State of West Bengal and Another*** *1984 CriLJ 1535. In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that S.90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the*

*matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, S.90 can be invoked. Therefore, so far as* ***Jayanti Rani Panda*** *(supra) is concerned, the porseuctirx was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore,* ***Jayanti Rani Panda****'s case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that the he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence. Reliance can also be made in the case of* ***Emperor v. Mussammat Soma*** *reported in (1917) CriLJR 18 (Vol.18). In that case the question of consent arose in the context of an allegation of kidnapping of a minor girl. It was held that the intention of the accused was to marry the girl to one Dayaram and she obtained Kujan's consent to take away the girl by misrepresenting her intention. In that context it was held that at the time of taking away the girl there was a positive misrepresentation i.e. taking the girls to the temple at Jawala Mukhi and thereafter they halted for the night in Kutiya (hut) some three miles distance from Pragpur and met Daya Ram, Bhag Mai and Musammat Mansa and Musammat Sarasti was forced into marrying Daya Ram. This act was found to be act of kidnapping without consent. But, in the instant case, a girl though aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil and it was totally under misconception on the part of the victim that the accused is likely to marry her, therefore, she submitted to the lust of the accused. Such fraudulent consent cannot be said to be a consent so as to condone the offence of the accused. Our attention was also invited to the decision of this Court in the case of* ***Deelip Singh Alias Dilip Kumar v. State of Bihar*** *AIR 2005 SC 203 : 2004 (3) BLJR 2373 : 2005 (2) MhLj 147 : 2005 (I) OLR (SC) 181 RLW : 2005 (2) SC 165 2004 (9) SCALE 278 : 2005 (1) SCC 88 : 2005 (1) UJ 179 (SC) wherein this Court took the view that prosecturix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But accused's promise was not false from its inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the facts as this Court found that the accused promise was not false from its inception. But in the present case we found that first accused committed rape on victim against her will and consent but subsequently, he held out*

*a hope of marrying her and continued to satisfy his lust. Therefore, it is apparent in this case that the accused had no intention to marry and it became further evident when Panchayat was convened and he admitted that he had committed sexual intercourse with the victim and also assured her to marry within 2 days but did not turn up to fulfil his promise before the Panchayat. This conduct of the accused stands out to hold him guilty. What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the conclusion that it was not only the accused but prosecutrix was also equally keen, then in that case the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what the consequences may result for indulging into such acts and when the accused promised to marry but he never intended to marry right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in S.375 -"without her consent". A consent obtained by misconception while playing a fraud is not a consent."*

(IV) In another two Judge Bench decision of the Apex Court reported in [(2013) 9 SCC 293], ***Prashant Bharti v. State (NCT of Delhi)***, the Apex Court dealt with quashing of FIR in a case involving offence punishable under Section 376 of IPC after following the earlier decision in ***Rajiv Thapar*** [(2013) 3 SCC 330]. The facts of the case was that the complainant/prosecutrix, aged 21 years, made a phone call to police control room on 16-2-2007. When police reached her residence, she made a statement to the police alleging that on the preceding day, the appellant, who was known to her, had made a phone call to her at 8:45 pm inviting her to a certain place. When she reached there, the appellant took her in his car and drove around. He offered her cold drink (Pepsi) allegedly containing poisonous/intoxicating substance. After drinking the same, she felt inebriated whereupon the appellant

started misbehaving with her and also touched her breasts. She then got the car stopped, and hired an auto-rickshaw to return to her residence. The police then took her to hospital for her medical examination, but as per medical report, there was no evidence of poisoning. Based on the statement of the complainant/prosecutrix, FIR was registered under Section 328 and 354 IPC and the appellant was arrested on the same day. After a lapse of five days, the complainant/prosecutrix made a supplementary statement to the police alleging that the appellant had been having physical relations with her in his house on the assurance that he would marry her but he subsequently refused to marry her. She was again taken to hospital for medical examination. In the medical report it was recorded, that she had no external injuries, and that her hymen was not intact. It was pointed out that a vaginal smear was not taken, because more than a month had elapsed from the date of the alleged intercourse(s). Likewise, it was pointed out that her clothes were not sent for forensic examination because she had changed the clothes worn by her at the time of the alleged occurrence(s). Based on the supplementary statement the offence under Section 376 IPC was added to the case.

(ii) In paragraph 22, the Apex Court held as under:

> *"22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the CrPC.") has been dealt with by this Court in Rajiv Thapar & Ors. v. Madan Lal Kapoor reported in 2013 (3) SCC*

*330, wherein this Court inter alia held as under:*

*"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to herein above, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution / complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.*

*30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-*

*30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?*

*30.2. Step two: whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?*

*30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?*

*30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?*

*30. 5. If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."*

(V) In another 2 Judge Bench decision of the Apex Court reported in [2013 KHC 4905 : 2013 (14) SCALE 51 : AIR 2014 SC 384 : 2014 CriLJ 540 : 2013 (16) SCC 651], ***State of U.P v. Naushad***, the Apex Court dealt with a case where the facts was that the accused - Naushad is the son of the maternal uncle of the prosecutrix's father - who is the informant. The informant complained that Naushad used to visit their house often and enticed his daughter and cheated her, promising to marry her and had regular sexual intercourse with her on this pretext. The informant came to know about this when his daughter narrated to her mother how she was raped and she got pregnant. The complainant along with his wife went to complain to the parents of the accused, Irshad and his wife and told them that their son-Naushad raped their daughter by giving a false promise of marriage and she has become pregnant. Irshad and his wife accepted their fault and promised to punish Naushad. A Panchayat was held a day before lodging the complaint when

Irshad and his wife offered Rs.10,000/- to Rs.20,000/- to them and said that they will not allow to marry their son with the victim. The informant alleged that Irshad and his wife even threatened to kill him if any action is taken. On the basis of this information given by Irshad, crime no. 115 of 2003 was registered at P.S. Kotwali Nagar in Muzaffar Nagar. After investigation, the Investigating Officer arrested Irshad and Naushad. Victim was sent for medical examination and the report was submitted by Dr. Abha. After the charge sheet was submitted, the case was committed to the Sessions Court. The Sessions Judge framed charge under Section 376, IPC against Irshad and Section 376 read with Section 109, IPC against Naushad and both were further charged under Section 506, IPC. The Sessions Judge held the accused Naushad guilty of the charge under Section 376 and convicted him, sentencing him to imprisonment for life. Being aggrieved by this, the accused filed an appeal before the High Court. The High Court allowed the appeal and held that the prosecution had failed to prove its case beyond reasonable doubt and the order of conviction and sentence of the accused respondent was set aside and he was directed to be released forthwith. Against the reversal of conviction and sentence of the accused by the High Court, the appellant - State has filed the present appeal. In the said judgment the Apex Court held in paragraph 10 as under:

*"10. We will answer point nos. 1 and 2 together as they are*

*related to each other. Section 376 of IPC prescribes the punishment for the offence of rape. Section 375 of the IPC defines the offence of rape, and enumerates six descriptions of the offence. The description "secondly" speaks of rape "without her consent". Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix 'against her consent'. The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of 'bad character'. How is 'consent' defined? Section 90 of the IPC defines consent known to be given under 'fear or misconception' which reads as under:*

*"90. Consent known to be given under fear or misconception.-- A consent is not such consent as it 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; xxxx"*

*Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 of the IPC. Thus, the alleged consent said to have obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her. In the case of* ***Yedla Srinivas Rao v. State of A.P.****, 2006 KHC 1927 : 2006 (11) SCC 615, with reference to similar facts, this Court in para 10 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 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 persuaded 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."*

(ii) Further, in para 17 of the said judgment, this Court held that:

*"In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW 1 as well as PW 6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact."*

*Thus, this Court held that the accused in that case was guilty of the offence of rape as he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact."*

(VI) In another two Judge Bench decision of the Apex Court reported in [2013 KHC 4423 : 2013 (3) KHC SN 9 : 2013 (2) KLD 240 : 2013 (2) KLT 762 : 2013 (2) KLJ 810 : 2013 (7) SCALE 383 : AIR 2013 SC 2071 : 2013 CriLJ 2990 : 2013 (7) SCC 675 : 2013 (3) SCC (Cri) 660 : 2013 (127) AIC 122 : 2013 (3) CTC 567 : MANU/SC/0546/2013], ***Deepak Gulati v. State of Haryana***, the Apex Court dealt with a case where the allegation was that the prosecutrix, 19 years of age, student of 10+2 in Government Girls Senior Secondary School, Karnal, and the accused/appellant were known each other for some time. Appellant had been meeting her in front of her school in an

attempt to develop intimate relations with her. On 10/05/1995, the appellant induced her to go with him to Kurukshetra, to get married and she agreed. En route Kurukshetra from Karnal, the appellant took her to Karna lake (Karnal), and had sexual intercourse with her against her wishes, behind bushes. Thereafter, the appellant took her to Kurukshetra, stayed with his relatives for 3-4 days and committed rape upon her. The prosecutrix was thrown out after 4 days by the appellant. She then went to one of the hostels in Kurukshetra University, and stayed there for a few days. The warden of the hostel became suspicious and thus, questioned the prosecutrix. The prosecutrix thus narrated the incident to the warden, who informed her father. Meanwhile, the prosecutrix left the hostel and went to a temple, where she once again met the appellant. Here, the appellant convinced her to accompany him to Ambala to get married. When they reached the bus stand, they found her father present there along with the police. The appellant was apprehended.

(ii) In the said case, the Apex Court held in paragraphs 18, 19, 20, 21 and 23 as under:

> "*18. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court*

*must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.*

*19. In Deelip Singh (supra), it has been observed as under:*

*"20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the Court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."*

*20. This Court, while deciding Pradeep Kumar Verma (supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re, ILR 1913 (36) Mad. 453, wherein it has been observed:*

*"We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married ..... " thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person". ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence."*

*21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at 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.*

*23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre- decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in Court at Ambala. However, here they were apprehended by the police."*

(VII) In another two Judge Bench decision of the Apex Court in ***Dhruvaram Murlidhar Sonar (Dr.) v. State of Maharashtra & Ors.***, [2019 (1) KHC 403 : 2019 (1) KLD 242 : 2019 (1) SCALE 64 : AIR 2019 SC 327 : 2019 CriLJ 1169 : 2019 (18) SCC 191 : AIR OnLine 2019 SC 68], the Apex Court dealt with a case of rape where prosecution allegation was that the defacto complainant's husband died on 05/11/1997, leaving behind her and her two

children. During this time, the appellant informed her that there have been differences between him and his wife, and therefore, he is planning to divorce his wife. Further, the appellant informed the complainant that since they belong to different communities, a month is needed for the registration of their marriage. Therefore, she started living with the appellant at his Government quarters. The FIR further states that she had fallen in love with the appellant and that she needed a companion as she is a widow. Therefore, they started living together, as if they were husband and wife. They resided some time at her house and some time at the house of the appellant. The appellant acted as if he has married her and has maintained a physical relationship with her. However, he has failed to marry her as promised. When things stood thus, his brother, i.e accused No. 2, claims to have married her. Thereafter, in the year 2000, complainant received the information from the co-accused about the marriage of the appellant with some other woman. Therefore, she filed the aforesaid complaint and FIR dated 06/12/2000 came to be registered against the appellant and the co- accused.

(ii) In the said decision the Apex Court held as under in paragraphs 7, 8 and 9 as under:

> *"7. We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record.*
>
> *8. It is well settled that exercise of powers under S.482 of the Cr.P.C. 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 and Ors. v. Bhajan Lal and Ors.****, 1992 KHC 600 : 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604 : 1992 CriLJ 527 has elaborately considered the scope and ambit of S.482 Cr.P.C. Seven categories of cases have been enumerated where power can be exercised under S.482 of Cr.P.C. Para 102 thus reads:*

*"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 Art.226 or the inherent powers under S.482 of the Code which we have extracted and re-produced 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 S.156(1) of the Code except under an order of a Magistrate within the purview of S.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 S.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 concerned Act (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 concerned Act, 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."*

(ii) Thereafter, in paragraph 20 the Apex Court held as under:

*"20. 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 later 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 S.376 of the IPC."*

(VIII) In ***Anurag Soni v. State of Chhattisgarh***, [2019 KHC 6441 : 2019 (2) KHC SN 35 : 2019 (6) SCALE 211 : AIR 2019 SC 1857 : 2019 CriLJ 2508 : 2019 (13) SCC 1], another two Bench decision of the Apex Court, the Apex Court dealt with a case where it was alleged by the prosecution that the Prosecutrix was a student of B. Pharm and was familiar with the accused since 2009 and there was love affair between them. Accused had even proposed her for marriage and this fact was within the knowledge of their respective family

members. Accused was posted as Junior Doctor and on 29/04/2013, the accused took prosecutrix to his house and there they had physical relationship. Later, accused refused to marry the prosecutrix. Upon the complaint filed by the prosecutrix, a crime was registered and after investigation, a charge sheet was filed. Trial Court convicted accused for offence under S.376(1), IPC, sentencing him to rigorous imprisonment for 10 years and to pay a fine of Rs. 50,000/-. In appeal, the High Court confirmed the judgment and order of conviction. Hence the accused has filed this appeal before the Supreme Court.

(ii) In the said case dismissing the appeal at the instance of the accused against the conviction imposed under Section 376 of IPC, it was held as under:

> *"Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises / promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per S.90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under S.375 of the IPC. Though, in S.313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to herein above, such a story is not believable. The prosecutrix, in the*

*present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that appellant's marriage is fixed with another lady Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant accused. Even considering S.114A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the Court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed herein above, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise / false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under S.375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under S.376 of the IPC."*

(iii) In paragraph 14 of the above judgment, the Apex Court observed as under:

*"14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per S.90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under S.375 of the IPC. Though, in S.313 statement, the accused came up with a case*

*that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that appellant's marriage is fixed with another lady - Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant-accused. Even considering S.114A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the Court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed herein above, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise / false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under S.375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under S.376 of the IPC."*

(IX) Another decision placed by the learned counsel for the petitioner is ***Sonu @ Subhash Kumar v. State of Uttar Pradesh & anr.***, [2021 (2) KHC 314 : 2021 KHC OnLine 6136 : 2021 (3) SCALE 635 : AIR 2021 SC 1405 : 2021 (2) KLT OnLine 1152]. In this case, the Apex Court dealt with a case wherein FIR was lodged by the defacto complainant on 07.02.2018 before the S.H.O stating that the complainant developed friendship with the accused

and the accused assured the complainant that he would marry her. Thereby she was exploited physically for one and a half years and the complainant had also spoken to the parents and sister of the accused. Further, the father of the accused had informed the complainant that he would arrange marriage of the accused with him. After a lapse of about one and a half years, the accused went back to his home and informed the appellant that since he wished to perform a court marriage, the appellant would come to Jhansi. Accordingly, the appellant reached Jhansi for the purpose of marriage. But the father of the accused informed her that the accused did not wish to marry her. This is the base on which FIR was registered. In this case in paragraphs 8 to 11, the Apex Court observed as under while quashing the FIR:

> *"8. The contents of the FIR as well as the statement under S.164 of CrPC leave no manner of doubt that, on the basis of the allegations as they stand, three important features emerge:*
>
> *(i) The relationship between the appellant and the second respondent was on consensual nature;*
>
> *(ii) The parties were in the relationship for about a period of one and a half years; and*
>
> *(iii) Subsequently, the appellant had expressed a disinclination to marry the second respondent which led to the registration of the FIR.*
>
> *9. In **Pramod Suryabhan Pawar (supra)**, while dealing with a similar situation, the principles of law which must govern a situation like the present were enunciated in the following observations:*
>
> *"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..."*

*10. Further, the Court has observed:*

> *"To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to S.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."*

*11. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under S.482 of Cr:PC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under S.482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established."*

(X) In ***Naim Ahamed v. State (NCT of Delhi)***, [2023 SCC OnLine SC 89], the Apex Court dealt with a case where the prosecution case was that prosecutrix was residing in a tenanted premises with her husband and three children, in the year 2009. The accused was also residing in a tenanted premises which was situated in front of her house. On 21.03.2015, the prosecutrix lodged a complaint against the accused alleging inter alia that the accused was persuading her by stating that her husband was not earning sufficient income and that he (the accused) had a good job and he would maintain her according to his status. The accused also assured her that

he would solemnize marriage (nikah) with her. Thereafter, the accused with an intention to have illicit intercourse with her, used to call her at various places, as a result thereof, she was impregnated in the year 2011. She further alleged that the accused persuaded the prosecutrix that after the delivery of child, he would marry her. He also assured her that he was not a married man and after the marriage, he would take her to his native place. In the year 2012, the accused enticed her away in another rented premises and continued to have illicit relationship with her. After sometime the accused vacated the said rented premises with a false excuse that his parents were severely ill and he had to visit his native place. He told the prosecutrix to take shelter in a shelter home along with the minor child Naman. He also forced her to take divorce from her husband. The prosecutrix had further alleged in the complaint that the accused had lied to her that he had gone to his native place, but in fact he had not gone, which she came to know when she visited the call center where the accused was working. When she made hue and cry at his place of working, he assured her that he would soon marry her. In the year 2012, she visited the native place of the accused and came to know that he was already married and had children also. The parents of the accused refused to keep her there. Thereafter also, the accused kept on assuring her to marry her, but did not marry. Thus crime alleging commission of offence punishable under Section 376 of the Indian Penal

Code by the accused, was registered.

(ii) In the said case, the Apex Court dealt with the question of consent after referring the earlier decisions and it was observed in paragraph 21 as under:

> *"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 loin 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."*

8. Scanning the decisions herein above discussed in paragraphs (I) to (X), the legal position is emphatically clear that a promise to marry, without having any intention or any inclination to marry the victim, will vitiate the consent in terms of Section 90 of IPC, concomitantly if consent has been given under fear of injury or misconception of fact, such consent obtained, cannot be construed to be valid consent. So also, when the prosecutrix had sexual intercourse with the accused on the *bona fide* representation made by the accused that he would marry her, the same was a false promise at the instance of the accused and the same is hit by Section 90. That apart, as categorically enumerated as `Secondly' under Section 375 of IPC, consent is treated as "wilful consent" in the situations dealt under the caption `Thirdly' to `Seventhly'. The same are as under:

> *"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.*
>
> *Fifthly:- 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."*

9. Explanation 2 to Section 375 of IPC provides that 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.

10. Thus it has to be summarised that when, *prima facie,* materials would show that the prosecutrix was subjected to sexual intercourse on the promise of marriage without any *bona fides* under a misconception of fact, then the consent is vitiated. If the materials would show that the relationship is purely consensual without an element of misconception of fact, the same is not rape.

11. Be it so, no doubt, the question to be considered by a court while considering quashment of the proceedings is, whether at the very inception there is mutual consent to have sexual intercourse or the same is under a misconception of fact, on the promise of marriage or otherwise. But the said aspect depends on the facts of each case. So, no hard and fast rule to be applied to almost all cases similarly.

12. On scrutiny of the allegations in the prosecution records in 3 cases together, it is emphatically clear that the defacto complainant travelled along with the accused, who was the driver of a tempo van used by the defacto cmplainant along with her family for a tour programme to Kodaikanal, during April, 2005. Thereafter, intimacy developed in between them through mobile phone and other modes and accordingly she was subjected to rape at about 3 p.m on 17.07.2005 on the back seat of the tempo van bearing Registration

No.KL 7A 6037. The further allegation is that during this occurrence, the accused photographed the visuals. No complaint was lodged till 2017 in this occurrence and accordingly Crime No.453/2017 was lodged and S.C.No.955/2018 was registered after a long period of 13 years. Even though the defacto complainant did not raise any complaint regarding the allegation of rape as on 17.07.2005 for a period of 6 years, her case further is that on 16.11.2021 the accused again subjected her to rape in room No.109 of IV Cottage Lodge, Munnar. Repeated sexual intercourse in this regard also stated in S.C.No.956/2018. Thereafter, as alleged in C.P.No.37/2023, the defacto complainant was alleged to be raped by the accused on 17.10.2015. Therefore, it is discernible from the facts of the case that the defacto complainant initially had sexual intercourse with the accused during 2005 voluntarily with her consent and continued the same during 2011 and 2015 and on no stretch of imagination the prosecution case would reveal that the sexual intercourse is the outcome of misconception of fact, in any manner. Therefore, this is a fit case where this Court has to exercise its powers under Section 482 of Cr.P.C to quash the proceedings

13. In the result, these Criminal Miscellaneous Cases stand allowed. Annexure 1 in all the 3 cases and all further proceedings in S.C.No.956/2018 and S.C.No.955/2018 in Crl.M.C.No.9538/2023 and Crl.M.C.No.9546/2023 respectively, on the files of Special Court for trial of

offence against women and children (Protection of Children from Sexual Offences Act (PoCSO Act), Ernakulam, and C.P.No.37/2023 on the files of the Judicial First Class Magistrate Court-I, North Paravur, in Crl.M.C.No.9561/2023, arose out of Crime No.453/2017 of North Paravur Police Station, stand quashed.

Registry shall forward a copy of this order to the trial court for information and further steps.

Sd/-

***A. BADHARUDEEN, JUDGE***

*rtr/*