



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION (ST) NO.17769 OF 2023

Tapan Anant Thatte,
Age : 38 Years, Occu.: Advocate,
R/at : Flat No.201, Siddhagiri Building,
DK Sandu Marg, Chembur East,
Mumbai 400071. .. Petitioner

Versus

1. The State of Maharashtra
2. PQR [Victim. Through CR No. 14/2023
Registered with Alankar Police Station,
Pune City.] .. Respondents

...

Mr. Satyavrat Joshi i/b Mr. Samay Pawar, for the Petitioner
Mr. S. V. Gavand, A.P.P., for the State-Respondent No.1.
Ms. Anjali Patil, for the Respondent No.2.

...

**CORAM : BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.**

DATED : 14th NOVEMBER, 2024

JUDGMENT (PER MANJUSHA DESHPANDE, J.) :-

1. Rule. Rule made returnable forthwith with the consent of the parties.

2. The Petitioner is facing charges for the offence punishable under Sections 376(2)(n), 504, 506 of the Indian Penal Code (“IPC”), pursuant to the filing of FIR No. 14 of 2023, by the complainant i.e. the Respondent No.2 in the present Writ Petition.

3. It is the contention of the Petitioner that during May 2020 to January 2021, the Respondent No.2 was going through a divorce wherein she had sought legal advice from the Petitioner. It is contended by the Petitioner that it was clear understanding between him and the Respondent No.2 that he would not appear for her in any proceedings in Pune but would guide her through process and accordingly the Respondent No.2 agreed for professional fees of Rs.5,00,000/- to be paid to the Petitioner.

Since the Petitioner was facing financial crunch due to Covid-19 pandemic, he sought financial assistance from the Respondent No.2, during the period May 2020 to January 2021. It is not disputed that the Respondent No.2 had transferred total Rs. 33,00,000/- to the account of the Petitioner during the said period. It is submitted by the learned counsel Mr. Joshi that out of the total amount which

was transferred by the Respondent No.2, Rs.28,00,000/- were towards the hand loan and Rs.5,00,000/- towards the professional fees of the Petitioner. By 03.08.2022, the Petitioner had repaid an amount of Rs.28,00,000/- to the Respondent No.2. The Respondent No.2 has not disputed the repayment of the amount. The Petitioner is relying on iMessage Exchange dated 03.08.2022 wherein the Respondent No.2 has specifically admitted about the full and final settlement of the loan amount.

4. According to the Petitioner despite having fully settled the loan amount owed by him towards the Respondent No.2, the Respondent No.2 started demanding Rs.5,00,000/- from him and also threatened him that if he did not return the said amount, she would lodge a false complaint against him. He was therefore constrained to file a private complaint against the Respondent No.2, before the learned Metropolitan Magistrate at Kurla, under Section 385 of the IPC on 16.10.2022. Since the Respondent No.2 continued her threats during 28.12.2022 to 05.01.2023 demanding Rs.5,00,000/-, the Petitioner has filed one more private complaint against her before the Judicial Magistrate First Class at Pune on 11.01.2023 for the offence punishable under Section 385 of the

Chaitanya

IPC.

5. The learned counsel Mr. Joshi, representing the Petitioner has contended that, it is on account of filing of two private complaints by the Petitioner against the Respondent No.2, by way of counter blast, she has lodged C.R. No. 14 of 2023 on 27.01.2023, alleging offence punishable under Section 376(2)(n), 406, 420, 504 and 506 of the IPC.

6. It is against this charge-sheet, the Petitioner has approached this Court seeking directions to quash and set aside the charge-sheet No.61 of 2023, which is filed pursuant to the C.R. No. 14 of 2023, registered at the Alankar Police Station, Pune, which has been registered as Sessions Case No. 836 of 2023.

7. As per the allegations in the FIR, it is alleged by the Respondent No.2, that he and the Petitioner were acquainted with each other since their schooldays as they were classmates and had studied in the same school, though they drifted apart by passage of time and got busy in their respective lives they once again came into the contact with each other sometime in January 2020.

Chaitanya

The Respondent No.2 was staying in United States of America with her husband and a child. While staying in the USA, she was working in Amazon, however due to the discord with her husband, she decided to return to India alongwith her son and sever her ties with her husband and to secure a divorce. Since she was aware that the Petitioner was an Advocate, in order to secure legal advice, she contacted him. But when she contacted him, he informed her that he does not deal with matrimonial matters, however he assured her that he would give her appropriate counsel to represent her proceedings in the courts of law. As per assurance, he has also made available services of the Advocate for which the Respondent No.2 has paid appropriate legal remuneration of Rs. 3,00,000/-.

8. In the meanwhile due to lockdown the Petitioner came back to his native place at Pune. During the said period the Petitioner and the Respondent No.2 became intimate, since he exhibited sympathy and affection towards her and he had accepted her with her background and she also believed him. According to her, their physical relations further continued, sometimes with her consent and even without her consent.

Chaitanya

The Petitioner had requested her for financial assistance since his mother was not keeping well and due to Covid-19, he was also facing financial problems. From time to time she had made payment of huge amount to the Petitioner through bank transactions.

9. In the meanwhile, during September 2020, when there was relaxation in the lockdown, the Respondent No.2 with the permission of her family members shifted alongwith the Petitioner to Mumbai and started to reside with him. According to her, during her stay with him when there were differences between them he used to abuse her in front of her close friends.

10. In January 2021, when the Respondent No.2. obtained a decree of divorce from her husband, the Petitioner by making a phone call informed her brother that they would be getting married on 05.05.2021. Once when the Petitioner had gone for a cycling trip and had forgotten his iPad, the Respondent No.2 had opened his iPad and she realized that he was having affair with some other girls while he was staying with her had and promised to marry her. When he was confronted about it, he chose to ignore her questions.

Chaitanya

According to the Respondent No.2, the Petitioner started threatening her therefore she left him and came back to Pune to reside with her mother. Even after that, the Petitioner was in contact with her assuring her that he would return her money and even marry her.

11. In the meanwhile, she realised that whatever information the Petitioner had given her about his background and about his parent was not correct, and the Petitioner has cheated her therefore she started pursuing with him for return of huge amount which she has parted with him from her own account. According to her, the Petitioner assured her that he would return her money and by 19.08.2021 he had returned Rs. 19,87,000/-. He had also apologized to her. It is stated, in the complaint that though their relationship had gone sour, she ignored all the differences and started meeting him again. He again assured her that he would marry her.

When she reminded him about the residual Rs.10,00,000/- which were due towards her after much persuasion he has returned Rs.5,00,000/- and according to her he has not returned remaining Rs.5,00,000/-. In fact, he threatened and caused her mental harassment by informing

her that he has filed complaint against her on 31.12.2022, for the offence punishable under Section 38 and 506 of the IPC, at Mumbai. Since she has demanded residual amount which the Petitioner did not return, she has decided to file complaint against him and accordingly she has filed the FIR against him.

12. The Respondent No.2 has filed reply-affidavit in the present Petition opposing the reliefs claimed by the Petitioner. According to her, the Petitioner has not approached this Court with clean hands and suppressed the material facts from this Court. On this ground alone the Writ Petition deserves to be dismissed. It is contended that, she met the Petitioner when she was emotionally vulnerable and going through the divorce proceedings after seven years of marriage. The Petitioner won her confidence by being with her and supporting her, as well as her three year old son during her emotional turmoil. It is alleged by her that he has taken Rs.40,00,000/- as a loan for his mothers hospitalization. Since she was acquainted with him from her school days, she has believed him and acted according to his advice during her divorce proceedings.

13. She resided with him in an apartment at Mumbai

from July 2020 to January 2021, since the Petitioner had convinced her to move in with him with her son at his apartment in Mumbai. It is alleged by her that she has been sexually, mentally and verbally abused by the Petitioner during their relationship. While they were staying together, the Petitioner was violent on various occasions. The infidelity of the Petitioner was disclosed, when he had left his iPad at home while going on a trip. The abuses and ill-treatment meted out by the Petitioner, became unbearable to her and therefore she decided to leave the Petitioner and returned to stay with her mother. According to her, the Petitioner still owes her Rs.5,00,000/- and when she filed the FIR, the Petitioner has assured to pay balance of Rs.5,00,000/- before this Court.

14. The learned Respondent No.2 has urged that on the background of the aforementioned facts, the Writ Petition deserve to be dismissed. It is contended by the counsel for the Respondent No.2 that the document placed on record supports the case of the Respondent and the allegations made in the FIR, the Petitioner has abused the Respondent and manipulated her during their stay together and he still owes her money and therefore, considering the above mentioned

facts and circumstance the Writ Petition deserves to be dismissed.

15. It is the contention of the Petitioner that, so far as the financial transaction between the Petitioner and the Respondent No.2 is concerned, there are no charges in the charge-sheet against him for the offence punishable under Sections 406 and 420 of the IPC. As regards the offence punishable under Section 376(2)(n) of the IPC is concerned, he and the Respondent No.2 had physical relations during the period May 2020 to January 2021, while the Respondent No.2 was still married to another person. The Respondent No.2 was in a relationship with the Petitioner of her own volition. It is contended that, since the Petitioner has refused to marry Respondent No.2, she has filed complaint against him on rebound alleging offence punishable under Section 376(2)(n) of the IPC. It is alleged by the Respondent No.2, that since he had allegedly verbally abused her, he had committed offence punishable under Section 506 of the IPC. Section 506 of the IPC provides punishment for criminal intimidation. Section 503 of the IPC provides for meaning of criminal intimidation which reads thus :

Chaitanya

503. Criminal intimidation.—*Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.*

The Petitioner's conduct of alleged verbal insult and abuse does not come within the scope of Section 503 of the IPC. It requires that there has to be threat of injury to a person, reputation, or property with intent to cause alarm etc.

16. While making his submission learned counsel Mr. Joshi urged that the Respondent No.2 has filed the FIR on 27.01.2023 against the Petitioner as a counter blast since he had filed two complaints against her on 16.10.2022 and 11.01.2023. The settlement of account by the present Petitioner is not disputed by the Respondent herein. Though the Respondent No.2 is claiming that Rs. 5,00,000/- are yet to be received by her from the Petitioner from the amount, which he had borrowed from her, the Petitioner disputed the same

and claims that the said amount was towards his legal remuneration for the various proceedings, which were pending between the Respondent No.2 and her husband. Even otherwise the charge-sheet has been filed in pursuant to the C.R. No. 14 of 2023 only in respect of offence punishable under Section 376(2)(n), 504 and 506 of the IPC, therefore the question of cheating and criminal breach of trust are not the subject matter of the pending proceedings.

17. It is contended that as far as the allegations of the offence punishable under Section 376(2)(n) of the IPC is concerned, from the contents of the FIR, it is evident that while marriage of the Respondent No.2 was still in subsistence, she has kept physical relationship with the Petitioner herein. Though the Respondent No.2 has stated that sometimes it was without her permission and against her will, the Petitioner had established physical relationship with her. However her subsequent conduct of shifting to Mumbai and staying with the Petitioner clearly indicates that she had willingly resided with the Petitioner with the permission of her family. She herself has stated that in September 2020, with the permission of her family she had shifted to Mumbai and started residing with the

Petitioner and in January 2021 she obtained divorce from her husband. Though she has claimed that the Petitioner had promised to marry her but the fact remains that her divorce was finalized in January 2021 and before that she has shifted to live with him in September 2020. Moreover, it is her own stand in the complaint that when she realized that the Petitioner had other girlfriends, on her own she left his company and returned to live with her mother.

18. Having gone through the contents of the FIR, we do not find that the offence punishable under Sections 376(2)(n) of the IPC has been made out.

Section 376(2)(n) of the IPC reads thus :

“376. Punishment for rape.—

(1)...

(2) Whoever,—

(a)

(b)

(c) ...

(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.”

Rape is defined under Section 375 of the IPC, which reads thus :

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”

The rape is said to have been committed when there is physical relationship imposed on a woman against her will, without her consent. So far as the consent is concerned, there are seven categories of consent given in Section 375 of the IPC, which reads thus :

“First.—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.

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.”

‘Consent’ is explained under the caption 2 of the explanation under section 375 of the IPC, which reads thus :

“Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates

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

19. Though the allegations are made by the Respondent No.2, that she has kept physical relations with the Petitioner against her will and sometimes without her consent. Her subsequent conduct of residing with him for months together alongwith her son and with the permission of her family, does not support her allegations that the Petitioner has committed rape which would fall under Section 376(2)(n) of the IPC. Section 376(2)(n) is about rape repeatedly on the same woman.

On bare perusal of FIR itself, it is more than clear that while the Petitioner was still married but she established relationship with the Petitioner for a considerable period of time. She also chose to with him on her own free will as well as with the permission of her family. It is not merely a case of relationship having gone sour, but even financial transactions appear to have gone wrong. However, we are not going to address the issue of financial transactions since the charges

which are framed are only in respect of Section 376(2)(n), 504 and 506 of the IPC.

20. Though it is the specific allegation of the Respondent No.2 that the Petitioner had established physical relationship with her under the pretext of marriage, therefore due to the breach of promise to marry which is a false promise, he has committed an offence punishable under Section 376(2)(n) of the IPC. The law in this regard now has been crystallized by various judicial pronouncements of High Court as well as the Hon'ble Apex Court. In *Pramod Suryabhan Pawar V/s. The State of Maharashtra And Anr., reported in (2019) 9 SCC 608*, the Hon'ble Apex Court had occasion to deal with allegations of Section 375 of the IPC on the background of physical relationship, on the pretext of the false promise of marriage and the consent given by a woman for such relationship. While considering the said issue the Hon'ble Apex Court has held that 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

promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act.

It is observed by the Hon’ble Apex Court that, “where promise to marry is false and intention of maker at the time of making promise was not to abide by it but to deceive woman to convince her to engage in sexual relations, there is a ‘misconception of fact’ that vitiates women’s consent, on the other hand a breach of promise cannot be said to be a false promise. To establish false promise, maker of promise should have had no intention of upholding his word at the time of giving it. ‘Consent’ of woman under Section 375 is vitiated on the ground of ‘misconception of fact’ where such misconception was basis for her choosing to engage in said act.”

21. It is summarized that consent of a woman in the offence under Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish

whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.

22. Applying the said proposition of law to the present case, the Respondent No.2 herself has stated in her complaint that while her marriage was in subsistence, she has indulged in physical relationship with the Petitioner and she on her own has left him on ground of infidelity. Hence, the case of the Petitioner is fully covered by the prepositions of the law as laid by the Hon’ble Apex Court in case of **Pramod Suryabhan Pawar V/s. The State of Maharashtra And Anr** (*supra*).

23. Yet in another decision of the Hon’ble Apex Court in case of **Naim ahmed V/s. State (NCT of Delhi), reported in 2023 LiveLaw (SC) 66 : (2023) 1 S.C.R. 1061**, a view has been taken by the Hon’ble Apex Court with the facts similar to that of present Petition, wherein the prosecutrix was a married woman and a mother of three children, who engaged in

physical relationship with the accused, later on accusing him of rape. She had also also gone to stay with the accused during the subsistence of marriage with her husband. In the facts of this case only when the some dispute arose between the accused and the prosecutrix, she filed complaint alleging him commission of rape within the meaning of Section 375 of the IPC. In the facts of this case it has been held by the Hon'ble Apex Court that, on the background of the fact that she had resided with the accused during the subsistence of her marriage leaving her husband, it cannot be said that the prosecutrix had given her consent for sexual relationship with Appellant so as to hold Appellant under the misconception of fact guilty for having committed rape within the meaning of Section 375 of the IPC.

24. Having considered the submissions of respective counsel and having gone through the FIR as well as documents placed on record, we find substance in the grounds raised in the Petition. The reading of FIR as well as the charge-sheet do not disclose that, the allegations of Section 376(2)(n) alongwith Section 504 and 506 of the IPC have been made out by the Respondent No.2 in her complaint. From the complaint

itself, it is evident that, the Petitioner and the Respondent No.2, being two consenting adults had indulged in a relationship, which is gone wrong and sour, as a result the respective parties have filed criminal proceedings against each other. If the criminal procedures are allowed to be continued it is not likely to result in conviction. Therefore, it would amount to abuse of process of law if such proceedings are allowed to be continued.

Hence in order to secure ends of justice, charge-sheet No.61 of 2023, which has now been registered as Sessions Case No. 836 of 2023, pending before the Sessions Judge, Pune, pursuant to filing of C.R. No. 14 of 2022 registered at Alankar Police Station, Pune, for the offence punishable under Section 376(2)(n), 504 and 506 is quashed and set aside.

Rule is made absolute in aforesaid terms.

(MANJUSHA DESHPANDE, J.)

(BHARATI DANGRE, J.)