



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF NOVEMBER, 2024

BEFORE

THE HON'BLE MR JUSTICE M.NAGAPRASANNA

CRIMINAL PETITION NO. 5952 OF 2024

BETWEEN:

SRI AKHIL THOMAS
S/O THOMAS VARGHESE
AGED ABOUT 31 YEARS,
PERMANENT RESIDENT OF:
ELAVUMKAL HOUSE,
VANNAPURAM P.O.,
THODUPUZHA, IDUKKI DISTRICT
KERALA – 685 607.

NOW RESIDING AT:
FLAT NO.402, B BLOCK,
NAGARJUNA PREMIUM APARTMENT,
ROSE GARDEN, JP NAGAR, 6TH PHASE,
BENGALURU – 76.

...PETITIONER

(BY SRI BABY BALAN, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA BY
PUTTENAHALLI POLICE STATION,
REPRESENTED BY
STATE PUBLIC PROSECUTOR,
HIGH COURT BUILDING,
BENGALURU – 560 001.





2. MARY OVIA JOHN
D/O SMT. ABI JOHN
AGED ABOUT 31 YEARS
RESIDING AT 93/1, 7TH B CROSS ROAD
ASHA TOWNSHIP,
DODDAGUBBI
BENGALURU – 560 077.

ALSO AT:
NO.20/1, 2ND CROSS
GRACE COTTAGE
NEW ENSION LANE
JJR NAGAR
BENGALURU – 560 018.

...RESPONDENTS

(BY SMT.RASHMI PATIL, HCGP FOR R-1;
SMT.ANANYA M.L., ADVOCATE FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482
OF CR.P.C.,(528 OF BNSS) PRAYING TO QUASH THE ENTIRE
PROCEEDINGS IN CR.NO.270/2023 AND IN C.C.NO.5946/2024
OF RESPONDENT POLICE PENDING IN THE FILE OF XXX ADDL.
CHIEF METROPOLITAN MAGISTRATE, BENGALURU FOR THE
OFFENCE P/U/S 506, 376 AND 420 OF IPC.

THIS PETITION, COMING ON FOR ADMISSION, THIS DAY,
ORDER WAS MADE THEREIN AS UNDER:



CORAM: HON'BLE MR JUSTICE M.NAGAPRASANNA

ORAL ORDER

The petitioner is before this Court calling in question the proceedings in C.C.No.5946 of 2024 registered for offence punishable under Sections 376, 420 and 506 of the IPC.

2. Heard Sri Baby Balan, learned counsel appearing for petitioner, Smt Rashmi Patil, learned High Court Government Pleader appearing for respondent No.1 and Smt Ananya M L, learned counsel appearing for respondent No.2.

3. The petitioner and the 2nd respondent are said to be in a relationship, physical as well. The relationship is said to be on the promise of the petitioner getting married to the complainant. The breach of promise of marriage has led the complainant to register the complaint against the petitioner in Crime No.270 of 2023 for the aforesaid offences. The police conduct investigation and file a charge sheet. The filing of the



charge sheet has driven the petitioner to the doors of this Court in the subject petition.

4. The learned counsel appearing for petitioner submits that the acts from the date they met till the date of registration of the crime were all consensual, but never on a promise of marriage. The complainant was already married and had projected herself to be a divorced lady in bumble app and therefore, when the petitioner came to know the fact that she was not yet divorced, had breached the said promise. He would submit that there is no crime that is made for offence of rape on consensual acts.

5. Learned counsel for the 2nd respondent submits that the respondent is not willing to pursue the matter any further and would leave the decision to the hands of the Court.

6. Learned High Court Government Pleader would refute the submission of the petitioner in contending that the petitioner should come out clean in a full blown trial, as the offence laid is the one punishable under Section 376 of the IPC.



7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

8. The afore-narrated facts are not in dispute. The petitioner and the respondent come in contact on a bumble app. It is the contention of the petitioner that in the app, the complainant had projected herself to be a divorced lady and therefore, the petitioner had evinced interest to develop friendship with the 2nd respondent/complainant. The friendship blossomed into relationship and the relationship went into physical relationship as well. After few months after the relationship, the petitioner then discovers that the complainant is not a divorced lady and is having a child which is 5 years old. It is then he breaches the promise allegedly held for marrying the complainant. This leads the complainant to register the complaint. Since the entire allegation springs from the complaint, it is necessary to notice the complaint. It reads as follows:

"To.
The Inspector of Police
J.P.Nagar P.S.,
Bengaluru

Place: Bengaluru
Date:04.09.2023



From,

Smt. Mary Ovia John
D/o. Smt. Abi John
Aged 30 years,
R/a No.93/1, 7th B Cross Road,
Asha Township, Doddagubbi,
Bengaluru, Karnataka-560077

Respected Sir,

Sub: Complaint against Akhil for rape, cheating & threatening.

I am residing at the above mentioned address, a No.93/1,7th B Cross Road, Asha Township, Doddagubbi, Bengaluru, Karnataka - 560077. I originally hail from Thiruvananthapuram, Kerala and one Mr. Akhil Thomas from Idukki, Kerala. I met Akhil Thomas through an online dating platform (Bumble) and got into relationship on 26/06/2022. We both are divorced, I have a kid of 5 years old who is living with my ex-husband. On knowing the above facts, we got into a relationship and few months later we were living together on the assurance of getting married in the future in apartment In JP Nagar (NCC Nagarjuna Premier, Rose Garden, J.P Nagar 6th phase – 560 078). Ever since we moved into the JP Nagar apartment on October 2nd, 2022, we lived a very happy relationship until he got another alliance through his family.

On assuming his interest on me was pure and with deep sincerity, we got into a physical relationship on the promise of getting married. But on asking about our marriage, he brought up reasons which are baseless and illogical that his family will not accept me, that I do not have a good reputed job, salary, bank balance so on and so forth. I got into depression and even lost my job at 24x7 as a customer support on the above said reasons.

We were together running a business of manufacture and sale of luxury candles which was also going smoothly. Due to my unstable mental state, I planned on relocating to Kerala in March 2023. Upon asking about ending our relationship, he said he cannot



end this relationship and that he is in deep love and wants me to be with him for the rest of his life.

Akhil in spite of making up reasons that he is trying to maintain distance from me, he came back to Bangalore on 25th June and insisted on booking a hotel room to spend time with each other. He then insisted me to stay with him in his flat to spend time together for around 3 days. I resisted to get intimate with him yet he forced me to have sex with him on the promise of getting married. Later when I returned to Bangalore, he asked me to get his passport which was at my home and insisted me to come and stay over at his place in Aluva, Kerala. On the same evening he got emotional and said he cannot break this relationship and enjoys spending time and getting intimate with him. I was reluctant to maintain a physically intimate relationship after all the mental torture he has done to me, yet he still forced me to have sex with him promising me that he does not wish to break this relationship off.

Akhil made up reasons only for physical intimacy and later made excuses for ending up the relationship. I couldn't handle the trauma caused by him, due to which I tried to end my life and attempted to suicide the next day i.e., on August 17th, 2023. In spite of all this happening he did not show any sympathy or passion towards me and he was on the stand to end this relationship.

He then mentioned to me he just wants to end this relationship that he has got another alliance who is well settled in USA and that he wishes to take that alliance forward. I was totally broken down by hearing this and I said that I have no other option left but get married to him or inform his family about this relationship.

I request your good self to register a FIR for rape, cheating and breach of trust."

The police after investigation file a charge sheet. The summary of the charge sheet as obtaining in column No.17 reads as follows:



“17. ಕೇಸಿನ ಸಂಕ್ಷಿಪ್ತ ಸಾರಾಂಶ

ಈ ದೋಷಾರೋಪಣ ಪಟ್ಟಿಯಲ್ಲಿ ನಮೂದಿಸಿರುವ ಆರೋಪಿಯು ಪುಟ್ಟೇನಹಳ್ಳಿ ಪೊಲೀಸ್ ಠಾಣಾ ಸರಹದ್ದಿನ ಜೆ.ಪಿ.ನಗರ 6ನೇ ಹಂತ, ರೋಸ್ ಗಾರ್ಡನ್, 100 ಅಡಿ ರಸ್ತೆ, ಎನ್.ಸಿ.ಸಿ ನಾಗಾರ್ಜುನ ಪ್ರೀಮಿಯರ್ ಅಪಾರ್ಟ್ಮೆಂಟ್, ಬಿ-ಬ್ಲಾಕ್, 4ನೇ ಮಹಡಿ, ಪಾಟ್ ನಂ. 402 ಅನ್ನು ಸಾಕ್ಷಿ-5 ರವರು ಬಾಡಿಗೆಗೆ ಪಡೆದುಕೊಂಡಿದ್ದ ಪ್ಲಾಟ್ ನ ಒಂದು ರೂಂನಲ್ಲಿ. ಅರ್ಧ ಭಾಗದಷ್ಟು ಬಾಡಿಗೆಯನ್ನು ಸಾಕ್ಷಿ-5 ರವರಿಗೆ ಆನ್ ಲೈನ್ ಮುಖಾಂತರ ನೀಡಿ ವಾಸವಿದ್ದು, ಆರೋಪಿಯು ಸಾಕ್ಷಿ-1 ರವರನ್ನು ಮದುವೆ ಮಾಡಿಕೊಳ್ಳುವುದಾಗಿ ನಂಬಿಸಿ ಆಕೆಯನ್ನು ಆಗಾಗ್ಗೆ ಸಾಕ್ಷಿ-5 ರವರ ಪ್ಲಾಟ್ ನಲ್ಲಿರುವ ಒಂದು ರೂಂಗೆ ಆಗಾಗ್ಗೆ, 2022ನೇ ಜೂನ್ ತಿಂಗಳಿನಿಂದ ಜೂನ್-2023 ರವರೆಗೆ ಕರೆದುಕೊಂಡು ಒಂದು ರೂಂನಲ್ಲಿ. ಲೈಂಗಿಕವಾಗಿ ಬಳಸಿಕೊಂಡು ಅತ್ಯಾಚಾರ ಮಾಡಿದ್ದ ಸಾಕ್ಷಿ-1 ಮತ್ತು ಆರೋಪಿ ಪ್ಲಾಟ್ ನಲ್ಲಿರುವುದು ಸಾಕ್ಷಿ-8 ಮತ್ತು ಸಾಕ್ಷಿ-9 ರವರು ನೋಡಿದ್ದು, ಅಲ್ಲದೆ ಆರೋಪಿಯು ದಿನಾಂಕ: 25/06/2023 ರಂದು ಸಾಕ್ಷಿ-1 ರವರನ್ನು ಮಡಿವಾಳ ರಸ್ತೆಯಲ್ಲಿರುವ ನೆಕ್ಸ್, ಟೇ ಕೈಟ್ಸ್ ಹೋಟೆಲ್ ಗೆ ಕರೆದುಕೊಂಡು ಹೋಗಿದ್ದನ್ನು ಸಾಕ್ಷಿ-6 ರವರು ನೋಡಿದ್ದು, ಅಲ್ಲಿಯೂ ಸಹ ಸಾಕ್ಷಿ-1 ರವರನ್ನು ಮದುವೆಯಾಗುವುದಾಗಿ ನಂಬಿಸಿ ಅತ್ಯಾಚಾರ ಮಾಡಿದ್ದು, ತನಿಖಾ ಕಾಲದಲಿ ಸಾಕ್ಷಿ-15 ರವರು ಸಾಕ್ಷಿ-2 & 3 ರವರ ಸಮಕ್ಷಮದಲ್ಲಿ, ಪಂಚನಾಮೆ ಕ್ರಮ ಜರುಗಿಸಿದ್ದು, ಆರೋಪಿಯು ಸಾಕ್ಷಿ-1 ರವರನ್ನು ಮದುವೆಯಾಗುವುದಾಗಿ ನಂಬಿಸಿ ಅತ್ಯಾಚಾರವೆಸಗಿ ಮೋಸ ಮಾಡಿ ಬೆದರಿಕೆ ಹಾಕಿರುವುದು ಸಾಕ್ಷಿ-5&6 ಸಾಕ್ಷಿ-8&9 ರವರುಗಳ ವಿಚಾರಣೆ ಮತ್ತು ಸಾಕ್ಷಾಧಾರಗಳಿಂದ ದೃಢಪಟ್ಟಿರುತ್ತದೆ,

ಆದ್ದರಿಂದ ಆರೋಪಿಯು ಕಾಲಂ ನಂ.5(1) ರಲ್ಲಿ ನಮೂದಿಸಿರುವ ಕಲಂನನ್ವಯ ಶಿಕ್ಷಾರ್ಹ ಅಪರಾಧವೆಸಗಿರುವುದರಿಂದ ಸಾಕ್ಷಿ-16 ರವರು ಆರೋಪಿ ವಿರುದ್ಧ ದೋಷಾರೋಪಣ ಪಟ್ಟಿಯನ್ನು ಸಲ್ಲಿಸಿರುತ್ತಾರೆ.”

If the contents of the complaint and the summary of the charge sheet are read in tandem, what would unmistakably emerge is, obliteration of the crime against the petitioner, for the reason that the complainant was already married and the marriage was still subsisting at the time when she projected herself to be a divorced lady without a divorce actually happening. Therefore, there cannot be promise of marriage held on to a



lady, who was already married. Be that as it may. The other acts alleged are all consensual acts. On such consensual acts in a relationship between the petitioner and the respondent cannot become the offence of rape as obtaining under Section 376 of the IPC.

9. The issue need not detain this Court for long or delve deep into the matter. This Court in **Crl.P.No.9120 of 2024** disposed on **05-11-2024** has held as follows:

"....

9. It now becomes germane to notice the judgments of the Apex Court. The Apex Court has delineated the inter-play between the offence of rape and a consensual sexual relationship, both on the false promise of marriage, and promise of marriage. Therefore, a deeper delving into the issue becomes unnecessary, suffice to quote the judgments of the Apex Court rendered over the years. The Apex Court in the case of **PRAMOD SURYABHAN PAWAR v. STATE OF MAHARASHTRA**¹ has drawn distinction between rape and consensual sexual relationships. While delineating inter-play between promise of marriage and allegation of rape, the Apex Court has held as follows:

"....

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v. State of Chhattisgarh* [*Anurag Soni v. State of Chhattisgarh*, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509], this Court held:

¹ (2019) 9 SCC 608



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

Similar observations were made by this Court in *Deepak Gulati v. State of Haryana* (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (*Deepak Gulati*):

"21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused;"

15. In *Yedla Srinivasa Rao v. State of A.P.* (2006) 11 SCC 615 : (2007) 1 SCC (Cri) 557] the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the Court observed:

"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and 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 fulfill the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent."



16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24)

"21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

(emphasis supplied)

17. In Uday v. State of Karnataka, (2003) 4 SCC 46: 2003 SCC (Cri) 775] the complainant was a college-going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition



from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors : (SCC p.58, para 25)

"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."

(emphasis supplied)

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to



marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

10. The Apex Court, a little later in the case of DHURVARAM MURLIDHAR SONAR (supra), while following the earlier judgment of the Apex Court in the case of UDAY v. STATE OF KARNATAKA reported in (2003) 4 SCC 46 and DEELIP SINGH v. STATE OF BIHAR reported in (2005) 1 SCC 88, has held as follows:

"18. In Uday v. State of Karnataka (2003) 4 SCC 46 : 2003 SCC (Cri) 775, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus : (SCC pp. 56-57, paras 21 & 23)

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She



admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

19. In *Deelip Singh v. State of Bihar*, (2005) 1 SCC 88 : 2005 SCC (Cri) 253], the Court framed the following two questions relating to consent : (SCC p. 104, para 30)

(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?

In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. 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 girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time.

20. With this factual background, the Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of



promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law. It was held thus: (Deelip Singh v. State of Bihar, (2005) 1 SCC 8 : 2005 SCC (Cri) 253], SCC p. 106, para 35)

"35. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday case [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] at para 24 come to the aid of the appellant."

21. In Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660], the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone 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 a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case



of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be levelled against the accused.

23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.

24. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. **She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant**



has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

(Emphasis supplied)

The Apex Court, in the afore-quoted judgment, has considered the entire spectrum of the law on the issue while following the judgment in the case of **DR.DHRUVARAM MURALIDHAR SONAR V. STATE OF MAHARASHTRA** reported in **(2019)18 SCC 191** and had obliterated the proceedings *qua* the accused.

10. Later to the judgment so rendered by the Apex Court in the case of **PRAMOD SURYABHAN PAWAR**, the Apex Court in the case of **SHAMBHU KHARWAR v. STATE OF UTTARPRADESH**² has held as follows:

"....

7. The parameters governing the exercise of the jurisdiction of Section 482 of CrPC are well-settled and have been reiterated in a consistent line of decisions of this Court. In *Neeharika Infrastructure v. State of Maharashtra*, a three Judge Bench of this Court which one of us was a part of (D.Y. Chandrachud J.), reiterated the parameters laid down in *R.P. Kapur v. State of Punjab* and *State of Haryana v. Bhajan Lal* and held that while the Courts ought to be cautious in exercising powers under Section 482, they do have the power to quash. The test is whether or not the allegations in the FIR disclose the commission of a cognizable offence. The Court does not enter into the merits of the allegations or trench upon the power of the investigating agency to investigate into allegations involving the commission of a cognizable offence.

8. In *Bhajan Lal* (supra) this Court formulated the parameters in terms of which the powers in Section 482 of CrPC may be exercised. While it is not necessary to revisit all these parameters again, a few that are relevant to the present

² 2022 SCC OnLine SC 1032



case may be set out. The Court held that quashing may be appropriate:

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

[...]

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

9. In Dhruvaram Murlidhar Sonar v. State of Maharashtra, a two Judge Bench of this Court while dealing with similar facts as the present case reiterated the parameters laid down in Bhajan Lal (supra) held that:

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

10. An offence is punishable under Section 376 of the IPC if the offence of rape is established in terms of Section 375 which sets out the ingredients of the offence. In the present case, the second description of Section 375 along with Section 90 of the IPC is relevant which is set out below.

"375. Rape - A man is said to commit "rape" if he -

[...]

under the circumstances falling under any of the following seven descriptions

Firstly ...

Secondly. - Without her consent.

[...]

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



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

xxx

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

11. In *Pramod Suryabhan Pawar v. State of Maharashtra*,⁷ a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in *Sonu @ Subhash Kumar v. State of Uttar Pradesh*,⁸ observed that:

"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action...

[...]

14. [...] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled...

[...]

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act...

[...]

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise



itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

(emphasis supplied)

12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge-sheet are correct as they stand, an offence punishable under Section 376 IPC was made out. Admittedly, the appellant and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent.

13. In this backdrop and taking the allegations in the complaint as they stand, it is impossible to find in the FIR or in the charge-sheet, the essential ingredients of an offence under Section 376 IPC. The crucial issue which is to be considered is whether the allegations indicate that the appellant had given a promise to the second respondent to marry which at the inception was false and on the basis of which the second respondent was induced into a sexual relationship. Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under Section 375 IPC are absent. The relationship between the parties was purely of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent.

14. The High Court, in the course of its judgment, has merely observed that the dispute raises a question of fact which cannot be considered in an application under Section 482 of CrPC. As demonstrated in the above analysis, the facts as they stand, which are not in dispute, would indicate that the ingredients of the offence under Section 376 IPC were not established. The High Court has, therefore, proceeded to dismiss the application under Section 482 of CrPC on a completely misconceived basis.

15. We, accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 5 October 2018 in application u/s 482 No 33999 of 2018. The application under Section 482 of CrPC shall accordingly stand allowed. The Case Crime No 11 of 2018 registered at Police



Station Rasra, District Ballia, charge-sheet dated 23 April 2018 in the aforementioned case and the order dated 24 May 2018 in Criminal Case No 785 of 2018 in the Court of the Addl. Chief Judicial Magistrate (First), Ballia taking cognizance of the charge-sheet shall accordingly stand quashed.”

(Emphasis supplied)

11. In yet another judgment, the Apex Court in the case of **MANDAR DEEPAK PAWAR V. STATE OF MAHARASHTRA**³, has held as follows:

“....

3. The parties chose to have physical relationship without marriage for a considerable period of time. For some reason, the parties fell apart. It can happen both before or after marriage. Thereafter also three years passed when respondent No.2 decided to register a FIR.

4. The facts are so glaring as set out aforesaid by us that we have no hesitation in quashing the FIR dated 16.12.2016 and bringing the proceedings to a close. Permitting further proceedings under the FIR would amount to harassment to the appellant through the criminal process itself.

5. We are fortified to adopt this course of action by the judicial view in (2019) 9 SCC 608 titled “Pramod Suryabhan Pawar v. State of Maharashtra & another” where in the factual scenario where complainant was aware that there existed obstacles in marrying the accused and still continued to engage in sexual relations, the Supreme Court quashed the FIR. A distinction was made between a false promise to marriage which is given on understanding by the maker that it will be broken and a breach of promise which is made in good faith but subsequently not fulfilled. This was in the context of Section 375 Explanation 2 and Section 90 of the IPC, 1860.

(Emphasis supplied)

12. Further, the Apex Court, again in the case of **NAIM AHAMED v. STATE (NCT OF DELHI)**⁴, delineating what would be false promise of marriage and a promise of marriage, has held as follows:

“....

10. It would be germane to note that the basic principles of criminal jurisprudence warrant that the

³ 2022 SCC OnLine SC 2110

⁴ 2023 SCC OnLine SC 89



prosecution has to prove the guilt of the accused beyond reasonable doubt by leading cogent evidence, however, considering the ethos and culture of the Indian Society, and considering the rising graph of the commission of the social crime - 'Rape', the courts have been permitted to raise a legal presumption as contained in Section 114A of the Indian Evidence Act. As per Section 114A, a presumption could be raised as to the absence of consent in certain cases pertaining to Rape. As per the said provision, if sexual intercourse by the accused is proved and the question arises as to whether it was without the consent of the woman alleged to have been raped, and if she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

11. It cannot be gainsaid that a consent given by a person would not be a consent as intended by any Section of the Penal Code, 1860, if such consent was given by the person under the fear of injury, or under a misconception of fact as contemplated in Section 90 IPC. Further, Section 375 also describes certain acts which if committed by the accused under the circumstances mentioned therein, as the commission of 'Rape', even though committed with the consent of the prosecutrix. In our opinion, the expression "misconception of fact" contained in Section 90 IPC is also required to be appreciated in the light of the Clauses - contained in Section 375 IPC, more particularly the Clauses - Thirdly, Fourthly and Fifthly thereof, when the accused is charged for the offence of 'rape'. The circumstances described in the said three Clauses are wider than the expression "misconception of fact", as contemplated in Section 90 of IPC. Section 375 describes seven circumstances under which the 'rape' could be said to have been committed. As per the Clause - Thirdly, a rape could be said to have been committed, even with her consent, when the consent of the prosecutrix is obtained by putting her or any person in whom she is interested in fear of death or of hurt. As per the Clause - 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; and as per the Clause - Fifthly, with her consent when at the time of giving the consent, the prosecutrix by reason of unsoundness of mind or intoxication or the administration of stupefying or unwholesome substance by the accused or through another, she is unable to understand the nature and consequences of that to which she gives consent. Thus, apart from the prosecutrix being under the misconception of fact as contemplated in Section 90, her consent would be treated as 'no consent' if she had given her consent under any of the circumstances mentioned in Section 375 of IPC.



12. The exposition of law in this regard is discernible in various decisions of this Court, however the application of such law or of such decisions would depend upon the proved facts in each case, known as legal evidence. The ratio laid down in the judgments or the law declared by this Court do provide the guidelines to the judicial mind of the courts to decide the cases on hand, but the courts while applying the law also have to consider the evidence before them and the surrounding circumstances under which the alleged offences are committed by the accused.

13. A reference of some of the decisions of this Court dealing with the different dimensions and angles of the word 'consent' in the context of Section 90 and Section 375 would be beneficial for deciding this appeal.

14. In *Uday v. State of Karnataka*⁴, the prosecutrix aged about 19 years had given her consent for having a sexual intercourse with the accused with whom she was deeply in love, and it was alleged by the prosecution that the prosecutrix continued to meet the accused as the accused had given her a promise to marry her on a later date. The prosecutrix became pregnant and the complaint was lodged on failure of the accused to marry her. This Court while holding that under the circumstances, the consent could not be said to have been given under a misconception of fact under section 90 of IPC, held in para 21 and 23 as under:—

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

22. -xxx- xx -

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to



understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

15. In *Deelip Singh alias Dilip Kumar v. State of Bihar* (supra), this Court after discussing various earlier decisions of this Court and other High Courts, further explained the observations made in *Uday* case (supra) and observed 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 Section 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 Section 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 Cri LJ 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 Cri LJ 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."

16. In *Deepak Gulati v. State of Haryana*⁵, this Court gave one more dimension of the word 'consent' by distinguishing 'Rape' and 'consensual sex' and observed as under:



"21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. xxxxx

23. xxxxx

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her".

17. Again in Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra (supra), this Court interpreting the Section 90 and the Clause - Secondly in Section 375 of IPC, observed as under:—

"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused



and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC."

18. Now, in the instant case, having regard to the statutory provisions and their interpretations by this Court in various judgments, one may be tempted to hold the appellant-accused guilty of the offence under Section 376 IPC as has been done by the Sessions Court and the High Court, however, on the closer scrutiny of the evidence on record, we find that it was fallacy on the part of the courts below to hold the appellant guilty under Section 376 IPC.

19. After duly examining the record in the light of the submissions made by the learned counsels for the parties, following facts have emerged:—

- (i) Prosecutrix was a married woman having three children.
- (ii) Accused was staying in a tenanted premises situated in front of the house of the prosecutrix.
- (iii) Though initially hesitant, the prosecutrix developed liking for the accused, and both started having sexual relationship with each other.
- (iv) The prosecutrix delivered a male child on 28/10/2011 from the loin of the accused.
- (v) The prosecutrix went to the native place of the accused in 2012 and came to know that he was a married man having children.
- (vi) The prosecutrix still continued to live with the accused in separate premises.
- (vii) The prosecutrix and her husband took divorce by mutual consent in 2014 and thereafter prosecutrix permanently left her three children with her husband.
- (viii) The prosecutrix lodged the complaint on 21st March, 2015 alleging that she had consented for sexual relationship with the accused as the accused had promised her to marry and subsequently did not marry.

20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause - Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of



promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. As stated earlier, each case would depend upon its proved facts before the court."

(Emphasis supplied)

13. The Apex Court, subsequently, in the case of **Ms. X V. Mr. A⁵**, has held as follows:

"....

12. This Court, in the facts of the said case, set aside the judgment of the High Court which refused to exercise its jurisdiction under Section 482 of Cr. P.C. to quash the proceedings. The Court found that this was a fit case wherein the High Court ought to have invoked its jurisdiction under Section 482 of Cr. P.C. to quash the proceedings.

13. In the present case also, the facts are almost similar. Even as per the version of the complainant, the following facts have been emerged:

(i) 4 years prior to the FIR being lodged on 1st October 2020, accused No. 1 followed the prosecutrix and told her that he loved her and she should also love him;

(ii) After a period of 2 years, she agreed to love him and both were intimate with each other;

(iii) One year prior to the date of the incident, accused No. 1 took the prosecutrix to his aunty's house in Chitradurga and they stayed there. On that day at about 09.00 am, in his aunty's house, by giving trust and belief that he would marry her, accused No. 1 forcibly made sexual contact with the prosecutrix;

(iv) Thereafter, accused No. 1 took the prosecutrix to various places including his own house and committed sexual intercourse with her; and

⁵ 2024 SCC OnLine SC 316



(v) As per the version of the prosecutrix, the first incident has taken place in the year 2019. As per Karnataka Secondary Education Examination Board Certificate, her date of birth is 12th September 1998. Even if it is assumed that the incident has taken place in January 2019, she would have been over the age of 18.

14. After the prosecutrix became pregnant, accused No. 1 caused her abortion on 17th August 2020. Though her initial version was that she was admitted in the hospital for two days, it is falsified by the statement of the doctor/Head of Krishna Nursing Home. After this incident, she discussed the matter with her elders in the family and decided to lodge the complaint.

15. We find that, in the present case also like the case of *Pramod Suryabhan Pawar* (supra), the allegations in the FIR so also in the restatement (Annexure P-6) made before the Dy. S.P., Challakere, do not, on their face, indicate that the promise by accused No. 1 was false or that the complainant engaged in the sexual relationship on the basis of such false promise. This apart from the fact that the prosecutrix has changed her version. The version of events given by the prosecutrix in the restatement (Annexure P-6) made before the Dy. S.P., Challakere is totally contrary to the one given in the FIR.

16. Similar facts arose for consideration before this Court in the case of *Shambhu Kharwar* (supra). In the said case, the prosecutrix had filed a complaint that there was love affair between her and the accused for a period of three years. The accused had given an assurance to her regarding solemnization of marriage. They started living under the same roof and also made sexual relationship. Thereafter, the accused entered into a ring ceremony with someone else. In this background, the prosecutrix had lodged the complaint that the accused had forcible sexual intercourse with her on the false promise of marriage. After considering the material placed on record, the Court observed thus:

"13.Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under Section 375 IPC are absent. The relationship between the parties was purely of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent."

17. This Court, in the case of *State of Haryana v. Bhajan Lal*⁴, has observed thus:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers



under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

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

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

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

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

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the 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."

18. We find that the present case would squarely fall under categories (1), (3) and (5) as reproduced hereinabove for the reasons which we have already recorded in the earlier paragraphs. No doubt, that the power of quashing the criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases, it is also equally settled that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint. However, in the present case, even if the



allegations made in the FIR and the material on which the prosecution relies, are taken at its face value, we find that there are no sufficient grounds for proceeding against the accused. We find that no error has been committed by the learned Single Judge of the High Court by holding that permitting further proceedings to continue would be an abuse of process of law and result in miscarriage of justice. The High Court has correctly applied the law on the issue and come to a just finding warranting no interference.”

(Emphasis supplied)

14. The Apex Court, further in the case of **SHIV PRATAP SINGH RANA V.STATE OF MADHYA PRADESH**⁶, has held as follows:

“....

26. We have carefully gone through the definition of “rape” provided under Section 375IPC. We have also gone through the provisions of Section 376(2)(n)IPC, which deals with the offence of rape committed repeatedly on the same woman. Section 375IPC defines “rape” by a man if he does any of the acts in terms of clauses (a) to (d) under the seven descriptions mentioned therein. As per the second description, a man commits rape if he does any of the acts as mentioned in clauses (a) to (d) without the consent of the woman. Consent has been defined in Explanation 2 to mean 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. However, the proviso thereto clarifies 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.

27. Having regard to the above and in the overall conspectus of the case, we are of the view that the physical relationship between the prosecutrix and the appellant cannot be said to be against her will and without her consent. On the basis of the available materials, no case of rape or of criminal intimidation is made out.

28. The learned counsel for the respondents had placed considerable reliance on the provisions of Section 90IPC, particularly on the expression “under a misconception of fact”. Section 90IPC reads thus:

⁶ (2024) 8 SCC 313



"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."

29. Section 90 IPC says that a consent is not such a consent as it is intended by any section of IPC, if the consent is given by a person under the fear of injury or under a misconception of fact.

30. In *Dhruvaram Murlidhar Sonar v. State of Maharashtra* [*Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191 : (2020) 3 SCC (Cri) 672] , this Court after examining Section 90IPC held as follows : (SCC p. 198, para 17)

"17. Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances."

31. This Court also examined the interplay between Section 375IPC and Section 90IPC in the context of consent in *Pramod Suryabhan Pawar v. State of Maharashtra* [*Pramod Suryabhan Pawar v. State of Maharashtra*, (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903] , and held that consent with respect to Section 375IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action (or inaction), consents to such action. After deliberating upon the various case laws, this Court summed up the legal position as under : (SCC p. 620, para 18)



"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

32. The learned counsel for the respondents had relied heavily on the expression "misconception of fact". However, according to us, there is no misconception of fact here. Right from the inception, it is the case of the prosecution that while the appellant was insisting on having a relationship with the prosecutrix, the later had turned down the same on the ground that the appellant was the friend of her younger brother and a distant relative of her *jijaji*. That apart, according to the prosecutrix, the appellant was younger to her. Nonetheless, the prosecutrix had accompanied the appellant to a temple, where she had voluntarily taken bath under a waterfall. Her allegation that the appellant had surreptitiously taken photographs of her while she was bathing and later on changing clothes and was blackmailing her with such photographs remain unfounded in the absence of seizure of such photographs or the mobile phone on which such photographs were taken by the appellant. If, indeed, she was under some kind of threat from the appellant, it defies any logic, when the prosecutrix accompanied the appellant to Gwalior from Dabra, a journey which they had made together by train. On reaching Gwalior, she accompanied the appellant on a scooter to a rented premises at Anupam Nagar, where she alleged that the appellant had forced himself upon her. But she did not raise any alarm or hue and cry at any point of time. Rather, she returned back to Dabra along with the appellant. The relationship did not terminate there. It continued even thereafter. It is the case of the prosecutrix herself that at one point of time the family members of the two had met to discuss about their marriage but nothing final could be reached regarding their marriage. It was only thereafter that the FIR was lodged.

33. As already pointed out above, neither the affidavit nor stamp papers have been recovered or seized by the police; so also the jewellery. The alleged cheque of the prosecutrix's mother given to the appellant or the bank statement to indicate transfer of such money have not been gathered by the police. In the absence of such materials, the entire substratum of the prosecutrix's case collapses. Thus, there is hardly any possibility of conviction of the appellant. As a matter of fact, it is not even a case which can stand trial. It appears to be a case of a consensual



relationship which had gone sour leading to lodging of FIR. In the circumstances, the Court is of the view that compelling the appellant to face the criminal trial on these materials would be nothing but an abuse of the process of the court, result of the trial being a foregone conclusion.

34. From the factual matrix of the case, the following relevant features can be culled out:

(i) the relationship between the appellant and the prosecutrix was of a consensual nature;

(ii) the parties were in a relationship for a period of almost two years; and

(iii) though there were talks between the parties and their family members regarding marriage, the same did not fructify leading to lodging of FIR.

35. That being the position and having regard to the facts and circumstances of the case, we are of the view that it would be in the interest of justice if the proceedings are terminated at this stage itself. Consequently, impugned order of the High Court dated 3-10-2019 [*Shivpratap Singh Rana v. State of M.P.*, 2019 SCC OnLine MP 5836] and the order of the Sessions Judge dated 24-4-2019 are hereby set aside and quashed.

36. Resultantly, proceedings in Sessions Trial No. 505 of 2018, pending before the 10th Additional Sessions Judge, Gwalior, are hereby quashed."

(Emphasis supplied)

15. The Apex Court, in its recent judgment, in the case of **LALU YADAV V. STATE OF UTTAR PRADESH**⁷ has held as follows:

"....

13. The decision in "XXXX" v. *State of Madhya Pradesh*⁶, also assumes relevance in the contextual situation. This court took into consideration an earlier decision of this Court in *Naim Ahamed v. State (NCT of Delhi)*², where the allegation was one of alleged rape on false promise of marriage, made five years after the complainant and the accused started having relations and even got pregnant from the accused, of course when she was having a subsisting marriage, the Court found that there cannot be any stretch of imagination that the

⁷ 2024 SCC OnLine SC 2876



prosecutrix had given her consent for sexual relationship under misconception. Having considered the said decision and finding identity in facts, this court in the decision reported in (2024) 3 SCC 496 reversed the order impugned therein dismissing the petition filed under Section 482, Cr. P.C. for quashment of FIR and allowed the appeal by setting aside the impugned order and quashing the subject FIR.

14. Now, having bestowed our anxious consideration to the decisions referred *supra* with reference to the factual situations obtained in the case at hand, we are of the considered view that the High Court has palpably gone wrong in not considering the question whether the allegations in the complaint reveals *prima facie* case that the complainant had given her consent for the sexual relationship with the appellant under misconception of fact, as alleged, or whether it reveals a case of consensual sex. Firstly, it is to be noted that the subject FIR itself would reveal that there occurred a delay of more than 5 years for registering the FIR; secondly, the very case of the complainant, as revealed from the FIR, would go to show that they lived for a long period as man and wife and thirdly, the facts and circumstances obtained from the subject FIR and other materials on record would reveal absence of a *prima facie* case that the complainant viz., respondent No. 4 had given her consent for sexual relationship with the appellant under misconception of fact. At any rate, the allegations in the FIR would not constitute a *prima facie* case of false promise to marry from the inception with a view to establish sexual relationship and instead they would reveal a *prima facie* case of long consensual physical relationship, during which the complainant addressed the appellant as her husband. Moreover, it is also the case of the complainant, revealed from the subject FIR and the other materials on record that she went along with the appellant to Varanasi with the knowledge of her family and stayed with him in hotels during such visits. The subsequent refusal to marry the complainant would not be sufficient, in view of the facts and circumstances obtained in the case at hand, by any stretch of imagination to draw existence of a *prima facie* case that the complainant had given consent for the sexual relationship with the appellant under misconception of fact, so as to accuse the appellant guilty of having committed rape within the meaning of Section 375, IPC.

15. The long and short of the above discussion is that the case at hand is a befitting case where the High Court should have exercised the power available under Section 482, Cr. P.C. to prevent abuse of the process of the Court. Now that the allegation of offence under Section 313, IPC is omitted, there is absolutely



no *prima facie* case for proceeding further against the appellant on the allegation of commission of offence punishable under Section 376, IPC. We are of the considered view that the High Court should have exercised its inherent power."

(Emphasis supplied)

The Apex Court, in the afore-quoted judgments, have considered the interplay between consensual acts and rape, as also, the interplay between promise of marriage and its breach *qua* cheating and has delineated that, such acts would neither become rape nor cheating, as obtaining under Sections 376, 417 and 420 of the IPC.

16. Insofar as the judgment that the learned counsel appearing for the 2nd respondent/complainant seeks to place reliance upon, in the case of **ANURAG SONI V. STATE OF CHATTISGARH - (2019)13 SCC 1**, the same has been considered and the law has further been elucidated by the Apex Court in the subsequent judgments quoted hereinabove. Therefore, what would become binding are the judgments that are quoted in the course of the order. Wherefore, the armory that has emerged from the arsenal of the learned counsel for the petitioners, Smt. Sadhana S Desai, are undoubtedly overwhelming to what is projected by the learned counsel Sri Avishkar, appearing for the 2nd respondent/complainant .

17. In the light of the afore-quoted judgments and the observations made during the course of the order, if further proceedings against the petitioners are not obliterated and the trial is continued, it would, on the face of it, become an abuse of the process of law and result in miscarriage of injustice."

In the light of the judgment of this Court as afore-quoted and the observations made during the course of the order, if further proceedings against the petitioner are not obliterated, it would,



on the face of it, become an abuse of the process of law and result in miscarriage of injustice.

10. For the aforesaid reasons, the following:

ORDER

- (i) Criminal Petition is allowed.
- (ii) Proceedings in C.C.No.5946 of 2024 (Crime No.270 of 2023) pending on the file of XXX Additional Chief Metropolitan Magistrate, Bengaluru stands quashed *qua* the petitioner.

Sd/-
(M.NAGAPRASANNA)
JUDGE