

A

SHAMBHU KHARWAR

v.

STATE OF UTTAR PRADESH & ANR.

(Criminal Appeal No. 1231 of 2022)

B

AUGUST 12, 2022

**[DR DHANANJAYA Y CHANDRACHUD AND
A S BOPANNA, JJ.]**

C *Penal Code 1860: ss. 376, 375 – Punishment for rape – Necessary ingredients of s. 375 – On facts, accusation of rape by the second respondent-women against the appellant-man on the pretext of marriage – Application by appellant seeking quashing of criminal case registered for an offence punishable u/s. 376 – Dismissed by the High Court – On appeal, held: Relationship between the parties-appellant and the second respondent purely consensual in nature – They are both educated adults – Relationship of the second respondent with the appellant 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 – Thus, the essential ingredients of an offence u/s. 376 not made out – Order passed by the High Court set aside and the application u/s. 482 CrPC allowed.*

E

Allowing the appeal, the Court

F **HELD: 1.1 In the instant case, 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. 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. As regards, the issue 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**

H

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, 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. [Paras 12, 13][163-C-D, F-G]

1.2 The High Court merely observed that the dispute raises a question of fact which cannot be considered in an application under Section 482 CrPC. The facts would indicate that the ingredients of the offence under Section 376 IPC were not established. Thus, the High Court proceeded to dismiss the application under Section 482 CrPC on a completely misconceived basis. The impugned judgment and order of the High Court in application u/s 482 is set aside. The application under Section 482 CrPC shall accordingly stand allowed. [Paras 14, 15][163-G-H; 164-A-C]

Neeharika Infrastructure v. State of Maharashtra (2021) SCC OnLine SC 315; R.P. Kapur v. State of Punjab AIR 1960 SC 866 : [1960] SCR 388; State of Haryana v. Bhajan Lal (1992) 1 Suppl. SCC 335 : [1990] 3 Suppl. SCR 259; Dhruvaram Murlidhar Sonar v. State of Maharashtra (2019) 18 SCC 191; Pramod Suryabhan Pawar v. State of Maharashtra (2019) 9 SCC 608 : [2019] 11 SCR 423; Sonu @ Subhash Kumar v. State of Uttar Pradesh (2021) SCC OnLine SC 181 – referred to.

Case Law Reference

[1960] SCR 388	referred to	Para 7	
[1990] 3 Suppl. SCR 259	referred to	Para 7	
(2019) 18 SCC 191	referred to	Para 9	G
[2019] 11 SCR 423	referred to	Para 11	

CRIMINALAPPELLATE JURISDICTION: Criminal Appeal No. 1231 of 2022.

H

A From the Judgment and Orders dated 05.10.2018 of the High Court of Judicature at Allahabad in Application u/s 482 No. 33999 of 2018.

Ramjee Pandey, Uday Prakash, Raghvendra Shukla, Advs. for the Appellant.

B Mohit D. Ram, Ms. Monisha Handa, Rajul Shrivastav, Anubhav Sharma, Ms. Srishti Singh, Advs. for the Respondents.

The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

C 1. Delay condoned.

2. Leave granted.

D 3. The appeal arises from a judgment dated 5 October 2018 of a Single Judge of the High Court of Judicature at Allahabad. The High Court dismissed an application instituted by the appellant under Section 482 of the Code of Criminal Procedure 1973¹ for quashing Criminal Case No 785 of 2018 in the Court of the Addl. Chief Judicial Magistrate (First), Ballia arising out of Case Crime No 11 of 2018 registered at Police Station Rasra, District Ballia for an offence punishable under Section 376 of the Indian Penal Code 1860². The appellant had also
E sought the quashing of a charge-sheet bearing charge-sheet No 94 of 2018 dated 23 April 2018 submitted under Section 173 of CrPC and the order taking cognizance dated 24 May 2018.

F 4. Case Crime No 11 of 2018 was registered on 18 January 2018 at Police Station Rasra, District Ballia on the basis of information furnished by the second respondent. In her complaint, the second respondent stated as follows:

G “I was having affair with Shambhu Kharwar as his wife, who is also the resident of Village- Sarai Bharti, Post- Rasada, District-Ballia. I hereby give my statement that there was love affair between us since a period of about 3 years and Shambhu Kharwar gave an assurance to me regarding solemnization of marriage and as a result of the same started living with me under the same roof and also used to have sexual relationship with me and also

¹ “CrPC”

H ² “IPC”

used to make a demand of certain amount time to time. But I always followed him and till date I am unmarried and whenever I asked him regarding the solemnization of marriage, he used to make false and frivolous averments and at last without informing me solemnized marriage with someone else on 10.12.2017 and after the same, returned to me and told nothing regarding the solemnization of marriage, but on being pressurized by me again and again he had admitted that he has entered into a ring ceremony with someone else, this information has been received by me from him only. I am very sad and whenever I asked him to solemnize marriage with me, he kept on making lame excuses and gave false assurances by saying that he will leave her by sexually assaulting her and thereafter, will solemnize marriage with me. After hearing the same, I have decided to initiate criminal proceedings against him. Therefore, it is prayed that suitable action may kindly be taken against him. Shambhu Kharwar son of Lallan Kharwar, resident of Sarai Bharti Rasada, Ballia Date 18.01.2018.”

A
B
C
D

5. The statement of the second respondent was recorded under Section 161 of CrPC during investigation. Her statement was recorded under Section 164. In the statement under Section 164, the second respondent stated that during the course of training at a Teachers’ Training College, she came in contact with the appellant in 2013 and they got into a relationship. On 12 June 2014, the marriage of the second respondent was solemnized with someone else in spite of which the relationship with the appellant continued. The second respondent stated that the appellant had compelled her to break away from the marriage and her matrimonial relationship had come to an end since March 2015, barely three months after she stayed in the matrimonial home. The second respondent states that she thereafter returned to the parental home and then started living with the appellant. After the completion of her training in 2016, the second respondent continued to live with the appellant until December 2017. The grievance of the second respondent was that the appellant got engaged to someone else on 10 December 2017. Though the appellant is alleged to have agreed to break off his engagement, he failed to abide by his assurance.

E
F
G

6. Apart from the above narration, it is of significance to note that the second respondent was granted a divorce by mutual consent by an order dated 17 September 2017 of the Principal Judge of the Family Court at Ballia.

H

- A 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**,³ 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**⁴ and **State of Haryana v. Bhajan Lal**⁵ 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.

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

- E “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).

- F [...] (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.”

- G 9. In **Dhruvaram Murlidhar Sonar v. State of Maharashtra**,⁶ a two Judge Bench of this Court while dealing with similar facts as the

³ 2021 SCC OnLine SC 315

⁴ AIR 1960 SC 866

⁵ 1992 Supp (1) SCC 335

H ⁶ 2019 (18) SCC 191

present case reiterated the parameters laid down in **Bhajan Lal** (supra) A
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.**” B
(emphasis supplied)

10. An offence is punishable under Section 376 of the IPC if the C
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 – D
[...]

under the circumstances falling under any of the following seven descriptions

Firstly ... E

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: F

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. G

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 H

A 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**

B **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...**

G

[...]

18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375

⁷ 2019 (9) SCC 608

H ⁸ 2021 SCC OnLine SC 181

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.**

A

B

(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.

C

D

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.

E

F

G

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

H

- A 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.
- B 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
- C 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.

16. Pending application, if any, stands disposed of.

Nidhi Jain

Appeal allowed.