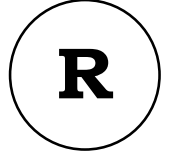


Reserved on : 30.05.2024
Pronounced on : 07.06.2024



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 07TH DAY OF JUNE, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.13912 OF 2023

BETWEEN:

- 1 . MR. SANTHOSH SHETTY,
S/O ANAND SHETTY
AGED ABOUT 35 YEARS.
- 2 . ANAND SHETTY
S/O VENKAPPA SHETTY
AGED ABOUT 63 YEARS.
- 3 . SMT. GULABI SHETTY
W/O ANAND SHETTY
AGED ABOUT 61 YEARS.
- 4 . SRI JAYAPRAKASH SHETTY
S/O ANAND SHETTY
AGED ABOUT 38 YEARS.
- 5 . JYOTHI D. SHETTY
D/O DINAKAR SHETTY
AGED ABOUT 34 YEARS.
- 6 . DINAKAR SHETTY
S/O RAMANNA SHETTY

AGED ABOUT 41 YEARS.

ALL ARE RESIDING AT
NO.2-4A, ULLURU HOUSE
HAKLADI VILLAGE
KUNDAPURA TALUK
UDUPI DISTRICT – 576 201.

... PETITIONERS

(BY SRI MAHESH KIRAN SHETTY S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
BY SUB INSPECTOR OF POLICE
KUNDAPURA POLICE STATION
BENGALURU
REPRESENTED BY ITS
STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA
HIGH COURT BUILDING
BENGALURU – 560 001.

2 . SMT. ANUMITHA
D/O ANTHONY D COSTA
GIRIJAXI NILAYA
BRAHMANAGUDI ROAD
HANGALLOOR VILLAGE
KUNDAPURA TALUK
UDUPI DISTRICT – 576 201.

... RESPONDENTS

(BY SRI THEJESH P., HCGP FOR R-1;
SRI P.B.UMESH, ADVOCATE FOR R-2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF
CR.P.C., PRAYING TO QUASH THE ENTIRE PROCEEDINGS IN
C.C.NO.1926/2023 PENDING ON THE FILE OF THE ADDL.CIVIL

JUDGE AND J.M.F.C. KUNDAPURA FOR THE OFFENCE P/U/S 417, 420, 109, 504, 376 R/W 34 OF IPC.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 30.05.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioners are before this Court calling in question proceedings in C.C.No.1926 of 2023 pending before the Additional Civil Judge & JMFC, Kundapura registered for offences punishable under Sections 376, 471, 420, 109, 504 r/w 34 of the IPC.

2. Heard Sri S. Mahesh Kiran Shetty, learned counsel appearing for the petitioners, Sri P. Thejesh, learned High Court Government Pleader appearing respondent No.1 and Sri P.B. Umesh, learned counsel appearing for respondent No.2.

3. *Sans* details, facts germane are as follows:-

The 2nd respondent is the complainant. The 1st petitioner, in terms of the averments in the petition, is said to be working as a Supervisor in Royal Kerabiam Group International Shipping

Company at New Jersey, United States of America, and was looking for a girl to get married. Owing to the said desire, he posted his profile, on matrimonial website called 'Shetty Matrimonial'. After posting his profile, the 1st petitioner comes in contact with the 2nd respondent. Both began talks. This happens up to 07-01-2023. The 1st petitioner was in India at that point in time. On 08-01-2023, the 1st petitioner and the complainant met at a temple in Haklady and are said to have exchanged their opinions, which led to negotiations between the members of the families of both the 1st petitioner and the complainant. The proposal for marriage is said to have been accepted by the family members of both the families. Engagement of the 1st petitioner and the complainant is held on 11-01-2023.

4. On 11-01-2023, it is the averment that the complainant asked the petitioner to transfer ₹4/- lakhs to invest in some money earning fund. It is immediately done. On the morning of 12-01-2023 the 1st petitioner flies back to New Jersey. Communications between the two, including the families, galore. About seven months later emerges a complaint. Narration in the complaint is that on 11-01-2023 the 1st petitioner at about 6.00

p.m. noticing the fact that no one was in the house, forced the complainant to indulge in sexual intercourse, on the ground that the marriage of the 1st petitioner with the complainant had been agreed to be held on 08-09-2023. It is the further averment that believing the words of the family members of the 1st petitioner, invitations were also printed about the marriage. For manifold reasons which are narrated in the complaint, the engagement breaks and the marriage fails. It is then the aforesaid complaint emerges. All the family members including accused No.1, would be husband of the complainant are arrayed as accused in the complaint. The Police conduct investigation upon the complaint and file a charge sheet against all the petitioners. Filing of charge sheet is what has driven the petitioners to this Court in the subject petition.

5. The learned counsel appearing for the petitioners would vehemently contend that the incident narrated in the entire complaint is highly improbable. After the engagement, it is the case of the petitioners that all the family members never went away and there was no occasion at 6.00 p.m. on that day for the 1st petitioner to take the complainant to a room and indulge in sexual

intercourse. It is the case of the 1st petitioner that throughout 7 months, the complainant goes on demanding money and, therefore, the family members doubting *bona fides* of the complainant decided to call off the marriage. The decision to call off the marriage cannot amount to cheating. Spending time with the complainant along with members of the family of the complainant cannot amount to rape under Section 376 of the IPC. It is his submission that there can be no better illustration of abuse of the process of law.

6. Per contra, the learned High Court Government Pleader appearing for the 1st respondent/State and the learned counsel appearing for the 2nd respondent/complainant would in unison submit that the Police after investigation have filed a charge sheet. Since the charge sheet is filed, it is for the petitioners to come out clean in a full blown trial. The complainant's counsel would contend that all the members of the families sitting together have decided upon marriage. Date of marriage was fixed. Invitation cards were also printed. After seven months, the family members of the 1st petitioner call off the marriage. The impact upon the complainant, and the family, is so huge that it would amount to cheating.

Therefore, it is a clear case where the petitioners have lured the family of the complainant and the complainant into marriage and have cheated, breaking the engagement.

7. Insofar as the allegation under Section 376 of the IPC is concerned, it is the submission of the learned counsel for the 2nd respondent that on the day of engagement, noticing that no one was in the house of the complainant, the 1st petitioner has indulged in the act of sexual assault upon the complainant, that too on the promise of marriage. Therefore, he would submit that it is a clear case where all the offences are met and the petition should be dismissed.

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

9. The afore-narrated facts are not in dispute. The jugglery of dates would require reiteration. The 1st petitioner uploading his profile on a matrimonial website is a matter of record. After such

uploading, the complainant coming in contact with the 1st petitioner is also a matter of record. On 10-01-2023 the families of both the 1st petitioner and the complainant met and the proposal of marriage is accepted. On 11-01-2023, betrothal ceremony takes place. It is the averment in the petition on the strength of the Bank statement that, ₹4/- lakhs was transferred to the account of the complainant. It is an admitted fact that the complainant did receive the said amount. On the next day morning i.e., on 12-01-2023, the 1st petitioner takes a bus from Kundapur to Mumbai and travels from Mumbai to Miami, USA. The flight details and the bus details are also appended to the petition.

10. It is an admitted fact that the 1st petitioner travels from Kundapur to Mumbai and Mumbai to Miami on 12-01-2023. Seven months passed by. Communications galore between the two, including whatsapp chats. Nowhere in any whatsapp chat even a line of narration is made by the complainant about the 1st petitioner or the complainant indulging in sexual intercourse on 11-01-2023, on the day of betrothal ceremony at 6.00 p.m. Several differences crop up between the 1st petitioner and the complainant or their

families. Engagement breaks. Breaking of engagement results in the subject complaint. Since the complaint is the genesis of the problem, I deem it appropriate to notice the foundation in the complaint to lay down the offences. The primary offence alleged is the offence punishable under Section 376 of the IPC. The foundation is found at paragraphs 1 and 2 of the complaint which read as follows:

"1. ನಾನು ಮೇಲ್ಕಾಣಿಸಿದ ವಿಳಾಸದಲ್ಲಿ ನನ್ನ ತಂದೆ ಅಂತೋನಿ ಡಿ'ಕೋಸ್ಟಾ, ತಾಯಿ ಗೀತಾ, ಅಣ್ಣ ಅನೂಪ ಇವರುಗಳು ಜೊತೆ ವಾಸವಾಗಿರುತ್ತೇನೆ. ನಾನು ಎಂ.ಎ. ಪದವೀಧರೆಯಾಗಿದ್ದು, ಎಚ್.ಡಿ.ಎಫ್.ಸಿ. ಲೈಫ್ ಇನ್ಶೂರೆನ್ಸ್, ಉಡುಪಿ ಶಾಖೆಯಲ್ಲಿ ಸೇವೆಯನ್ನು ಸಲ್ಲಿಸುತ್ತಿದ್ದೇನೆ. ಒಂದನೇ ಆರೋಪಿಯಾದ ಸಂತೋಷ್ ಶೆಟ್ಟಿಯು ಇವರು 'ಶೆಟ್ಟಿ ಮೆಟ್ರಿಮೋನಿಯಲ್' ಎಂಬ ವೆಬ್‌ಸೈಟ್‌ನಲ್ಲಿ ಆತನು ಅಮೇರಿಕಾ ಸಂಯುಕ್ತ ಸಂಸ್ಥಾನದ ನ್ಯೂಜೆರ್ಸಿಯಲ್ಲಿ ಖಾಸಗಿ ಹಡಗು (ಕ್ರೋಸ್) ರೋಯಲ್ ಕೆರೆಬಿಯನ್ ಗ್ರೂಪ್‌ನ ಇಂಟರ್‌ನ್ಯಾಶನಲ್ ಕಂಪನಿಯಲ್ಲಿ ಸೂಪರ್‌ವೈಸರ್ ಎಂದು ಹೇಳಿ ಪೋಷಣೆ ಗಳನ್ನು ಹಾಕಿ ಪರಿಚಯಿಸಿ ಕೊಂಡಿದ್ದನು. ನಾನು ತಾರೀಖು:07-01-2023 ರಂದು ಆತನಿಗೆ ಗೆಳೆತನಕ್ಕೆ ವಿನಂತಿಸಿದಾಗ, ಆತನು ಅದನ್ನು ಸ್ವೀಕರಿಸಿ ನನ್ನ ಜೊತೆ ಚಾಟ್ ಮಾಡಲು ಆರಂಭಿಸಿದನು. ಆತನ ಐ.ಡಿ. ನಂಬ್ರ ಬಿಎನ್‌ಟಿ157277 ಆಗಿರುತ್ತದೆ. ಆಗ ಒಂದನೇಯ ಆರೋಪಿಯು ರಜೆಯಲ್ಲಿದ್ದು, ಅಮೇರಿಕಾದಿಂದ ಊರಿಗೆ ಬಂದಿದ್ದನು. ಆತನು ಕುಂದಾಪುರ ತಾಲೂಕಿನ ಹಕ್ಕಾಡಿಯ ನಿವಾಸಿಯಾಗಿರುತ್ತಾನೆ. ನಮ್ಮಿಬ್ಬರಲ್ಲಿ ಆತ್ಮೀಯತೆ ಮೂಡಿತ್ತು. ಆಗ ನಾನು ಮತ್ತು ಆತನ ಸಂಭಾಷಣೆ ಮಾಡುತ್ತಿದ್ದೆನು. ಆತನು ನನ್ನನ್ನು ದಿನಾಂಕ: 08-01-2023 ರಂದು ಕುಂದಾಪುರ ತಾಲೂಕಿನ ಆನೆಗುಡ್ಡೆಯ ದೇವಸ್ಥಾನದಲ್ಲಿ ಪರಸ್ಪರ ಭೇಟಿ ಆದವು. ಒಂದನೇ ಆರೋಪಿಯು ನನ್ನನ್ನು ಮದುವೆಯಾಗುವ ವಿಚಾರ ಮಾತನಾಡಿದನು. ನಮ್ಮ ಜಾತಕವು ತಾಳೆ ಆಗಿದ್ದರಿಂದ ಒಂದನೇ ಆರೋಪಿಯು ನನ್ನನ್ನು ತುಂಬಾ ಇಷ್ಟಪಡುವುದಾಗಿ ತಿಳಿಸಿ ಮದುವೆಯಾಗುವುದಾಗಿ ಒತ್ತಾಯಿಸಿದನು. ನಾನು ಹಾಗೂ ನನ್ನ ತಾಯಿ ಗೀತಾ ಒಪ್ಪಿಕೊಂಡೆವು. ಒಂದನೇ ಆರೋಪಿಯು ನಮ್ಮ ತಂದೆ-ತಾಯಿಯ ಕುಂದಾಪುರ ತಾಲೂಕಿನ ಹಕ್ಕಾಡಿ ಗ್ರಾಮದ ಮನೆಗೆ ಮದುವೆಯ ಬಗ್ಗೆ ಮಾತನಾಡಲು ಬರಬೇಕೆಂದು ತಿಳಿಸಿದನು. ಆತನ ಆಹ್ವಾನದಂತೆ ನನ್ನ ತಾಯಿ ಗೀತಾ ಹಾಗೂ ತಂದೆ ಅಂತೋನಿ ಡಿ'ಕೋಸ್ಟಾ ದಿನಾಂಕ: 10-01-2023 ರಂದು ಬೆಳಿಗ್ಗೆ 10.30 ಗಂಟೆಯ ಸುಮಾರಿಗೆ 1ನೇ ಆರೋಪಿತನ ಮನೆಗೆ ಹೋದವು. ಆಗ ಅಲ್ಲಿ 1ನೇ ಆರೋಪಿಯು ತಂದೆ ಆನಂದ ಶೆಟ್ಟಿ, ತಾಯಿ ಗುಲಾಬಿ ಶೆಟ್ಟಿ, 1ನೇ ಆರೋಪಿ ಸಂತೋಷ್ ಶೆಟ್ಟಿ ಇವರುಗಳು ಇದ್ದರು. ಅವರುಗಳೆಲ್ಲರೂ ಕುಳಿತು, ಮದುವೆಯ ಬಗ್ಗೆ ಅವರ ಬಲವಾದ ಆಶಯವನ್ನು ವ್ಯಕ್ತಪಡಿಸಿದರು. ಅವರುಗಳೆಲ್ಲರೂ ಮದುವೆ ಬಗ್ಗೆ ನಮ್ಮನ್ನು ಒತ್ತಾಯಿಸಿದರು. ತಾರೀಖು:11-01-2023 ರಂದು ಬೆಳಿಗ್ಗೆ 12 ಗಂಟೆಗೆ ನಿಶ್ಚಿತಾರ್ಥದ ಕಾರ್ಯಕ್ರಮ ಮಾಡಲಾಯಿತು. ಆಗ 1 ಹಾಗೂ 3ನೇ ಆರೋಪಿತರು ನಮ್ಮ ಮನೆಗೆ ಬಂದು, ನಿಶ್ಚಿತಾರ್ಥವಾಯಿತು. ಉಂಗುರಗಳ ವಿನಿಮಯ ಆಗಿ ಮದುವೆಯ ನಿಶ್ಚಿತಾರ್ಥವಾದ ನಂತರ ಆರೋಪಿತರಿಬ್ಬರೂ ಉಪಹಾರ ಮಾಡಿಕೊಂಡು ಹೋದರು. ಆ ಸಂದರ್ಭದ ಭಾವಚಿತ್ರಗಳನ್ನು ತೆಗೆಯಲಾಯಿತು.

2. ಒಂದನೇಯ ಆರೋಪಿಯು ದಿನಾಂಕ: 11-01-2023 ರಂದು ಸಂಜೆ 6 ಗಂಟೆಯ ಸಮಯ ಒಂದನೇ ಆರೋಪಿಯು ನಮ್ಮ ಮನೆಗೆ ಬಂದಿದ್ದನು. ಆಗ ನನ್ನ ತಂದೆ - ತಾಯಿ ದಿನಸಿ ವಸ್ತುಗಳನ್ನು ತರಲು ಅಂಗಡಿಗೆ ಹೋಗಿದ್ದನು. ಆಗ ಆರೋಪಿಯು ಬಲಾತ್ಕಾರದಿಂದ, ನನ್ನ ಇಚ್ಛೆಗೆ ವಿರೋಧವಾಗಿ ನಮ್ಮ ಮನೆಯ ಮಾಳಿಗೆ ಮೇಲಿರುವ ಕೊಠಡಿಯಲ್ಲಿ ನನ್ನ ಜೊತೆ ಬಲಾತ್ಕಾರವಾಗಿ ಎರಡು ಬಾರಿ ಹಠ ಸಂಭೋಗವನ್ನು ಮಾಡಿರುತ್ತಾನೆ. ಒಂದನೇ ಆರೋಪಿಯು ಬಲ ಪ್ರಯೋಗ ಮಾಡಿ, ನನ್ನ ಶೀಲ ಹರಣ ಮಾಡಿದ ನಂತರ ನಾನು ತೀವ್ರ ಅವಮಾನದಿಂದ ಅಳುತ್ತಾ ಕುಳಿತೆನು. ಆಗ ಒಂದನೇ ಆರೋಪಿಯು ತಾನು ಹೇಗೋ ನಿನ್ನನ್ನು ಮದುವೆಯಾಗುವ ಹುಡುಗ, ಆತನು ಶೀಲಹರಣ ಮಾಡಿದ ವಿಚಾರವನ್ನು ಯಾರಿಗೂ ಹೇಳಬೇಡಾ ಎಂದು ಹೇಳಿದ್ದರಿಂದ ನಾನು ಸುಮ್ಮನಿದ್ದನು. ಒಂದನೇ ಆರೋಪಿಯು ಕಾಮುಕನಾಗಿದ್ದು, ಕಾಮಾತುರದಿಂದ ನನ್ನ 'ರೇಪ್' ಮಾಡಿರುತ್ತಾನೆ. ಆತನಿಂದ ನನ್ನ ಮಾನಹಾನಿ, ಅವಮಾನ ಆಗಿರುತ್ತದೆ.”

(Emphasis added)

To drag all other members of the family as accused for the offences under Sections 417, 420, 109 and 504 of the IPC, the foundation is laid in paragraphs 3 to 8 of the complaint, which read as follows:

“3. ನನ್ನ ತಂದೆ ರೋಮನ್ ಕ್ಯಾಥೋಲಿಕ್ ಕ್ರಿಶ್ಚಿಯನ್ ಜಾತಿಗೆ ಸೇರಿದವರಾಗಿದ್ದಾರೆ. ನನ್ನ ತಾಯಿ ಗೀತಾ ಹಿಂದೂ ಜಾತಿಗೆ ಸೇರಿದವರಾಗಿದ್ದಾರೆ. ನನ್ನ ತಾಯಿಯ ತಂದೆ ಶೆಟ್ಟಿ ಜಾತಿಗೆ ಸೇರಿದವರಾಗಿದ್ದು, ನನ್ನ ತಾಯಿಯ ತಾಯಿ ಕೊಲಾರಿ ಜಾತಿಗೆ ಸೇರಿದವರಾಗಿದ್ದಾರೆ. ನಾನು ಹಿಂದೂ ಸಂಪ್ರದಾಯದಂತೆ ಬೆಳೆದಿದ್ದು, ನಾನು ದೇವಸ್ಥಾನಕ್ಕೆ ಹೋಗುವವಳಾಗಿದ್ದೇನೆ. ಈ ಎಲ್ಲಾ ವಿಚಾರಗಳನ್ನು 1ನೇ ಆರೋಪಿಗೆ ಪರಿಚಯವಾದ ದಿನವೇ ನಾವುಗಳು ತಿಳಿಸಿ ಹೇಳಿರುತ್ತೇವೆ. ನಮ್ಮ ವೈಕಿ 2 ರಿಂದ 6ನೇ ಆರೋಪಿತರಿಗೆ ನಮ್ಮ ಹಿನ್ನೆಲೆ ಬಗ್ಗೆ ಸಂಪೂರ್ಣವಾಗಿ ತಿಳಿಸಿರುತ್ತೇವೆ. ಆ ಬಗ್ಗೆ ನಮ್ಮ ಹತ್ತಿರ ಸಾಕ್ಷ್ಯಗಳಿವೆ. ಎಲ್ಲಾ ಆರೋಪಿತರು ನಮ್ಮ ಜಾತಿಯ ವಿಚಾರದಲ್ಲಿ ಹಾಗೂ ನಮ್ಮ ಕುಟುಂಬಿಕ ಹಿನ್ನೆಲೆಯ ವಿಚಾರದಲ್ಲಿ ಯಾವುದೇ ಆಕ್ಷೇಪವಿಲ್ಲ ಎಂದು ತಿಳಿಸಿರುತ್ತಾರೆ.

4. ದಿನಾಂಕ: 10-02-2023 ರಂದು ಬೆಳಿಗ್ಗೆ 11.20ಕ್ಕೆ 1ನೇ ಆರೋಪಿಯ ತಂದೆ (1) ಆನಂದ ಶೆಟ್ಟಿ, (2) ಆತನ ಅಣ್ಣ ಜಯಪ್ರಕಾಶ ಶೆಟ್ಟಿ, (3) ಆತನ ತಂಗಿ ಜ್ಯೋತಿ ಡಿ. ಶೆಟ್ಟಿ, (4) ಆತನ ಭಾವ ದಿನಕರ ಶೆಟ್ಟಿ (ಜ್ಯೋತಿ ಡಿ. ಶೆಟ್ಟಿಯ ಗಂಡ) ಇವರುಗಳು ಮದುವೆಯ ಬಗ್ಗೆ ಹೆಚ್ಚಿನ ಮಾತುಕತೆ ಮಾಡಲು ನಮ್ಮ ಮನೆಗೆ ಬಂದರು. ಆರೋಪಿತರ ವೈಕಿ 4ನೇ ಆರೋಪಿ ಜಯಪ್ರಕಾಶ್ ಶೆಟ್ಟಿ ಗುಜರಾತಿನಲ್ಲಿ ವಾಸವಾಗಿರುತ್ತಾನೆ. ಹಾಗೂ 5 ಮತ್ತು 6ನೇ ಆರೋಪಿತರು ಬೆಂಗಳೂರಿನಲ್ಲಿ ವಾಸವಾಗಿರುತ್ತಾರೆ. ಅವರುಗಳು ಆಗಾಗ ಉರಿಗೆ ಅಂದರೆ ಹಕ್ಕಾಡಿಯ ಮನೆಗೆ ಬಂದು ಹೋಗುತ್ತಿದ್ದರು. ನಾವು ಅವರುಗಳ ಬಳಿ ಎಲ್ಲಾ ವಿಚಾರಗಳನ್ನು ತಿಳಿಸಿದ್ದರೂ, ಆ ದಿನ ನನ್ನ ಹಾಗೂ ಒಂದನೇ ಆರೋಪಿಯ ನಡುವೆ ಮದುವೆಯ ದಿನಾಂಕ: 08-09-2023 ರಂದು ಎಂದು ತೀರ್ಮಾನ

ವಾಗಿರುವುದನ್ನು ದೃಢೀಕರಿಸಿದರು. ಮದುವೆಗಾಗಿ 'ಸಹನಾ ಕನ್ನನ್‌ಷನ್ ಹಾಲ್' "ನಲ್ಲಿ ಉಭಯುತರ ಒಪ್ಪಿಗೆಯಿಂದ ನಿಗದಿಪಡಿಸಲಾಗಿತ್ತು.

4. ನಾವು ಮದುವೆಯ ಆಮಂತ್ರಣ ಕಾಗದವನ್ನು ಮುದ್ರಿಸಿ ಸಂಬಂಧಿಕರಿಗೆ, ಬಂಧುಗಳಿಗೆ ಹಾಗೂ ಸ್ನೇಹಿತರಿಗೆ ಹಂಚಿರುತ್ತೇವೆ. ಆರೋಪಿತರ ಕಡೆಯಿಂದಲೂ ಮದುವೆಯ ಆಮಂತ್ರಣ ಕಾಗದವನ್ನು ಎಲ್ಲರಿಗೂ ಹಂಚಲಾಗಿದೆ. ಎರಡು ಕಡೆಯಿಂದ ಹಂಚಲಾದ ಮದುವೆಯ ಆಮಂತ್ರಣ ಪತ್ರವನ್ನು ಲಗ್ನೀಕರಿಸಲಾಗಿದೆ.

5. 1ನೇ ಆರೋಪಿಯು ತಾರೀಖು: 22-08-2023 ರಂದು ಅಮೇರಿಕಾದಿಂದ ಭಾರತಕ್ಕೆ ನನ್ನನ್ನು ಮದುವೆಯಾಗುವ ಬಗ್ಗೆ ಬರುವುದಾಗಿ ತಿಳಿಸಿದನು. ಆತನನ್ನು ಸ್ವಾಗತಿಸಲು ನಾವು ಸಿದ್ಧವಾಗಿದ್ದೆವು. ನಾವುಗಳು ಬಹಳ ಸಂತೋಷವಾಗಿದ್ದೆವು.

6. ತಾರೀಖು: 07-09-2023 ರಂದು ಮೆಹಂದಿ ಹಾಗೂ ತಾರೀಖು: 08-09-2023ಕ್ಕೆ ಮದುವೆ ಎಂದು ಮತ್ತು ಅದೇ ದಿನ ರಾತ್ರಿ ಮೂರ್ತದಾರರ ಸಭಾಭವನ ತಲ್ಲೂರಿನಲ್ಲಿ ರಿಸೆಪ್ಷನ್ ಎಂದು ನಾನು ಸಂತೋಷದಲ್ಲಿದ್ದೆನು. 5ನೇ ಆರೋಪಿತೆಯು ಮೂರ್ತದಾರರ ಸಭಾಭವನ ತಲ್ಲೂರಿನ ಸಭಾಭವನವನ್ನು ನೋಡಿ, ಒಪ್ಪಿ ಆಕೆಯೇ ಅದರ ಸ್ಟ್ರೀನ್‌ಶಾಟ್ ಕಳುಹಿಸಿರುತ್ತಾಳೆ. ಒಂದನೇ ಆರೋಪಿಯು ಕಳುಹಿಸಿದ ವಿಮಾನದ ಟಿಕೆಟ್‌ನ ಪ್ರತಿಯನ್ನು ಲಗ್ನೀಕರಿಸಿದ್ದೇನೆ.

7. ಒಂದನೇ ಆರೋಪಿಯು ತಾರೀಖು: 19-08-2023 ರಂದು ನನಗೆ ವಾಟ್ಸಾಪ್ ಕರೆಯನ್ನು ಮಾಡಿ ಆತನು ಮದುವೆಗೆ ಬರುವುದಿಲ್ಲಾ ಎಂಬ ಆಘಾತಕಾರಿ ವಿಚಾರವನ್ನು ತಿಳಿಸಿದನು. ನಾನು ಆತನಿಗೆ ಭಾರತಕ್ಕೆ ಬನ್ನಿ. ನನ್ನನ್ನು ಮದುವೆಯಾಗಿ ಎಂದು ವಿಧವಿಧವಾಗಿ ವಿನಂತಿಸಿದರೂ, ಒಂದನೇ ಆರೋಪಿಯಿಂದ ಪ್ರತಿಕ್ರಿಯೆ ಬಂದಿಲ್ಲಾ. ಒಂದನೇ ಆರೋಪಿಯು ನನಗೆ ಮೋಸ ಮಾಡಲು ಹೊರಟಿರುತ್ತಾನೆ ಎಂದು ನನಗೆ ಖಚಿತವಾಯಿತು. ನಾನು ಊರ ತುಂಬಾ ಎಲ್ಲಾ ಮದುವೆಯ ಆಮಂತ್ರಣ ಪತ್ರವನ್ನು ಹಂಚಿರುತ್ತೇನೆ. ಈಗ ಊರಿನಲ್ಲಿ ಮುಖ ಎತ್ತಿ ತಿರುಗಾಡದ ಪರಿಸ್ಥಿತಿಯು ನನಗೆ ಉಂಟಾಗಿರುತ್ತದೆ.

8. ನಾನು, ನನ್ನ ತಂದೆ ಹಾಗೂ ತಾಯಿ ತಾರೀಖು: 22-08-2023 ರಂದು ಮಂಗಳವಾರ ಮಧ್ಯಾಹ್ನ 3.30 ಗಂಟೆಗೆ ಒಂದನೇ ಆರೋಪಿಯ ಹಕ್ಕಾಡಿ ಮನೆಗೆ ಈ ಬಗ್ಗೆ ಮಾತನಾಡಲು ಹೋದೆವು. ಆಗ 2 ಹಾಗೂ 3ನೇ ಆರೋಪಿತರು ನಮಗೆ ಅವಹೇಳನ ಮಾಡಿ, ಮೂದಲಿಸಿ ಈ ಮದುವೆ ನಡೆಯುವುದಿಲ್ಲಾ. ಒಂದನೇ ಆರೋಪಿಯು ನನ್ನನ್ನು ಮದುವೆಯಾಗುವುದಿಲ್ಲಾ ಎಂದು ಹೇಳಿ ನಮ್ಮ ಮನಸ್ಸಿಗೆ ನೋವುಂಟು ಮಾಡಿದರು. ನಿಜಾಂಶವೇನೆಂದರೆ 2 ರಿಂದ ನೋ ನ್ಯೂ ಆರೋಪಿಗಳಿಗೆ ಈ ಮದುವೆ ನಡೆಯುವುದು ಇಷ್ಟವಿರಲಿಲ್ಲಾ. ಅವರುಗಳಿಗೆ ಒಂದನೇ ಆರೋಪಿಯನ್ನು ತುಂಬಾ ವರದಕ್ಷಿಣೆ ತರುವ ಹುಡುಗಿಯರೊಂದಿಗೆ ಮದುವೆ ಮಾಡಬೇಕೆಂಬ ದುರಾಸೆ ಇತ್ತು. ಒಂದನೇ ಆರೋಪಿಯು ನನ್ನ ಹತ್ತಿರಕ್ಕೆ ಬಂದು ನನ್ನ ಅಂಗಸುಖ ಪಡೆಯುವ ದುರಾಸೆಯಿಂದ ಮದುವೆಯ ನಾಟಕವಾಡಿರುತ್ತಾನೆ. ಆತನು ಸ್ವಂತ ಬುದ್ಧಿಯಿಂದ ಹಾಗೂ 2 ರಿಂದ ನೋ ಆರೋಪಿತರು ನೀಡಿದ ದುರ್ಬೋಧನೆ ಯಿಂದ ನನ್ನೊಂದಿಗೆ ಮದುವೆಯನ್ನು ಆಗದೇ ವಂಚಿಸಿರುತ್ತಾನೆ."

(Emphasis added)

The narration in the complaint is that on the evening of 11-01-2023 at about 6.00 p.m. the 1st petitioner comes to the house of the complainant. The parents of the complainant, on the date of engagement, are said to have gone to get groceries to the house. At that time, the 1st petitioner is said to have indulged in sexual intercourse with the complainant on the promise of marriage against the consent of the complainant. For the other offences against other members of the family the averment is that, invitation cards had been printed and any amount of request made by the complainant and her family to the members of the family of the 1st petitioner, none came forward and therefore the complaint against them also. The Police conduct investigation and file a charge sheet. The summary of the charge sheet reads as follows:

“ಕೇಸಿನ ಸಂಕ್ಷಿಪ್ತ ಸಾರಾಂಶ

ಈ ರೋಷಾರೋಪಣ ಪತ್ರದ ಅಂಕಣ ನಂಬ್ರ 12 ರಲ್ಲಿ ನಮೂದಿಸಿದ ಆಪಾದಿತರ ಮೇಲೆ ಹೊರಿಸಲಾದ ಆವಾದನ ಏನಂದರೆ 1ನೇ ಆಪಾದಿತನು ಸಾಕ್ಷಿ 1 ನೇಯವರನ್ನು ಪ್ರೀತಿಸಿ ಮದುವೆಯಾಗುವುದಾಗಿ ನಂಬಿಸಿ ದಿನಾಂಕ: 11/01/2023 ಮಧ್ಯಾಹ್ನ 12.00 ಗಂಟೆಗೆ ಗೌರವಾನ್ವಿತ ನ್ಯಾಯಾಲಯದ ವ್ಯಾಪ್ತಿಗೆ ಒಳಪಡುವ ಕುಂದಾಪುರ ತಾಲೂಕು ಮಂಗಳೂರು ಗ್ರಾಮದ ಬ್ರಹ್ಮನಗುಡಿ ರಸ್ತೆಯಲ್ಲಿರುವ 'ಗಿರಿಜಾಕ್ಷಿ' ಎಂಬ ಹೆಸರಿನ ಸಾಕ್ಷಿ 1 ರಿಂದ 3 ನೇಯವರ ವಾಸದ ಮನೆಯಲ್ಲಿ ಸಾಕ್ಷಿ 2,3 ಮತ್ತು 3 ನೇ ಆರೋಪಿತಳ ಸಮಕ್ಷಮದಲ್ಲಿ ಸಾಕ್ಷಿ 1 ಮತ್ತು 1 ನೇ ಆರೋಪಿತನ ಮದುವೆ ನಿಶ್ಚಿತಾರ್ಥ ಮಾಡಿಕೊಂಡು ದಿನಾಂಕ 08/09/2023 ರಂದು ಕೋಟೇಶ್ವರದ ಸಹನ ಕನ್ಯೆನ್ಸನ್ ಹಾಲ್ನಲ್ಲಿ ಮದುವೆ ಮಾಡುವುದಾಗಿ ತೀರ್ಮಾನಿಸಿದ್ದು ಬಳಿಕ ಅದೇ ದಿನ ಮನೆಯಲ್ಲಿ ಯಾರೂ ಇಲ್ಲದ ಸಮಯ ಸಂಜೆ 6.00 ಗಂಟೆಗೆ ಅದೇ ಮನೆಯ ಮೇಲಂತಸ್ತಿನ ಬೆಡ್ ರೂಮಿನಲ್ಲಿ 1 ನೇ ಆರೋಪಿತನು ಸಾಕ್ಷಿ 1 ನೇಯವರ ಇಚ್ಛೆಗೆ ವಿರುದ್ಧವಾಗಿ ಆಕೆಯೊಂದಿಗೆ ಬಲತ್ಕಾರವಾಗಿ ಸಂಭೋಗ

ಮಾಡಿ ಆಕೆಯ ಶೀಲ ಹರಣ ಮಾಡಿದಲ್ಲದೆ, ಈ ವಿಚಾರವನ್ನು ಯಾರಿಗೂ ಹೇಳಬೇಡ ಮದುವೆಯಾಗುತ್ತೇನೆ ಎಂದು ನಂಬಿಸಿರುತ್ತಾನೆ, ಬಳಿಕ ದಿನಾಂಕ: 10/02/2023 ರಂದು 2,4,5,6 ನೇ ಆರೋಪಿತರು ಸಾಕ್ಷಿ 1 ನೇಯವರ ಮನೆಗೆ ಬಂದು ಸಾಕ್ಷಿ 1, 2, 3 ನೇಯವರೊಂದಿಗೆ ಮದುವೆಯ ಬಗ್ಗೆ ಮಾತುಕತೆ ನಡೆಸಿ ಒಪ್ಪಿಗೆ ಸೂಚಿಸಿ ಹೋಗಿದ್ದು, ಬಳಿಕ ಸಾಕ್ಷಿ 1 ರಿಂದ 3 ನೇಯವರು ಸಾಕ್ಷಿ 1, ನೇಯವರ ಮದುವೆ ಬಗ್ಗೆ ತಯಾರಿ ಮಾಡಿ ಮದುವೆ ಆಮಂತ್ರಣ ಪತ್ರಿಕೆಯನ್ನು ಸಂಬಂಧಿಕರಿಗೆ, ಹಿತೈಶಿಗಳಿಗೆ ಹಂಚಿದ್ದು, ಮದುವೆ ಬಟ್ಟೆ, ಚಿನ್ನಾ ಭಾರಣಗಳನ್ನು ಖರೀದಿಸಿ ಮದುವೆ ಹಾಲ್ ಗೊತ್ತುಪಡಿಸಿದ್ದು, ಬಳಿಕ ದಿನಾಂಕ: 19/08/2023 ರಂದು 1 ನೇ ಆರೋಪಿತನು ಸಾಕ್ಷಿ 1 ನೇಯವರಿಗೆ ದೂರವಾಣಿ ಕರೆ ಮಾಡಿ ಮದುವೆ ಆಗುವುದಿಲ್ಲವಾಗಿ ತಿಳಿಸಿದ್ದು, ಆತನನ್ನು ಮನವೊಲಿಸಿದರೂ ಆತನು ಮದುವೆ ಆಗಲು ಒಪ್ಪದೇ ಇದ್ದು, ನಂತರ ದಿನಾಂಕ: 22/08/2023 ರಂದು 3.30 ಗಂಟೆಗೆ ಸಾಕ್ಷಿ 1 ರಿಂದ 3ನೇಯವರು ಕುಂದಾಪುರ ತಾಲೂಕು ಹಕ್ಕಾಡಿ ಗ್ರಾಮದ ಉಳ್ಳೂರು ಮನೆ ಎಂಬಲ್ಲಿನ ಆರೋಪಿತರ ವಾಸದ ಮನೆಗೆ ಹೋಗಿ ಮದುವೆಯ ಬಗ್ಗೆ ವಿಚಾರಿಸಿದಾಗ 2 ಮತ್ತು 3 ನೇ ಆರೋಪಿತರು ಈ ಮದುವೆ ನಡೆಯುವುದಿಲ್ಲ ಸಂತೋಷ ಶೆಟ್ಟಿಗೆ ಮದುವೆಯಾಗಲು ಇಷ್ಟ ಇಲ್ಲ ಎಂದು ಅವಹೇಳನವಾಗುವಂತೆ ಹೇಳಿ ರಂಡೆ, ಮುಂಡೆ ಇತ್ಯಾದಿಯಾಗಿ ಆವಾಚ್ಯ ಶಬ್ದಗಳಿಂದ ನಿಂದಿಸಿ ಕಳುಹಿಸಿರುತ್ತಾರೆ. 1 ನೇ ಆರೋಪಿತರು ಸಾಕ್ಷಿ 1 ನೇಯವರೊಂದಿಗೆ ಅಕ್ರಮವಾಗಿ ಲೈಂಗಿಕ ಸಂಭೋಗ ನಡೆಸಿ, ಮುರುವೆ ನಿಶ್ಚಿತಾರ್ಥ ಮಾಡಿಕೊಂಡು ಮದುವೆಯಾಗುವುದಾಗಿ ನಂಬಿಸಿ, ಅಲ್ಲದೆ 1 ನೇ ಆರೋಪಿತನು ಅಮೇರಿಕಾದ ರೋಯಲ್ ಕರೇಬಿಯನ್ ಇಂಟರ್ ನ್ಯಾಷನಲ್ ಹೋಟೆಲಿನಲ್ಲಿ ವೈಟರ್ ಕೆಲಸ ಮಾಡುತ್ತಿದ್ದು, ಆದರೆ ಆತನು ಸಾಕ್ಷಿ 1ನೇಯವರಿಗೆ ತಾನು ಅಮೇರಿಕಾದ ಹೋಟೆಲ್‌ನಲ್ಲಿ ಸುಪರ್ ವೈಸರ್ ಆಗಿ ಕೆಲಸ ಮಾಡುವುದಾಗಿ ಸುಳ್ಳು ದಾಖಲೆಯನ್ನು ನೀಡಿ ವೋಸ ಮಾಡಿದ್ದಲ್ಲದೆ, ಬಳಿಕ ಆರೋಪಿ 2 ರಿಂದ 6 ನೇಯವರು ಸಮಾನ ಉದ್ದೇಶದಿಂದ ಮಾಡಿದ ದುಷ್ಕರಣೆಯಿಂದ ಸಾಕ್ಷಿ 1 ನೇಯವರನ್ನು ಮದುವೆಯಾಗದೇ ವೋಸ ವಂಚನೆ ಮಾಡಿರುವುದು ತನಿಖೆಯಿಂದ ತಿಳಿದುಬಂದಿರುತ್ತದೆ.

ಆದುದರಿಂದ 1 ನೇ ಆರೋಪಿತನು ಕಲಂ 376, 417, 420 ಐ.ಪಿ.ಸಿ ಮತ್ತು 2 ರಿಂದ 6 ನೇ ಆರೋಪಿತರು ಕಲಂ : 417, 420, 109, 504 ಜೊತೆಗೆ 34 ಐ.ಪಿ.ಸಿ ಯಂತೆ ಶಿಕ್ಷಾರ್ಹ ಅಪರಾಧ ಎಸಗಿರುವುದಾಗಿ ಸಲ್ಲಿಸಿದ ಈ ದೋಷಾರೋಪಣ ಪತ್ರ.”

(Emphasis added)

The summary is in complete reiteration of what is found in the complaint.

11. The issue now would be whether, trial should be permitted to be continued against the petitioners; 1st petitioner in

particular, for offences punishable under Section 376 of the IPC and all members of the family for other offences?

12. The fateful day that had played upon the 1st petitioner is on 11-01-2023, the date on which the betrothal ceremony took place, with the complainant. Talks of marriage between the members of the family had also taken place, and the date of marriage is to be fixed on 08-09-2023, these happen on the day of betrothal ceremony. Therefore, one factum is clear that there was no false promise of marriage. It is a marriage that had been decided. In the considered view of the Court, it is not a false promise of marriage. It was a betrothal ceremony and ensuing was the marriage. The documents appended to the charge sheet or the statements would nowhere drive home the point that on the evening of the day of betrothal ceremony, the 1st petitioner had indulged in such acts that would become ingredients of Section 375 of the IPC for it to become an offence under Section 376 IPC for rape.

13. It becomes germane to notice the judgments of the Apex Court on the issue, as to indulging in consensual acts of sexual intercourse on the promise of marriage, would become an ingredient of offence under Section 376 of the IPC or otherwise. 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 breach of promise of marriage. Therefore, a deeper delving into the issue becomes unnecessary, suffice to quote the judgments of the Apex Court. The Apex Court in the case of **PRAMOD SURYABHAN PAWAR v. STATE OF MAHARASHTRA**¹ has drawn distinction between rape and consensual sexual relationships. Delineating the 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 *DHRUVARAM 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 law on the issue, while following the judgment in the case of ***Dr. DHUVARAM MURALIDHAR SONAR V. STATE OF MAHARASHTRA*** reported in ***(2019) 18 SCC 191*** and had obliterated the proceedings *qua* the accused.

14. 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 KARWAR v. STATE OF UTTARPRADESH AND ANOTHER***² has held as follows:

² 2022 SCC OnLine SC 1032

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 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*,² 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)

15. In yet another judgment, the Apex Court in the case of

MANDAR DEEPAK PAWAR V. STATE OF MAHARASHTRA AND ANOTHER³ has held as follows:

"1. The appellant and respondent No.2 were undisputedly in a consensual relationship from 2009 to 2011 (or 2013 as stated by the respondent No.2). It is the say of the respondent No.2 that the consensual physical relationship was on an assurance of marriage by the appellant. The complaint has been filed only in 2016 after three years, pursuant where to FIR dated 16-12-2016 was registered.

2. On hearing learned counsel for parties, we find *ex facie* the registration of FIR in the present case is abuse of the criminal process.

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

³ 2022 SCC OnLine SC 2110

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 "Prmod 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.

6. The Criminal appeal is accordingly allowed.

7. Impugned judgment is set aside the proceedings in pursuance to FIR dated 16-12-2016 stands quashed, leaving parties to bear their own costs".

(Emphasis supplied)

The afore-quoted were all cases where the relationship between the accused and the prosecutrix was consensual and the allegation was that of offence punishable under Section 376 of the IPC for rape. The Apex Court delineates inter-play between the offence of rape and a consensual sexual relationship, both on false promise of

marriage and promise of marriage. In the case at hand, as observed hereinabove, there was no false promise of marriage. The intention was to get married, as betrothal ceremony takes place. Therefore, it cannot be brought under the ambit of false promise of marriage.

16. It becomes opposite to refer to the judgment of the Apex Court in the case of ***NAIM AHAMED v. STATE (NCT OF DELHI)***⁴, again delineating what would be false promise of marriage and a promise of marriage, wherein the Apex Court has held as follows:

“ ”

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

⁴ 2023 SCC OnLine SC 89

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 Karnataka⁴, 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 Haryana⁵, 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)

The Apex Court holds that there is a vast difference between false promise of marriage and promise of marriage or breach of promise of marriage. One cannot deny possibility of the accused making promise with all seriousness to marry the complainant. The circumstances beyond the control would have prevented to fulfill the promise. It would be a folly to treat each breach of promise of marriage as a false promise, and to prosecute a person for offences punishable under Section 376 of the IPC. The observations of the Apex Court would clearly become applicable to the facts of the case at hand. The 1st petitioner also did not perform the alleged act on false promise of marriage, it is allegedly performed on the date of the betrothal ceremony. Therefore, it cannot be construed to be a false promise of marriage. It at best could be a breach of promise of marriage, which would not become an offence under Section 376 of the IPC.

17. The other side of the coin in the complaint is that consent of the complainant was taken out of deceit. It becomes apposite to refer to the judgment of the Division Bench of the High Court of Kerala which delineates the concept of consent and holds it to be an enigma. The High Court of Kerala in the case of **RAMACHANDRA VS. STATE OF KERALA**⁵, has held as follows:

"Understanding the 'consent' of a woman on a promise to marry:

6. The consent of a woman on a promise to marry is an enigma for the prosecution to prove. Consent refers to the state of mind of both parties in an act. In a sexual act, if both have understood the nature of the sexual relationship, consent is implicit in such a relationship. While considering the relationship, the Court will have to weigh the position of the accused to control the woman. It is to be remembered that the statutory provisions of the offence of rape as understood in the Penal Code, 1860, is not gender neutral. A woman, on a false promise of marrying and having sexual relationship with a man, with the consent of the latter obtained on such false promise, cannot be punished for rape. However, a man on a false promise of marrying a woman and having sexual relationship with the woman would lead to the prosecution's case of rape. The law, therefore, creates a fictitious assumption that the man is always in a position to dominate the will of the woman. The understanding of consent therefore, has to be related to the dominant and subordinate relationship in a sexual act.

7. Section 375 of the IPC states that a man is said to commit rape if he has had any form of sexual intercourse

⁵ 2022 SCC Online Ker 1652

without the consent of a woman. Explanation 2 to Section 375 refers to the form of expression of 'consent'. It is appropriate to refer to explanation 2 which reads thus:

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

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

8. There cannot be any room for doubt in this case as to the consent of PW1 for having sexual intercourse with the accused. PW1 referred to three incidents of sexual intercourse. First of such incidents happened in a lodge. She did not raise any complaint immediately thereafter. Again, she had sexual intercourse at the residence of the accused. The third incident happened at her own house where also, she did not raise any complaint. According to her, she was promised by the accused that he would marry her. She also deposed about proposing the marriage at the Manarcaud Temple. But no ceremonies were conducted to establish legal marriage. She approached the Chief Judicial Magistrate, Kottayam, with a complaint. This was forwarded to the police for investigation. The police registered an FIR on 18/11/2014.

Consent on misconception of fact:

9. Section 90 of IPC refers to a consent as not consent intended by any provisions of the Penal Code, 1860. Section 90 reads thus:

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

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

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

10. We shall now advert to some of the precedents before considering the point of guilt of the accused in this case. In *Pramod Suryabhan Pawar v. State of Maharashtra [(2019) 9 SCC 608]*, the Apex Court distinguished sexual relationship based on false promise to marry and a breach of promise to marry. The Apex Court held that the offence of rape is not constituted when it was only a breach of promise to marry. The false promise of marriage is explained as a promise not given in good faith, with no intention of being adhered to at the time it was given. In *Anurag Soni v. State of Chhattisgarh [(2019) 13 SCC 1]* on a similar line, the Apex Court, noting that the accused had no intention to marry the prosecutrix, held that engaging in a physical relationship on the pretext of marriage, fell in the category of rape. In *Deepak Gulati v. State of Haryana [(2013) 7 SCC 675]* the Hon'ble Supreme Court distinguished rape and consensual sex and held that “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 made a false promise to this effect only to satisfy his lust. As the latter falls within the ambit of cheating or deception.” In *Dhruvaram Murlidhar Sonar (Dr.) v. State of Maharashtra [2019 (1) KHC 403]*, the Apex Court held that if the accused had not made a promise with the sole intention to seduce the prosecutrix to indulge in sexual act, such an act would not amount to rape. In *State of Uttar Pradesh v. Naushad [(2013) 16 SCC 651]* again the Hon'ble Supreme Court held that the consent of the victim obtained by the accused by

giving false promise of marrying her would amount to committing rape.

11. The false promise of marriage refers to the state of mind of the accused. The point of guilt is relatable to the state of mind of the accused at the time of committing the act of sex. If the accused had no real intention to marry, it can be easily concluded that the consent of the victim is a misconception of fact. The accused might have had intention to marry but he was not sure whether the marriage would take place or not. If the accused had not disclosed full information to the prosecutrix regarding the factors which would hamper or hinder the impending marriage with her, can the Court hold that sexual autonomy had been violated or not? Had the accused disclosed information about the chances of marriage, would she have consented? If there was no full disclosure of factors that could have a bearing on the consent of the woman, can we hold that such cases fall in the category of breach of promise? We need to discuss this in detail.”

(Emphasis supplied)

The Division Bench of the High Court of Kerala was following the judgments rendered by the Apex Court, on the issue, from time to time. The finding rendered by the Division Bench of the High Court of Kerala would also become squarely applicable to the contention urged in the case at hand. Thus, falls the offence under Section 376 of the IPC against the 1st petitioner.

18. What remains is the offence of cheating as alleged under Sections 417 and 420 of the IPC. Talks between the family

members for the date of marriage were also held fixing the date of the marriage. It is the submission that invitation cards were got printed for the marriage taking place on 08-09-2023. Marriage tumbles not on any act of the members of the 1st petitioner's family or the complainant's family. For manifold reasons, as averred in the petition, the marriage has tumbled down. It is not a case where the family of the 1st petitioner or the 1st petitioner had lured the complainant or her family members to get into the marriage. It was an agreement between both the families to perform the marriage of the 1st petitioner with the complainant. Merely because the engagement breaks, at a later date cannot amount to offence of cheating against the 1st petitioner or his family members. Therefore, there is no warrant to permit the trial to continue any further, as permitting it, would on the face of it, become an abuse of the process of law, resulting in patent injustice. It is in such cases, the Apex Court in plethora of cases directs this Court to step into exercise jurisdiction under Section 482 of the Cr.P.C., and obliterate the crime against the accused, failing which, it would become a misuse and abuse of the process of law, resulting in miscarriage of justice.

19. For the aforesaid reasons, the following:

ORDER

- (i) Criminal Petition is allowed.
- (ii) The proceedings in C.C.No.1926 of 2023 pending before the Additional Civil Judge and JMFC, Kundapura stand quashed.

**Sd/-
JUDGE**

BKP
CT:MJ