

HIGH COURT OF KERALA**Bench: Justice A. Badharudeen****Date of Decision: July 10, 2024**

Case No.: CRL.MC NO. 1545 OF 2023

CRIME NO.339/2022 OF VAZHAKKAD POLICE STATION,
MALAPPURAM

SC NO.1573 OF 2022 OF FAST TRACK SPECIAL COURT-II, MANJERI

PETITIONER/ACCUSED:**FAWAS****VS****RESPONDENT/COMPLAINANT:****STATE OF KERALA****Legislation:**

Section 482 of the Code of Criminal Procedure (Cr.P.C.)

Sections 366, 376 of the Indian Penal Code (IPC)

Subject: Criminal Miscellaneous Case seeking to quash the final report and proceedings in SC No. 1573/2022 on the files of the Special Court under the PoCSO Act, Manjeri, arising out of Crime No. 339/2022 of Vazhakkad police station, Malappuram. The petitioner is accused of committing rape on the promise of marriage.

Headnotes:

Criminal Law – Quashing of Proceedings – Consent and Misconception of Fact – Petitioner accused of rape on the promise of marriage – Contention that the relationship was consensual and based on mutual agreement, with no suppression of marital status – No prima facie case of false promise with intention to deceive – Apex Court precedents applied – Quashment of proceedings not considered due to need for trial to determine consent and misconception of fact [Paras 1-11].

Supreme Court Precedents – Reliance on Pramod Suryabhan Pawar v. State of Maharashtra [2019 KHC 6829] and Sonu @ Subhash Kumar v. State of Uttar Pradesh [2021 (2) KHC 314] – Distinction between false promise and breach of promise – Legal standards for vitiating consent due to misconception of fact under Section 375 IPC reiterated – Consent must involve active and reasoned deliberation, not vitiated by false promise unless made in bad faith [Paras 5-10].

Application of Law – Analysis of First Information Statement (FIS) and facts – Determination of whether the sexual intercourse resulted from consent or misconception of fact to be decided through evidence – Proceedings cannot be quashed without trial – Prayer for quashment dismissed, case to proceed to trial [Paras 10-11].

Decision:

Petition Dismissed – Proceedings to continue for trial

Referred Cases:

- Pramod Suryabhan Pawar v. State of Maharashtra [2019 KHC 6829]
- Sonu @ Subhash Kumar v. State of Uttar Pradesh [2021 (2) KHC 314]
- Anilkumar v. State of Kerala and Others [2021 (1) KHC 435]
- XXX. v. State of Kerala and Another in CrI.M.C.No.4933 of 2021

Representing Advocates:

For Petitioner: B. Raman Pillai (Sr.), R. Anil, Sujesh Menon V.B., Thomas Abraham (Nilackappillil), T. Anil Kumar, Thomas Sabu Vadakekut, Mahesh Bhanu S., Ressil Lonan For Respondent: Public Prosecutor Sri. M.P. Prasanth

ORDER

Dated this the 10th day of July, 2024

This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, to quash Annexure 6 Final Report and all further proceedings in S.C.No.1573/2022 on the files of the Special Court under the Protection of Children from Sexual Offences Act, 2012 (for short, 'the PoCSO Act' hereinafter), Manjeri, arose out of Crime No.339/2022 of Vazhakkad police station, Malappuram. The petitioner herein is the sole accused in the above crime.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor. Perused the relevant documents.

3. The prosecution case is that, on 25.8.2021, the accused herein subjected the de facto complainant to sexual intercourse on the promise of marriage, after kidnapping her. Thereafter, he retracted from the marriage and accordingly, the prosecution alleges commission of offences punishable under Sections 366 and 376 of the Indian Penal Code (for short, 'the IPC' hereinafter).

4. The learned counsel for the petitioner sought quashment of the proceedings, mainly raising a contention that the sexual relationship between the petitioner and the de facto complainant is one arose out of consent. It is also submitted that, at the time when the relationship continued, the petitioner was a married man and the de facto complainant had no case that at the time of commission of sexual intercourse, he suppressed the fact that he had already married. Therefore, there is no misconception of fact to hold that the consent is vitiated and therefore, none of the offences would attract the fact of this case. Accordingly, it is submitted that the case is liable to be quashed.

5. The learned counsel for the petitioner placed reliance on a decision of the Apex Court in **Pramod Suryabhan Pawar v. State of Maharashtra and Another** reported in [2019 KHC 6829]. In the said case, the Apex Court considered the facts of the case as under:

“Accused is a Deputy Commandant in CRPF while complainant is an Assistant Commissioner of Sales Tax. Both of them knew each other since 1998 and were intimate since 2004. Complainant and accused met regularly, travelled long distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a period of five years. When proposal of marriage was mooted, accused expressed his reservations about marriage as she belonged to a different caste. Under misconception of fact, consent was obtained, the complainant filed a case alleging offence of rape and offences under SC and ST Act. Accused approached the High Court by filing a petition under S.482 CrPC seeking to quash the FIR. High Court rejected the petition. Question before the Supreme Court was whether FIR lodged alleging rape is liable to be quashed.”

Allowing the appeal, the Apex Court held as under:

“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. Where there is 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 S.375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis of her choosing to engage in the said act. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their

getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under S.375 of the IPC has occurred."

6. Another decision of the Apex Court in **Sonu @ Subhash Kumar v. State of Uttar Pradesh and Another** reported in **[2021 (2) KHC 314]** also has been placed by the learned counsel to substantiate the contention raised by the petitioner, wherein, the facts of the case dealt in paragraph No.7 as under:

7. *On the basis of the rival submissions andwith the assistance of the counsel, we have perused the FIR. The FIR specifically records that the second respondent had developed a friendship with the appellant and that he had assured that he would marry her. The FIR then records that the appellant and the second respondent developed a physical relationship which spread over a period of one and a half years, during the course of which the second respondent conversed with the parents and sister of the appellant. It has been alleged in the FIR that the parents of the appellant were agreeable to the couple getting married. As a matter of fact, the appellant returned to his home town at Jhansi on 5 January 2018 when he had made a phone call to her stating that she should come and visit him so that they can get married. On travelling to Jhansi at the behest of the appellant, the second respondent was informed by the father of the appellant that the appellant did not wish to marry her. The contents of the statement under Section 164 of CrPC also indicate that the second respondent had "voluntarily developed relationship of husband-wife with him". The second respondent has then stated that "now, he and his family members are refusing to marry with me". The second respondent has further stated that "my sole grievance is that Sonu is refusing to marry with me".*

Thereafter, the Apex Court in paragraph Nos.10 and 11 in **Sonu's** case (supra) observed as under, while quashing the FIR lodged, alleging commission of offence under Section 376 of the IPC:

10. Further, the Court has observed:

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

7. Apart from that, decisions of this Court in **Anilkumar v. State of Kerala and Others** reported in **[2021 (1) KHC 435]** and **xxx. v. State of Kerala and Another** in Crl.M.C.No.4933 of 2021, also have been placed by the learned counsel for the petitioner, in support of his contention.

8. The learned Public Prosecutor would submit that, in the case at hand, whether the de facto complainant was a married lady at the time of start of the relationship or she was legally fit for marriage, are matters of evidence. Similarly, he argued that, going by the narration in the FIS, the accused and the de facto complainant made acquaintance and they started the relationship when the accused offered to marry her. There was meeting with the relatives of the accused also so as to fix the

marriage. After continuing the relationship on the promise of marriage, the accused married another lady and retracted from marriage. In such a case, whether the sexual intercourse is the outcome of consent or on the basis of misconception of fact are matters of evidence and therefore, quashment of the proceedings cannot be considered.

9. Going by the decisions dealt by the Apex Court as extracted hereinabove, the law is well settled that, *there is a distinction between a false promise given in the understanding by the maker that it would be broken and the breach of a promise which is made in good faith but subsequently not fulfilled. Where there is 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 could not be said to be a false promise. In order 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 S.375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis of her choosing to engage in the said act.*

10. Keeping the legal position in mind, I have perused the FIS given by the de facto complainant. In the FIS, it has been stated that de facto complainant made acquaintance with the accused through face book on 26.8.2020. Later, the accused expressed his willingness to marry the de facto complainant and the de facto complainant also agreed the said proposal. Thereby, both of them decided to inform the same to their family members. Later, on 24.5.2021, the accused telephoned the de facto complainant and requested her to reach Thrissur to have an opportunity to the family members of the accused to see the de facto complainant. The place of meeting was fixed at Kadavu Resort and she

reached there at about 2.00 p.m. Thereafter, there was decision to marry her. Later, both of them reached at Kadavu Resort at 12. 00 hrs and the de facto complainant demanded to have a separate room for her. Then, the accused informed her that only one room was available and it was difficult to get another room. Accordingly, both of them happened to stay at one room, on the assurance that the accused would not disturb the de facto complainant in any manner. But, later, the attitude of the accused changed, he threatened her and compelled to have sexual intercourse with her, assuring marriage as proposed. Accordingly, she was subjected to sexual intercourse without her consent. The relationship continued till 23.2.2022 and the accused demanded three months time to solemnize the marriage. Later, the de facto complainant understood that on 15.5.2022, the marriage of the accused was solemnized with another lady.

11. Even though the learned counsel for the petitioner argued that the de facto complainant was a married lady, the same is not established, prima facie. Therefore, whether the sexual intercourse is the outcome of consent or the de facto complainant was subjected to sexual intercourse on misconception of fact on the promise of marriage, are matters of evidence and in such a case, quashment of the proceedings without adducing evidence, could not be considered. Therefore, the prayer for quashment cannot be considered and as such, the matter shall go for trial. In the result, this petition is dismissed.

Registry is directed to forward a copy of this order to the Special Court concerned, for information and further steps.

