The High Court of Madhya Pradesh
MCRC 25681/2018
[Senjeet Singh vs. State of MP and Anr.]

Gwalior, dtd. 11/02/2020

Shri Rajiv Sharma, counsel for the petitioner.

Shri R. K. Upadhyay, Public Prosecutor for the respondent No.1/ State.

None for the respondent No.2 though served.

On 14/05/2019, Shri Ram Pathak, Ms. Nimisha Pathak and Shri Jamnesh Gupta, Advocates have filed their Vaklatnama on behalf of the respondent No.2. From the order sheets of this Court, it is clear that on 01/08/2019 Shri Ram Pathak,Advocate had appeared for the respondent No.2 and since the Case Diary was not available, therefore, the case was adjourned. Thereafter, on subsequent dates, none appeared for the respondent No.2. Today, none appears for respondent No.2 even in pass over round.

(2) Heard the learned counsel for the petitioner as well as the counsel for the State.

(3) This petition under Section 482 of CrPC has been filed for quashment of FIR in Crime No.103/2018 registered at Police Station Maharajpura, District Gwalior for offence under Sections 376, 323 of IPC as well as quashment of all consequential criminal proceedings.

(4) On 09/08/2019, the petitioner filed IA No. 6234 of 2019 for filing the copy of the charge sheet. From the charge sheet, it appears that the

same was prepared and filed before the Court below on 07/07/2018, whereas this petition was filed on 02/07/2018. Thus, it is clear that the charge sheet was filed during pendency of this petition.

(5) It is submitted by the counsel for the petitioner that since the charge sheet has been filed during the pendency of this petition, therefore, in the light of the judgments of the Supreme Court in the case of **Satish Mehra Vs. State (NCT of Delhi)** reported in **(2012) 13 SCC 614, Anand Kumar Mohatta and Anr. Vs. State (Govt. of NCT of Delhi) Department of Home and Annother** passed in **CRIMINAL APPEAL No.1395 OF 2018 [Arising out of SLP (Crl.) No. 3730 of 2016] by judgment dated 15th November, 2018** and the judgment passed by a Coordinate Bench of this Court in **Ravikant Dubey and Others Vs. State of M.P. and another** reported in **2014 Cr.L.R. (M.P.) 162**, this petition can be decided on merits.

(6) The Supreme Court in the case of **Satish Mehra (supra)** has held as under:-

> "**13.** Though a criminal complaint lodged before the court under the provisions of Chapter XV of the Code of Criminal Procedure or an FIR lodged in the police station under Chapter XII of the Code has to be brought to its logical conclusion in accordance with the procedure prescribed, power has been conferred under Section 482 of the Code to interdict such a proceeding in the event the institution/continuance of the criminal proceeding amounts to an abuse of the process of court. An early discussion of the law in this regard can be found in the decision of this Court in R.P. Kapur v. State of Punjab wherein the parameters of exercise

of the inherent power vested by Section 561-A of the repealed Code of Criminal Procedure, 1898 (corresponding to Section 482 CrPC, 1973) had been laid down in the following terms: (AIR p. 869, para 6)

(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding e.g. want of sanction;

(iii) where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and

(iv) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

14. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence, there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extra ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfy the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after

framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually comes on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in its entirety, do not, in any manner, disclose the commission of the offence alleged against the accused.

15. The above nature and extent of the power finds an exhaustive enumeration in a judgment of this Court in State of Karnataka v. L. Muniswamy (1977) 2 SCC 699 which may be usefully extracted below : (SCC pp. 702-03)

> "7. The second limb of Mr Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:
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This section is contained in Chapter XVIII called "Trial Before a Court of Session". It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the

accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the New Code, which corresponds to Section 561-A of the Code of 1898, provides that:

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In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

16. It would also be worthwhile to recapitulate an earlier decision of this court in Century Spinning & Manufacturing Co. vs. State of Maharashtra (1972) 3 SCC 282 noticed in L. Muniswamy's case (Supra) holding that: (SCC p. 704, para 10)

> "10 …. the order framing a charge affects a person's liberty substantially and therefore it is the duty of the court to consider judicially whether the materials warrant the framing of the charge. It was also held that the court ought not to blindly accept the decision of the prosecution that the accused be asked to face a

trial."

The Supreme Court in the case of **Anand Kumar Mohatta (supra)** has held as under:-

> **"15.** First, we would like to deal with the submission of the learned Senior Counsel for the Respondent No.2 that once the charge sheet is filed, petition for quashing of FIR is untenable. We do not see any merit in this submission, keeping in mind the position of this Court in Joseph *Salvaraj A. v. State of Gujarat (2011) 7 SCC 59.* In the case of Joseph Salvaraj A. (supra), this Court while deciding the question whether the High Court could entertain the 482 petition for quashing of FIR, when the charge sheet was filed by the police during the pendency of the 482 petition, observed: -
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> > *"16. Thus, from the general conspectus of the various sections under which the appellant is being charged and is to be prosecuted would show that the same are not made out even prima facie from the complainant's FIR. Even if the charge-sheet had been filed, the learned Single Judge could have still examined whether the offences alleged to have been committed by the appellant were prima facie made out from the complainant's FIR, charge- sheet, documents, etc. or not."*
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> 16. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 Cr.P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -
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> > *"**482. Saving of inherent power of the High Court.-** Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

> **17.** There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

In the case of **Ravikant Dubey (supra),** a Co-ordinate Bench of this Court has held as under :-

> "**8.** In view of the above, the questions of law which requires consideration are as follows: (i) Whether petition preferred by the petitioners under Section 482 of the Code for quashing the FIR can be entertained, when trial has been started and evidence of some witnesses have also been deposed before the Trial Court ? (ii) Whether evidence recorded by Trial Court during trial can be considered for quashing the FIR ? (iii) Whether any ground is available for quashing the FIR in view of the facts and laws available on record ? Regarding question of law no. (i) :-
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> 9. Learned Senior Counsel for the petitioners submitted that inherent powers can be used at any stage to prevent abuse of process of any Court or otherwise to secure the ends of justice. It makes no different whether trial has been started or not and whether some evidence has been deposed before the Trial Court or not. In support of his contention he placed reliance in the case of Sathish Mehra (supra) and Joseph Salvaraja Vs. State of Gujrat and others, (2011) 7 SCC 59.
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> 12. Therefore, in the considered view of this Court this petition is maintainable also even when trial is at advance stage. The question is answered accordingly."

(7) Thus, it is clear that the petition filed under Section 482 of CrPC cannot be dismissed merely on the ground that the trial has started or even some witnesses have been examined. Thus, this petition is considered on merits.

(8) The necessary facts for disposal of the present in short are that the respondent No.2 lodged a FIR on 03/03/2018 on the allegation that she is resident of Goverdhan Colony, Gole Ka Mandir, Gwalior and is a beautician by profession and had developed friendship with the petitioner about eight months prior to the date of FIR. The petitioner had promised to marry her and on the said promise, he has continuously raped her. A day before yesterday, he took her to his room situated behind Chawla Market and committed rape on her. Today also, he called her in his room and asked for sexual intercourse and when she refused to do so and insisted for marriage, then she was beaten and the petitioner refused to marry her and, therefore, the FIR was lodged. The statement of the prosecutrix was also recorded under Section 161 of CrPC. In her police statement, she has stated that she got married to one Sunil Shrivas in the year 2011 and because of family dispute, she left her husband in the year 2012 and came back to her parental home. She has studied up-to Class 10th. About eight months back, she came in contact with the

petitioner. The petitioner used to meet her and used to promise her to marry her. On the said promise, he continuously committed rape on her. He used to call her in his room and used to commit rape on her. A day before yesterday also, he took her to his room which is situated behind Chawla Market and committed rape on her. On the date of lodging of FIR again he called her in his room and asked for sexual intercourse but she refused to do so and insisted that first of all, the petitioner must marry her, then the petitioner refused to marry her on the ground that he does not belong to her caste and he is "Thakur" and assaulted by fists and blows as a result of which, she has sustained injuries. The statement of the prosecutrix was also recorded under Section 164 of CrPC. In her statement under Section 164 of CrPC, except the question of first marriage, all other facts were narrated by her.

(9) Seeking the quashment of the criminal case, it is submitted by the counsel for the petitioner that in fact, it was the respondent No2 who had suppressed the fact that she was already married and had also lodged a report under Section 498-A of IPC against her husband and the said case was still pending for offence under Section 498-A of IPC and under Section 3 /4 of Dowry Prohibition Act. The petitioner has also filed a copy of the marriage card, to show that the prosecutrix was already married before entering into physical relationship with the petitioner. It is submitted that even if the entire allegations made against the petitioner are considered, then it is clear that the prosecutrix herself knew this fact

that she is having a living spouse and there is no possibility of marriage until and unless a decree of divorce is granted and her marital ties with her husband are broken but still if she entered into physical relationship with the petitioner, then it cannot be said that the consent was obtained by misconception of fact and, therefore, provisions of Section 90 of IPC are not applicable. Since the prosecutrix herself was a consenting party, therefore, no offence under Section 376 of IPC is made out. It is submitted that it is clear from the FIR as well as from her statement under Sections 161 & 164 of CrPC that it was the respondent No.2, who used to go to the room of petitioner and there is no allegation that at any point of time any force was used by the petitioner for taking her to his room. Thus, the entire act of involving in sexual activity with the petitioner was the result of free consent of the prosecutrix.

(10) *Per contra,* it is submitted by the counsel for the State that not only the charges have been framed but from the copy of the charge sheet, it is clear that the prosecutrix has also been examined because certain documents were exhibited which is clear from the endorsement. Further, it is submitted that whether the consent given by the prosecutrix was a free consent or was obtained by misconception of fact, is a subject matter of trial and this Court while exercising power under Section 482 of CrPC should not quash the proceedings.

(11) Heard the learned counsel for the parties.

(12) The Supreme Court in the case of **Deepak Gulati vs. State of**

Haryana reported in **AIR 2013 SC 2071** has held as under:-

> **"18.** 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 mis- representation 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."

The Supreme Court in the case of **Tilak Raj vs. State of Himachal Pradesh,** reported in **AIR 2016 SC 406** has held as under:-

> **"19.**We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provision of The Indian Penal Code(in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

20. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus:

> "23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.
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> 24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.
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> 25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross- examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage."

The Supreme Court in the case of **Uday vs. State of Karnatak,** reported in **(2003) 4 SCC 46** has held 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 strait jacket 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. The approach to the subject of consent as indicated by the Punjab High Court in Rao Har Narain Singh (supra) and by the Kerala High Court in Vijayan Pillai (supra) has found approval by this Court in State of H.P. vs. Mango Ram(2000) 7 SCC 224. Balakrishnan, J. speaking for the Court observed (SCC pp. 230-31 para 13):-

> "The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

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 it. 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.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

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, is 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. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

This Court by order dated 18/05/2017 passed in the case of **Abid Ali vs. State of MP and Another [MCRC No.1363/2016]** has held as under:-

"Thus, from the facts and circumstances of the case, it is clear that the prosecutrix was deeply in love with the applicant. She continued to have physical relations with applicant knowing fully well that the applicant is avoiding the question of marriage. The prosecutrix went along with the applicant all alone to his farm house on various occasions and had physical

relations with him. Under these circumstances it cannot be held that the consent of the prosecutrix was obtained by making false promise of marriage.

Considering the allegations and the surrounding circumstances, this Court is of the considered opinion that the consent of the prosecutrix cannot be said to have been obtained by making false promise of marriage, and therefore it cannot be said that the applicant had committed offence punishable under Section 376 of IPC.

Consequently, the charge sheet filed against the applicant for offence under Section 376 of IPC is quashed.

The petition succeeds and is hereby **allowed**."

The Supreme Court in the case of **Yedla Srinivasa Rao vs. State of A.P.,** reported in **(2006) 11 SCC 615** has held as under:-

"10. It appears that the intention of the accused as per the testimony of PW1 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 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 fulfil the promise and persuaded 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. In this connection, reference may be made to a decision of the Calcutta High Court in the case of Jayanti Rani Panda v. State of West Bengal & Anr., (1984) Cri.L.J.1535. In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not

an act induced by misconception of fact and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked. Therefore, so far as Jayanti Rani Panda (supra) is concerned, the porseuctirx was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda's case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence. Reliance can also be made in the case of Emperor v. Mussammat Soma reported in (1917) Crl. Law Journal Reports 18 (Vol.18). In that case the question of consent arose in the context of an allegation of kidnapping of a minor girl. It was held that the intention of the accused was to marry the girl to one Dayaram and she obtained Kujan's consent to take away the girl by misrepresenting her intention. In that context it was held that at the time of taking away the girl there was a positive misrepresentation i.e. taking the girls to the temple at Jawala Mukhi and thereafter they halted for the night in Kutiya (hut) some three miles distance from Pragpur and met Daya Ram, Bhag Mal and Musammat Mansa and Musammat Sarasti was forced into marrying Daya Ram. This act was found to be act of kidnapping without consent. But, in the instant case, a girl though aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil and it was totally under misconception on the part of the victim that the accused is likely to marry her, therefore, she submitted to the lust of the accused. Such fraudulent consent cannot be said to be a consent so as to condone the offence of the accused. Our attention was also

invited to the decision of this Court in the case of Deelip Singh Alias Dilip Kumar v. State of Bihar, [2005] 1 SCC 88 wherein this Court took the view that prosecturix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But accused's promise was not false from its inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the facts as this Court found that the accused promise was not false from its inception. But in the present case we found that first accused committed rape on victim against her will and consent but subsequently, he held out a hope of marrying her and continued to satisfy his lust. Therefore, it is apparent in this case that the accused had no intention to marry and it became further evident when Panchayat was convened and he admitted that he had committed sexual intercourse with the victim and also assured her to marry within 2 days but did not turn up to fulfil his promise before the Panchayat. This conduct of the accused stands out to hold him guilty. What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the conclusion that it was not only the accused but prosecutrix was also equally keen, then in that case the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what the consequences may result for indulging into such acts and when the accused promised to marry but he never intended to marry right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375-"without her consent". A consent obtained by misconception while playing a fraud is not a consent."

The Supreme Court in the case of **Pramod Suryabhan Pawar vs. State of Maharashtra and Another,** reported in **(2019) SCCC 608** has held as under:-

"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 this Court observed:

> "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.
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> 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)

The Supreme Court in the case of **Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Others** reported in **2018 SCC Online SC 3100** has held 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 later 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 of the IPC.
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> **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 the 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 some time 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 18 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 complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

(13) If the fact of the present case are considered in the light of the judgments mentioned above, then it is clear that the respondent No.2 was having a living spouse and her divorce with her husband has not been taken place. The respondent No.2 was well aware of the fact that her marriage with the petitioner during the subsistence of first marriage, is not permissible under the law. Furthermore, during the last eight months, she regularly went to the room of the petitioner where she had physical relationship with the petitioner. It is nowhere mentioned that the physical relationships were developed under any coercion or pressure, but the FIR as well as her statement under Section 161 of CrPC indicates that the physical relationships were developed voluntarily. However, the respondent No.2 has tried to give it a colour of misconception of fact of false promise of marriage. When it was in the knowledge of the respondent No.2 herself that her marriage with the petitioner during the

subsistence of her first marriage is not possible and even if she entered into physical relationship with the petitioner, then it cannot be said that her physical relationship was on false promise of marriage. Under these circumstances, this Court is of the considered opinion that the act of the petitioner is not covered by Section 90 of IPC and the consent of the prosecutrix/respondent No.2 cannot be said to be a result of misconception of fact.

(14) As a result, this Court is of the considered opinion that no case is made out warranting the prosecution of the petitioner. Consequently, the FIR in Crime No.103/2018 registered at Police Station Maharajpura, District Gwalior for offence under Sections 376, 323 of IPC and all the consequential criminal proceedings are hereby quashed.

(15) This petition succeeds and is hereby **Allowed.**

(G. S. Ahluwalia)
Judge

MKB