

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.08.2020
PRONOUNCED ON : 20.09.2021

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.O.P.No.10901 of 2021 and
CrI.M.P.No.6464 of 2021

1.D.Santhanam
2.Priya ... Petitioners

Vs.

1.STATE: Represented by,
The Inspector of Police,
W-30 All Women Police Station,
Crime No.07 of 2021,
Poonamallee, Chennai-600 020.

2.R.Abhirami ... Respondents

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records and quash the case in Crime No.07 of 2021 on the file of the 1st respondent and quash the same.

For Petitioners : Mr.R.John Sathyan
For 1st Respondent : Mr.A.Damodaran,
Government Advocate (CrI. Side)
For 2nd Respondent : Mr.B.A.Sujay Prasanna

ORDER

This Criminal Original Petition has been filed to quash the FIR in Crime No.07 of 2021, pending on the file of the 1st respondent Police.

2.The 2nd respondent lodged a complaint against the petitioners before the learned District Munsif-cum-Judicial Magistrate, Sriperumbudur. On receipt of the same, the learned District Munsif-cum-Judicial Magistrate, Sriperumbudur, by order, dated 25.09.2020 in CrI.M.P.No.1121 of 2020 forwarded the complaint under Section 156(3) of Cr.P.C., to the 1st respondent Police and directed to register a case if cognizable offence is made out. On receipt of the same, the 1st respondent Police registered a case in Crime No.07 of 2021 against the petitioners for offence under Sections 376(2)(n), 417, 420, 506(ii) and Section 4 of the Tamil Nadu Prohibition of Women Harassment Act, 2002.

3.The gist of the case is that the 2nd respondent/defacto complainant is an Advocate (Enrolment No.2361 of 2015) by profession and is practising in Madras High Court and various Courts in and around Chennai. The 2nd respondent got married in the year 2009 with one T.N.Viswanath. Out of their wedlock, she gave birth to a male child and her husband is working in South Africa and he visited India lastly during the month of March 2015. During the month of April 2015, the 2nd respondent developed friendly relationship with the 1st petitioner, who is presently employed as Judicial Magistrate No.II,

Chidambaram. The 1st petitioner and the 2nd respondent got introduced through the social media viz., 'Nimbuzz'. Initially, they started to meet regularly in public places and were discussing about the cases. Whenever the 2nd respondent had legal doubts, the same were clarified by the 1st petitioner. Slowly, the 1st petitioner disclosed his family status that he is living separately with his mother at Iyyappanthangal and had ambition to pass Civil Judge Exam.

4. On 14.04.2015, the 1st petitioner called the 2nd respondent to come to his house to assist him in legal research work for his case. Believing the same, the 2nd respondent had gone to the house of the 1st petitioner. At that time, the 1st petitioner made false representation that he loves her and interested to remarry her and take care of her son and provide social security and also promised that after he becomes a Judicial Magistrate, he will talk to her husband T.N.Viswanath and take steps to dissolve her marriage by initiating divorce proceedings. On 15.04.2015, at about 10.30 a.m., the 1st petitioner again called her to assist him in legal work. When the 2nd respondent visited the 1st petitioner in his house, he dragged her into the bed room and attempted to have physical relationship. The 2nd respondent refused the same and said

that it is not moral. At that time, the 1st petitioner again reiterated his earlier false representation. Believing the false representation, the 2nd respondent consented to have sexual relationship with the 1st petitioner due to misconception of facts. On 20.04.2015, when the 2nd respondent was at her home, the 1st petitioner requested to lend a loan of Rs.15,000/- for clearance of his financial debts and he assured to return back the money within a week. Since the 2nd respondent was not having such amount, she expressed her inability. Again, the 1st petitioner made the earlier false promise and hence, the 2nd respondent gave Rs.15,000/- to him. During the period from the month of April 2015 to June 2019, on the false promise made by the 1st petitioner, the 2nd respondent blindly believed the same as true and had sexual intercourse with the 1st petitioner. After June 2019 when he became Judicial Magistrate, the 1st petitioner informed her to wait for few more months till he finishes his training period and get confirmation as Judicial Magistrate. From 20.04.2015 to 15.04.2018, the 2nd respondent had given totally Rs.10,50,000/- to the 1st petitioner in 18 instalments, of which nine instalments through online and other nine instalments by cash. On 17.07.2020, the 1st petitioner visited the 2nd respondent in her house at about 10.00 p.m., stayed there and left her house at around 09.00 a.m., on 18.07.2020. During that time, the 1st petitioner had

sexual intercourse with her. The CCTV footage and pictures of his arrival and departure from the house of the 2nd respondent is captured in the security camera of VGN Krona Apartment.

5. On 07.08.2020, the 1st petitioner called through mobile phone and informed the 2nd respondent not to call him hereafter and not to disturb him. When the same was questioned by her, she suddenly heard a lady voice claiming to be the wife of the 1st petitioner, the 2nd petitioner herein. The 2nd petitioner informed her that both of them got reunited and are living together and threatened her that they will kill her, if she continued to have extra marital affair with the 1st petitioner. Then only, the 2nd respondent realized that she was cheated and deceived by the petitioners and got sexually exploited by the 1st petitioner and also lost huge sums of money. On 08.08.2021, the 2nd respondent spoke to the mother of the 1st petitioner and explained the entire happenings. The 1st petitioner's mother informed that the petitioners got married several years before and they have a male child and due to some misunderstanding, they got separated and now, they reunited and living together. Thus, the 1st petitioner with criminal intention exploited the 2nd respondent and had sexual intercourse to fulfil his sexual desire and lust.

Hence, he committed the offence of rape by getting consent on misconception of facts. The 2nd respondent lodged a complaint to the 1st respondent Police on 10.08.2020. Since no actions was taken, she made a complaint before the learned District Munsif-cum-Judicial Magistrate, Sriperumbudur on 16.09.2020. Thereafter, the learned District Munsif-cum-Judicial Magistrate, Sriperumbudur, by order, dated 25.09.2020 in CrI.M.P.No.1121 of 2020 forwarded the complaint under Section 156(3) of Cr.P.C., to the 1st respondent Police.

6.The learned counsel for the petitioners submitted that the 2nd respondent got enrolled in the year 2015 and practising as Advocate in the Madras High Court and other Courts in and around Chennai. She got married to one T.N.Vishwanath in the year 2009, who is presently stationed in South Africa. Out of this wedlock, the 2nd respondent have a male child and her marriage is still in subsistence. The 1st petitioner joined law degree in the year 2009, completed the same in the year 2012 and got himself enrolled as an Advocate and was practising in various Courts. The 1st petitioner got selected as Judicial Magistrate in the year 2019 and presently serving as Judicial Magistrate No.II, Chidambaram. The 2nd petitioner is also an Advocate and

now, pursuing Doctorate. The marriage between the 1st petitioner and the 2nd petitioner took place on 12.09.2010 and they begot a son in the year 2012. The 1st petitioner and the 2nd respondent had come in contact, since they are law college batchmates to seek some professional assistance. This fact is known among the peers. The 1st petitioner was a studious law graduate and used to help every one, who had professional doubts. The 2nd respondent sought professional assistance of the 1st petitioner in drafting deeds and petitions for her clients. The 1st petitioner used to help the 2nd respondent and send the drafts through e-mail from 2015 till he joined the judicial service, for which the 2nd respondent paid professional fees through online which is now projected as though the 2nd respondent had extended loan on the request of the 1st petitioner.

7.The learned counsel for the petitioners further submitted that admittedly in this case, the guidelines issued by the Hon'ble Apex Court in the case of "*Sakiri Vasu Versus State of Uttar Pradesh reported in (2008) 2 SCC 409*" is not followed and thereby, the genuineness and veracity of the complaint could not be ascertained before forwarding the same. The 1st respondent Police without conducting proper enquiry, straight away registered

the case against the petitioners. The direction given to the 1st respondent was not a directive order one to register a case immediately. It was a conditional order to register the case only if on enquiry cognizable offence is made out. In this case, there is no material to show whether any inquiry was done before registering the FIR against the petitioners. The learned counsel further submitted that the 1st petitioner and the 2nd respondent got married to their respective spouses at the contemporaneous time. At the time of occurrence, the 2nd respondent is aged about 36 years and she is a Post Graduate in Management and Administration in Law, a well educated person who was representing the cases of her clients. The 2nd respondent was well aware that both she and the 1st petitioner were having respective families and their marriage were in subsistence. Hence, her relationship with the 1st petitioner was a conscious relationship. On a demeanour, if the relationship is admitted, it conclusively proves that it is only a consensual sex and not an offence of rape. While being so, the concept of misconception would not get attracted on the above facts and circumstances of the case.

8.The learned counsel for the petitioners further submitted that the

criminal intimidation remained in words at the most and not followed with any action. The CCTV footage is without any certificate under Section 65B of the Information Technology Act and hence, it is inadmissible. At the most, the recordings can show the entry and exit from the flat. The 2nd respondent admitted that her residence is a flat complex. But no independent person or adjacent flat owners have stated anything about the petitioner. As per admission of the 2nd respondent, she voluntarily participated in the act of the 1st petitioner without showing any resistance or objection for the relationship. The 2nd respondent got married to another man and she is a lawyer and very much aware of the moral and legal contingencies and consequences. In view of the same, none of the ingredients of offence is made out against the petitioners. Hence, the complaint is a motivated one and lodged with an ulterior motive.

9. In support of his submissions, the learned counsel for the petitioners relied on the decision of the Hon'ble Apex Court in the case of "***Dhruvaram Murlidhar Sonar Versus State of Maharashtra reported in 2019 AIR (SC) 327***", wherein it is held that "*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. Even if the allegation made in the complaint are taken at their face value and accepted in their entirety, they did not make out a case". In this case, the 1st petitioner's marital status is very much known to the 2nd respondent. Despite the same, she consciously continued her relationship with the 1st petitioner.

10. The learned counsel for the petitioners further submitted that some of the online transactions more particularly from 01.01.2019 to 30.06.2020 was not done as projected by the 2nd respondent. Further, the payments dated 21.07.2020 and 30.07.2020 were deliberately made to create record that the relationship between the 1st petitioner and the 2nd respondent continued even after the 1st petitioner got selected as Judicial Magistrate. The huge amounts which are said to have paid by the 2nd respondent through cash and online are highly imaginary. The 2nd respondent even at the first instance admitted that when the 1st petitioner requested Rs.15,000/- as loan on 20.04.2015 from her, she was unable to give such amount due to financial status. While being so, it

is highly unbelievable that such huge amounts were paid regularly to the 1st petitioner as cash.

11.For the point of misconception, the learned counsel for the petitioners relied on the decision of the Hon'ble Apex Court in the case of "***Pramod Suryabhan Pawar Versus State of Maharashtra reported in 2019 AIR (SC) 4010***", wherein the Hon'ble Apex Court reiterated the principle that "*in the case of misconception under Section 90 of 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.*" On the admitted facts made by the 2nd respondent, it is seen that there is no misconception. The 2nd respondent consciously continued her relationship.

12.Further, placed reliance on the decision in the case of "***Maheshwar Tigga Versus State of Jharkhand in C.A.No.635 of 2020, dated 28.09.2020***" wherein the Hon'ble Apex Court following the earlier two decisions (***Dhruvaram Murlidhar Sonar*** and ***Pramod Suryabhan Pawar***), had held that "*where the relationship originated with love affair, developed over a*

period of time accompanied by physical relations, consensual in nature, but the marriage could not fructify because the parties belongs to different castes and communities, quashed the proceedings”. In this case, both the 2nd respondent and the 1st petitioner knew their marital status. Thus, the 2nd respondent's consent for the relationship with the 1st petitioner would not amount to misconception of false promise of marriage and the consequential offence of rape. Nowhere, it is seen that the 2nd petitioner was aware about the relationship of the 2nd respondent with her husband. Hence, the learned counsel for the petitioners prayed to quash the FIR against them.

13. The learned Government Advocate (Crl. Side) appearing on behalf of the 1st respondent filed counter affidavit wherein apart from reiterating the complaint of the 2nd respondent, he submitted that the 2nd respondent had not given consent for sexual intercourse with the 1st petitioner. It is the 1st petitioner, who made false promise that he is in love with her and will make arrangement for the 2nd respondent to get divorce from her husband. The 1st petitioner on the false representation induced the 2nd respondent to part with money and also exploited her physically. He further submitted that initially, a complaint was lodged through online on 10.08.2020. On 17.08.2020, the 2nd

respondent sent a representation to the higher authorities and thereafter, C.S.R.No.244 of 2020, dated 05.09.2020 was issued. In compliance to the procedure under the Judges Protection Act, 1985 and the guidelines laid down by the Hon'ble Apex Court in the case of “**Delhi Judicial Service Association Versus State of Gujarat & Others reported in (1991) 2 SCC 406**”, the Deputy Commissioner of Police, Crime Against Women and Children Wing, Chennai forwarded the complaint to the Registrar General, Madras High Court, vide proceedings in C.No.175/DC CWC/Camp/2020, dated 17.09.2020 and sought permission for initiating action. The 2nd respondent simultaneously filed a petition under Section 156(3) Cr.P.C., in C.M.P.No.1121 of 2020 before the learned Judicial Magistrate-cum-District Munsif, Sriperumbudur and sought direction to register the complaint. The learned Judicial Magistrate-cum-District Munsif, Sriperumbudur directed the 1st respondent Police to register the complaint if cognizable offence is made out and take action in accordance with law as laid down by the Hon'ble Apex Court in the case of “**Lalita Kumari Versus State of Uttar Pradesh reported in 2013 (4) MLJ CrI. 579**” followed by this Court in the case of “**Sugesan Transport Private Limited Versus The Assistant Commissioner, Adyar reported in 2016 (2) LW (CrI.) 499**” and directed to submit a report immediately.

14.The learned Government Advocate (CrI. Side) further submitted that the Deputy Commissioner of Police, Crime Against Women and Children Wing, Chennai again forwarded the complaint to the Registrar General, Madras High Court, vide proceedings in C.No.175-I/DC CWC/Camp/2020, dated 07.10.2020 and sought permission for initiating further action. Further, the learned Judicial Magistrate-cum-District Munsif, Sriperumbudur vide proceedings in D.No.1067 of 2020, dated 23.10.2020 issued directions to the 1st respondent Police to submit a report as called for within a period of 30 days. Once again, the Deputy Commissioner of Police, Crime Against Women and Children Wing, Chennai forwarded the complaint to the Registrar General, Madras High Court vide proceedings C.No.175-II/DC CWC/Camp/2020, dated 23.11.2020 and sought permission for initiating further action. Finally, the Registrar General, High Court, Madras vide R.O.C.No.946/2020/RDJ/B3, dated 01.03.2020 granted permission to proceed in terms of the order passed in C.M.P.No.1121 of 2020 making it clear that the investigation should be concluded expeditiously exercising a degree of circumspection. Thereafter, the 1st respondent Police registered a case in Crime No.07 of 2021 on 06.05.2021 for offence under Sections 376(2)(n),

417, 420 and 506(2) of IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002.

15.It is further submitted that the delay in lodging the FIR is not that the complaint dated 10.08.2020 did not make out an offence, it is only due to procedural wrangle. After getting permission from the Registrar General, High Court, Madras on 01.03.2021, the FIR came to be registered. The Hon'ble Apex Court in the case of "**Anurag Sani Versus State of Chattisgarh in Criminal Appeal No.629 of 2019 (Arising out of S.L.P (CrI) No.618/2019)**" had held that "*the consent given by the prosecutrix was on misconception of fact and therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 IPC*". In the present case, the 1st petitioner being the married person with another lady (2nd petitioner), suppressing the same from the 2nd respondent indulged in sexual relationship with a promise to marry her and also help her to get divorce from her husband T.N.Vishwanath. The learned counsel for the petitioners relied on the judgment of the Hon'ble Apex Court in the case of **Dr.Dhruvaram Murilidhar Sonar** (Cited Supra), is not proper and it is distinguishable from the facts of the present case. In that case, the Hon'ble Apex Court analysed the

evidence in the charge sheet, but in the present case, it is at the stage of FIR and the investigation is in progress. The Hon'ble Supreme Court in the case of ***“Uday Versus State of Karnataka reported in (2003) 4 SCC 46”***, had held that *“there is no strange of formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact.”*

16.The learned Government Advocate (Crl. Side) further submitted that from the averments in the complaint, it is *prima facie* proved that the false representation has been made by the 1st petitioner right from the initial stage. On believing such promise, the 2nd respondent had sexual relationship with him and also given money on several occasions. The Hon'ble Apex Court in the case of ***“Chitra Versus Ravikumar & Another reported in 2002 (4) CTC 683”***, has observed that *“if there are materials to show that at the time of sharing the bed, the accused did not have the intention to marry of sharing the bed, the accused did not have the intention to marry the victim and he made the false promise, then the offence under Section 417 of IPC is clearly made out”*. The 1st petitioner made false promise that he would remarry the 2nd respondent and would take care of her child and help her in getting divorce

from her husband, received money on several occasions. Hence, the act of the 1st petitioner would attract offence under Section 420 IPC. Since the petitioners threatened the 2nd respondent to kill her if she reported the incident to the Police or media, they committed offence under Section 506(ii) IPC.

17. In support of his arguments, the learned Government Advocate (CrI. Side) placed reliance on the decision of the Hon'ble Apex Court in the cases of *“Rashmi Kumar Versus Mahesh Kumar Bhada reported in 1997(2) SCC 397; State of Uttar Pradesh Versus O.P.Sharma reported in 1996 (7) SCC 705; State of Kerala and Ors. etc., Versus O.C.Kuttan & Ors. etc., reported in (1999) 2 SC 651; Satvinder Kaur Versus State (Government of N.C.T of Delhi) reported in (1999) 8 SCC 728”*, wherein a word of caution has been sounded and held that the power of quashing should be sparingly and cautiously exercised only when the Court is of the opinion that otherwise there will be gross miscarriage of justice. In this case, it is not so. Hence, he prayed for dismissal of the quash petition.

18. The learned counsel appearing on behalf of the 2nd respondent filed

Counter Affidavit, Additional Counter Affidavit and submitted that the 2nd respondent got married with one T.N.Vishwanath in the year 2009. Out of their wedlock, they were blessed with a son. Presently, her husband T.N.Vishwanath is working in South Africa and he has not visited her since 2015. The learned counsel further submitted that the 2nd respondent completed M.B.A in Bharathidasan University during the month of April 2009 and thereafter, pursued law. In the year 2015, the 2nd respondent enrolled as Advocate and she is practising law in Madras High Court and other Courts in and around Chennai. During the month of April 2015, the 2nd respondent developed acquaintance with the 1st petitioner through social media application 'Nimbuzz'. At that time, the 1st petitioner was preparing for Civil Judge Exam. The 2nd respondent and the 1st petitioner used to meet at public places and discuss legal matters. Due to which, a friendship was developed between them. The 2nd respondent informed her marital status to the 1st petitioner, on the other hand the 1st petitioner suppressed about his marriage with the 2nd petitioner. The 1st petitioner projected that he is living with his mother at Iyyappanthangal, Chennai. From 14.04.2015, the 2nd respondent started visiting the 1st petitioner's house on several occasions. On the basis of false representation that the 1st petitioner would marry her and further take care of

her son and take steps to get divorce from her husband T.N.Vishwanath, the 2nd respondent has given her consent for sexual intercourse. Thereafter, they were having physical relationship regularly. At the later point of time, the 2nd respondent realized that the 1st petitioner had no intention to marry her and it was made only to satisfy his sexual drive and lust. The 2nd respondent admitted that whenever the 1st petitioner wanted to satisfy his desire, he sexually exploited her under the pretext of marriage. The 1st petitioner at no point of time revealed that he already got married.

19.The learned counsel for the 2nd respondent further submitted that from the month of April 2015, she made several payments through online from her bank account and also by way of cash to the tune of Rs.10,50,000/- to the 1st petitioner. On 17.07.2020, the 1st petitioner had come to the 2nd respondent's house, stayed at night hours and left her house on 18.07.2020. During the night hours, the 1st petitioner had sexual intercourse with her. The CCTV footage in the apartment is the testimony that the 1st petitioner stayed in the 2nd respondent's house. Since her complaint earlier lodged was not acted upon and no action taken, the 2nd respondent filed a petition under Section 156(3) Cr.P.C., before the learned Judicial Magistrate-cum-District Munsif,

Sriperumbudur, who directed the 1st respondent Police to register a case. He further submitted that during the year 2019, the 1st petitioner was appointed as Judge. Thereafter, the 1st petitioner called the 2nd respondent on 07.08.2020 and informed her not to contact him hereafter. At that time, the 2nd petitioner spoke to the 2nd respondent and introduced herself as wife of the 1st petitioner and informed that they got married long back and they have a son and warned the 2nd respondent not to continue her affair with the 1st petitioner and further threatened the 2nd respondent that she would be done away if she further continues her relationship with the 1st petitioner.

20. The points raised by the petitioners are defence theory, which have to be decided only at the time of trial and not at the stage of investigation. The petitioners' contention that the present complaint is given on ulterior motive and malafide is without any materials. The 1st petitioner got introduced to the 2nd respondent through college batchmate is false. It is seen that the 2nd respondent had professional relationship with the 1st petitioner, due to which, professional charges were paid by the 2nd respondent to the 1st petitioner. Now, it is projected as though the 1st petitioner got loan from the 2nd respondent is not sustainable. Even after the 1st petitioner got appointment as Judicial

Officer in the year 2019, there are installments to show that the 1st petitioner was receiving money. The bank account statements are the testimony for the same. The contention of the petitioners that the sexual intercourse was consensual is denied as false. For the false promise of marriage, the 2nd respondent would not have given consent by herself. On the facts of the case, it clearly proves that the act of the 1st petitioner amounts to rape.

21.The learned counsel for the 2nd respondent further submitted that the 1st petitioner is a married man, which fact is known to the 2nd respondent is false. Earlier, the 1st petitioner was working in HDFC Bank as Legal Manager. In his employee profile, his marital status was shown as single. The 2nd respondent for the false promise could not have surrendered herself to the sexual desire of the 1st petitioner and given huge sums of money as loan. The 1st petitioner being a Judicial Officer, his character and moral should be of high standard.

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22.To substantiate his arguments, the learned counsel for the 2nd

respondent relied on the case of “**Ram Lal Yadav and Others Versus State of Uttar Pradesh and Others reported in 1989 Cr.L.J.1013**” wherein it is held that the power of the Police to investigate the cognizable offence is not to be interfered with by the Court. Further, placed reliance on the case of “**State of Punjab Versus Gurumit Singh reported in (1996) 2 SCC 384**” for the proposition that the sole testimony of the prosecutix is sufficient to Police to investigate the case. Finally, placed reliance on the decision of this Court in “**SMG.Ramachendran Versus The State through the Inspector of Police, Anti Land Grabbing Special Wing, Thanjavur in Cr.L.O.P(MD)No.1921 of 2016**”, wherein this Court had held that in a Quash Petition filed under Section 482 of Cr.P.C., this Court cannot go into the disputed question of facts, as the *mens rea* of the accused cannot be looked into at this stage. Assailing these points, he prayed for dismissal of the Quash Petition.

23.This Court considered the rival submissions and perused the materials available on record.

24.The Hon'ble Apex Court in the case of “**Dhruvaram Murlidhar Sonar Versus State of Maharashtra reported in 2019 AIR (SC) 327**”

elaborately held that the consensual physical relationship between the parties would not constitute an offence under Section 376 of IPC. This case has been consistently followed in several cases. The Hon'ble Apex Court in the case of ***“Pramod Suryabhan Pawar Versus the State of Maharashtra reported in 2019 AIR (SC) 4010”*** held that *“there is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court must examine 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. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance.”*

25. In the case of ***“Maheshwar Tigga Versus the State of Jharkhand in Criminal Appeal No.635 of 2020”***, the Hon'ble Apex Court following ***“Dhruvaram Murlidhar Sonar”*** case (Cited Supra) held that *“where the relationship originated in a love affair, developed over a period of time accompanied by physical relations, consensual in nature, but the marriage*

could not fructify because the parties belonged to different castes and communities, quashed the proceedings.”

26.In sum and substance, the Hon'ble Apex Court viewed that in the case of misconception of facts, difference between rape and consensual sex has to be seen on the facts of each case. When the complaint sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto. The Hon'ble Apex Court had held that though Section 90 IPC does not define 'consent', but describes what is not 'consent'. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 IPC requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on careful study of all relevant circumstances.

27.It is not in dispute that the 2nd respondent, who is aged about 36 years is a major, matured, well educated and qualified Advocate. The 2nd respondent's marriage with one T.N.Vishwanath is not disputed and their marriage is in subsistence and they have a male child of ten years. The 2nd respondent got enrolled as Advocate in the year 2015 and practicing in Madras High Court and other Courts in and around Chennai. She developed relationship with the 1st petitioner, who was a practicing Advocate then. It is admitted that both met regularly in public places apart from visiting in their houses. Their acquaintance started on 5th April 2015 and blossomed into relationship and the same continued till the month of July 2020. All these years, the 2nd respondent had no quarrel, shown any resistance, protested or raised any objection for the relationship with the 1st petitioner. Now, the relationship got strained and the 2nd respondent made allegations and gave complaint against the 1st petitioner, which creates great suspicion. Further, the veracity of the complaint is highly doubtful. No doubt, this Court has to be cautious in quashing the FIR more so when the case is at the stage of investigation. Hence, on careful perusal of the complaint and the materials as well the Case Diary, this Court finds the foundational facts of the case is unbelievable for the following reasons:-

(i)The 2nd respondent/defacto complainant is a well educated woman of 36 years and she is an Advocate.

(ii)She got married to one T.N.Viswanath in the year 2009 and their marriage between them is in subsistence at the time of her relationship with the 1st petitioner.

(iii)It is the admitted case that the 2nd respondent came in contact with the 1st petitioner from 5th April 2015. On 14th April 2015, the 2nd respondent visited the 1st petitioner's home. When the 1st petitioner disclosed his love and his desire to have sexual relationship, the 2nd respondent did not show any protest, objection or refusal and she visited the 1st petitioner on 15th April 2015 at his residence and had physical relationship with the 1st petitioner. Thereafter, the relationship including physical relationship between them continued according to the 2nd respondent till June 2019 nearly for five years and thereafter on 17th July 2020.

(iv)The 2nd respondent admitted her physical relationship with the 1st petitioner during subsistence of her marriage with her husband

T.N.Vishwanath. The explanation given by her that she gave herself to the 1st petitioner believing that the 1st petitioner is unmarried, bachelor and he will marry her. On these admission, the relationship of the 1st petitioner with the 2nd respondent could not be termed as rape and it will not come under the definition of Section 375 IPC. Section 375 of IPC defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her 'will'" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if based only on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

(v)The 2nd respondent clearly in unequivocal terms by her acts and own admission willingly participated in sexual act with the 1st petitioner not once,

but on several occasion over a period more than five years.

28.The 2nd respondent's specific contention that she would not have given consent to the 1st petitioner to have sexual intercourse, but for the false promise made to marry her cannot be countenanced for the simple reason that the 2nd respondent knowing well that her marriage with N.T.Vishwanath is in subsistence. Despite the same, she had sexual relationship with the 1st petitioner not on one occasion, but on several occasions over a period of five years. Hence, it cannot be termed as misconception and rape.

29.In this case, it is seen that the 2nd respondent had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it as a secret as long as she could. The 2nd respondent did not resist the overtures of the 1st petitioner 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 her marital status and continued to have sexual relationship on several occasions. In this case, the sexual relationship between them continued

for five years which cannot be termed as rape. The facts of the case and the acknowledgment of the 2nd respondent about the physical relationship between them would not constitute the offence under Section 376 IPC. It would be beneficial to extract the relevant portion of ***Dhruvaram Murlidhar Sonar*** (cited supra) case:-

“21. 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 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 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.”

30. In this case, both the prosecutrix and the 1st petitioner are in the same profession as Advocates. The possibility of professional relationship is very much there. Admittedly, both were married and the 2nd respondent's marriage was in subsistence and she intended to seek divorce from her husband N.T.Vishwanath and thereafter, to marry the 1st petitioner. Hence, the 2nd respondent agreed for physical relationship and continued the same from the

year 2015 to 2019. The 2nd respondent needed companionship of the 1st petitioner and they were living together for a considerable period. It is not the case of the 2nd respondent that the 2nd respondent was forcibly raped. Thus, the 2nd respondent was consciously with active mind participated in the act. Further, it is not the case of 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 any misconception created in her mind. It is not in dispute that the 2nd respondent had sufficient intelligence to understand the significance and moral quality of the act she was consenting and show no objection. Thus, there is a clear distinction between rape and consensual sex. Admittedly, in this case, some amount was transferred by her to the 1st petitioner through online and some amount handed over in cash over a period of time on 18 occasions as borrowings, which cannot now be termed as offence of cheating. There is nothing to show that during the initial period of relationship, there was any false representation and the 2nd respondent deceived. The specific complaint is that the 1st petitioner failed to continue his relationship and the 2nd petitioner is the cause for it.

31.The only averments against the 2nd petitioner is that on 07.08.2020

through line application, heard her voice of threat, which is not followed with any subsequent act. By no stretch of imagination, it can be said that the offence of criminal intimidation made.

32.In the case of “*State of Haryana and others Versus Bhajan Lal and others reported in 1992 Supp (1) SCC 335*”, the Hon'ble Apex Court enumerated seven categories of cases wherein the power can be exercised under Article 226 and inherent power under Section 482 Cr.P.C and the same is extracted as follows:-

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

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

(3) Where the uncontroverted allegations made in the FIR

or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

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

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

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

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

33.A three judge Bench of the Hon'ble Apex Court in the case of “**State**

of Karnataka Versus L.Muniswamy and others reported in (1977) 2 SCC 699” had held as follows:-

“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:

“If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

This section is contained in Chapter 18 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:

“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 other wise to secure the ends of justice.”

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 realisation 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.”

34.A Three Judge Bench of the Hon'ble Apex Court in the case of “***State of Karnataka Versus M.Devendrappa and another reported in (2002) 3 SCC 89***” had held as follows:-

“6.Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only

*saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests*

specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.”

सत्यमेव जयते

35.Now, this Court in the light of the ratio laid down by the Hon'ble Apex Court and on existing facts of this case as discussed above in detail, Court holds that the acknowledged consensual physical relationship between the parties would not constitute an offence of rape under Section 376 IPC. Thus, allowing to continue the investigation in Crime No.07 of 2021 on the file

of the 1st respondent Police would amount to abuse of process of Court. Hence, the FIR registered against the petitioners is liable to be quashed and, is hereby quashed.

36. Accordingly, this Criminal Original Petition is allowed. Consequently, the connected Criminal Miscellaneous Petitions are closed.

20.09.2021

Index : Yes/No
Internet : Yes/No

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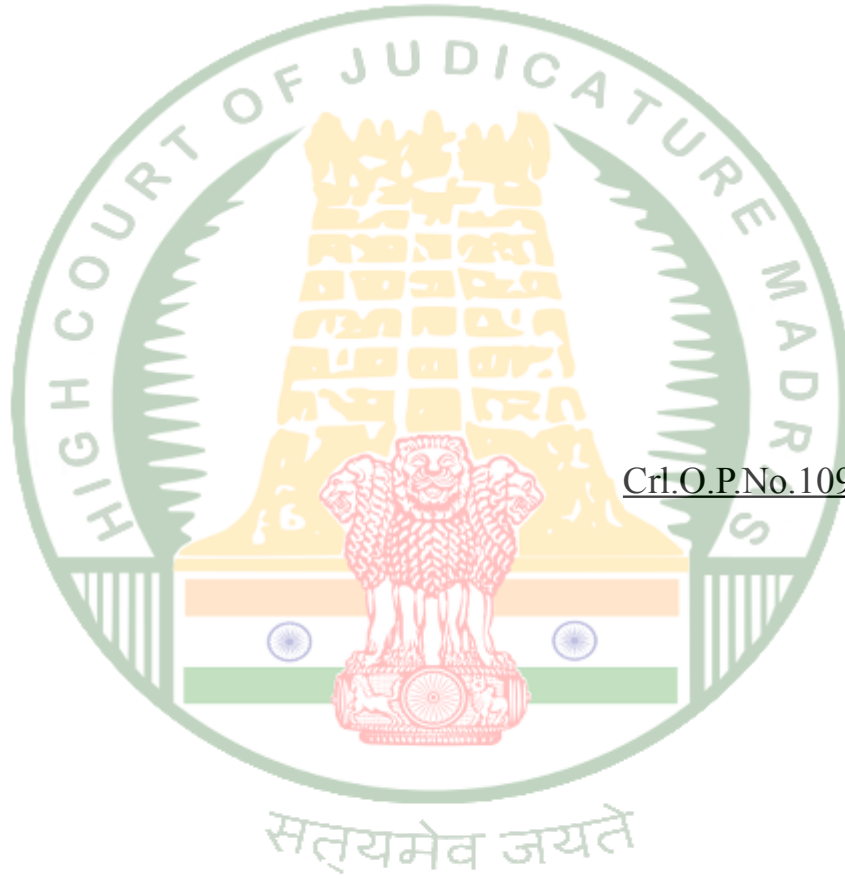
1. The Inspector of Police,
W-30 All Women Police Station,
Poonamallee, Chennai-600 020.

2. The Public Prosecutor,
High Court, Madras.

WEB COPY

M.NIRMAL KUMAR, J.

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Crl.O.P.No.10901 of 2021

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