

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO.1734 OF 2019**

Shyamsundar s/o Haribhau Wagh  
Age: 50 years, Occu.: Advocate,  
R/o. Samrat Ashok Nagar  
Laxmi Colony, Chhawani, Lane No.2,  
Aurangabad, Tq. & Dist.Aurangabad. ..Petitioner

VERSUS

1. The State of Maharashtra,  
Through Police Inspector/Investigation Officer,  
Khultabad Police Station, Khultabad,  
Tq. & Dist.Aurangabad.
2. Sau. Anita w.o. Raju Kharat  
Age: 28 years, Occu.: Household,  
At present Graves Company Road,  
Ambedkar Nagar, Lane No.15,  
CIDCO N-7, Aurangabad.  
Tq. & Dist.Aurangabad. ..Respondents

Advocate for Petitioner : Shri M.B. Sandanshiv  
APP for Respondent No.1-State : Shri.S.D.Ghayal  
Advocate for Respondent No.2 : Smt.Satyabhama R. Awad

**CORAM : T.V.NALAWADE &  
M.G.SEWLIKAR, JJ.**

**DATE: 2<sup>nd</sup> December, 2020**

**JUDGMENT:- (Per: M.G.Sewlikar, J.)**

1. By this petition under Articles 226 and 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of the First Information Report (FIR) No.570 of 2019 registered with Cidco Police Station, Aurangabad, under charge-sheet after investigation.

2. The petitioner is an Advocate practicing at Aurangabad. The informant (respondent No.2 herein) lodged FIR on 25-09-2019, alleging therein that she had engaged the petitioner as her Advocate for instituting a suit for declaration of civil death of her husband, who left the house on 27-07-2011 and did not return since then. She has also filed a civil suit against her parents-in-law at Buldana and has also filed application under the Protection of Women from Domestic Violence Act, 2005. The entire litigation is looked after by the petitioner. In the month of February 2017, the petitioner started texting 'good morning' and 'good night' messages to the respondent No.2. On the Valentine Day, he proposed her by making video call. The respondent no.2 - informant did not respond to his advances. The petitioner is a married man and the respondent No.2 is also a married woman having one son. The petitioner won her trust representing that he is not happy with his wife and that he was deeply in love with her and would marry her. In the month of March, 2017, the petitioner called respondent No.2 - informant under pretext that the case was listed in the District Court on that day. The petitioner drove her to Mhaismal in his Car bearing registration No.MH-20 DV-0094 and hired a room in Sagar Hotel. He established physical relations with her. He had sexual intercourse with respondent No.2 in Panchwad Pride, Nashik. He also had

sexual intercourse with respondent No.2 while coming back from Mumbai to Aurangabad after attending the case there. When respondent No.2 insisted on the petitioner to marry her, the petitioner resiled from his promise. Thus, respondent No.2 has alleged that the petitioner obtained her consent on false promise of marriage. On these allegations, an FIR was lodged on 25-09-2019, on the basis of which Crime No.570 of 2019 came to be registered at CIDCO Police Station, Aurangabad, for the offence punishable under Sections 323, 376(2)(n), 504 and 506 of the Indian Penal Code.

3. Heard Shri M.B.Sandanshiv, learned counsel for the petitioner and Shri S.D.Ghayal, learned APP for the respondent No.1-State.

4. Shri Sandanshiv, learned counsel for the petitioner argued that the petitioner could not have married respondent No.2 as both the petitioner and respondent No.2 are married. In terms of Section 5 of the Hindu Marriage Act, no person can marry during the life time of his spouse. The spouses of both the petitioner and respondent No.2 are alive. He argued that the physical relations between respondent No.2 and the petitioner were consensual. Respondent No.2 was aware of the marital status of

the petitioner. Therefore, it cannot be said that the consent given by the respondent No.2 was vitiated. He placed reliance on the following case laws:-

- 1) *Deepak Gulati Vs. State of Haryana [(2013) 7 Supreme Court Cases 675].*
- 2) *Uday Vs. State of Karnataka [(2003) 4 Supreme Court Cases 46].*
- 3) *Pramod Suryabhan Pawar Vs. State of Maharashtra and Another [2019 SCC OnLine SC 1073.*

5. In the case of *Deepak Gulati* (supra), the Hon'ble Supreme Court observed thus:

*“There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches to a conclusion that the intention of*

*the accused was malafide, and that he had clandestine motives.”*

6. In the case of *Pramod Suryabhan Pawar* (supra), after considering the case of *Uday* and *Deepak Gulati* (supra), the Hon'ble Supreme Court summarized the legal position, which reads thus:

*“22. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.”*

7. It is pertinent to note that the respondent No.2 - informant has filed a suit for declaration of civil death of her husband. She has also filed applications under the Protection of Women from Domestic Violence Act, 2005, against her parents-in-law and has also filed some litigation at Buldana. The respondent No.2 - informant has engaged the petitioner as her Advocate for

conducting this litigation. Thus, there is a relationship of lawyer and a client between the petitioner and respondent No.2, which is fiduciary relationship i.e. relationship of active trust and confidence. It is not in dispute that respondent No.2 was aware of the marital status of the petitioner.

8. In the case of ***Himalayan Cooperative Group Housing Society Vs. Balwan Singh [AIR 2015 SC 2867]*** it has been held that 'one of the most basic principles of the lawyer-client relationships is that lawyers owe fiduciary duties to their clients'. In paragraph Nos.24 and 25 of this Judgment, the Hon'ble Supreme Court has observed about the duties and responsibilities of an Advocate, which read thus:

*"24. The Bar Council of India Rules, 1975 (for short, "the BCI Rules"), in Part VI, Chapter II provide for the 'Standards of Professional Conduct and Etiquette' to be observed by all the advocates under the Advocates Act, 1972 (for short, "the Act, 1972"). In the preamble to Chapter II, the BCI Rules provide as follows:*

*An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client and in his*

*conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned (Emphasis supplied)*

25. *The Preamble makes it imperative that an advocate has to conduct himself and his duties in an extremely responsible manner. They must bear in mind that what may be appropriate and lawful for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may be improper for an advocate in his professional capacity.”*

9. Thus, the relationship between lawyer and the client is fiduciary relationship. On the backdrop of relationship between the Advocate and his client being fiduciary relationship, whether consent for sexual intercourse is material. Section 376-C of the Indian Penal Code deals with this contingency.

**“Section 376-C. Sexual intercourse by a person in authority:** *Whoever, being -*

*(a) in a position of authority or in a fiduciary relationship; or*

*(b) a public servant; or*

*(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women’s or children’s institution; or*

*(d) on the management of a hospital or being on the staff of a hospital,*

*abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual*

*intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.”*

From this Section, it is evident that whoever being in a fiduciary relationship abuses such position and has sexual intercourse with a woman with whom he has fiduciary relationship, such an act amounts to rape. In such cases consent of woman is immaterial.

10. Relationship of lawyer with his client is fiduciary relationship i.e. relationship of active trust and confidence. The petitioner abused this position and had physical relations with his client. An Advocate is in a position of superiority or dominance. The hapless client like the one in the case at hand, whose husband's whereabouts are not known, can have reasonable apprehension that her denial for physical relations with the petitioner would adversely impact on her legal representations. It is not expected of members of this noble profession to abuse their position of active trust and confidence and indulge in such immoral acts. The petitioner not only abused his position but also misrepresented the respondent No.2 that he was not happy with his wife. Having regard to this, the consent is immaterial when a person who is having dominance over the other abuses his position and establishes physical relations with the woman over whom he has dominance.

11. In this view of the matter, there is *prima-facie* evidence to show that the petitioner committed rape on his client i.e. respondent No.2. The consent also gets vitiated as a female client, whose condition has become precarious as her husband's whereabouts are not known, can have reasonable fear that there would not be adequate representation from the side of the Advocate, if she did not respond to his advances. From this count also, the petitioner is not entitled to any relief. The case of the prosecution, therefore, comes within the purview of Section 376(2)(k) and Section 376-C of the Indian Penal Code. The petition is therefore, devoid of any substance. Hence, the following order:

**ORDER**

- I) The petition is dismissed.
- II) The observations in this Judgment are made for the disposal of this petition only. Trial Court shall not get influenced by these observations and can come to an independent conclusion during trial.

( **M.G.SEWLIKAR** )  
**JUDGE**

SPT

( **T.V.NALAWADE** )  
**JUDGE**