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“SEXUAL ACT WITH WIFE IS NOT RAPE, EVEN IF FORCED”- A PLEA FOR CHANGE

AUTHORED BY - SHREYA GUPTA

Abstract

The Indian legal system's treatment of marital rape has long been a source of contention and criticism. The idea that "sexual act with wife is not rape, even if forced" describes the legal position that is now in place regarding this matter. This position is firmly anchored in social customs and conventional views of marriage, where the idea of spousal immunity—which states that a spouse cannot be charged with raping their partner—predominates. This is deeply ingrained in Section 375 of the Indian Penal Code, which defines rape but excludes non-consensual sexual relations between a husband and wife above a particular age. It is sometimes rationalized under the pretense of protecting marital sanctity and privacy. But a law like this ignores women's core human rights and keeps gender inequality alive. It fosters the notion that marriage corresponds to an irreversible agreement to sexual activity, regardless of the woman's willingness, and denies women sovereignty over their own bodies.

This paper discusses the stance of the Indian legislation governing Marital rape and analysis the impact of such judgements on the society.

Keywords- Marital Rape, Consent, Marriage

Introduction

Leading light judgement pronounced by the High Court of Chhattisgarh has raised many questions in the minds of people regarding their rights, morality and justice. On August 23rd, 2021, Hon'ble Justice Shri N.K. Chandravanshi delivered a judgement saying, sexual intercourse between husband and wife is not rape, even if forced. The landmark judgement is delivered in *Dilip Pandey & Ors v. State of Chhattisgarh*¹, where a 37-year-old was discharged against the rape charges set by his legally wedded wife against him. The High court slammed the charge under Section 375 of Indian Penal Code, 1860 saying that the said code does not mention the concept of Marital Rape and no such provisions are provided by the penal code against the said offence, hence declaring the offence, not punishable. It is a controversial judgement where the loop holes of law have been attacked and determined, but prima facie, for

¹ CR.R. No. 177 of 2021

a class of people, it's unjustified and against morality. This article will throw some light upon the provisions of IPC, 1860 and self-opinions regarding the present judgement.

Provisions under IPC

Section 375 of the Indian Penal Code, 1860² covers the definition of rape as-Rape- A man is said to commit "rape" if he-

- a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) Inserts to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions-

First- Against her will

Secondly- Without her consent

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by the reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

² Substituted by Act 13 of 2013

Explanation 1- For the purpose of this section, “vagina” shall also include *labia majora*.

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

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

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 376 provides with the punishment of rape as-

- i. Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

The provisions of law highlight the word “consent”. Consent is the unequivocal voluntary agreement to take part in the sexual activity and when the other person is unable to communicate her consent, that amounts to the offence of rape. It is necessary to communicate the consent irrespective of the age other than mentioned specifically. Sexual act with a woman, with or without her consent also constitutes rape provided she is under eighteen years of age. In 2017, Supreme Court in *Independent Thought v. Union of India and Anr.*³ altered the exception 2 as provided in Section 375 as sexual act with a woman below 18 years of age will constitute rape irrespective of marriage. Earlier the age was 15 years as specified which after this judgement, was changed to 18 years. The amendment was done to prevent child sexual abuses and child marriages up to a certain age that is 18, where a woman is completely capable of understanding the seriousness of the act, with a tag of an adult. It is obvious that the

³ Writ Petition (Civil) no. 382 of 2013, decided on October 11, 2017

violations of these provisions will end up punishing the accused yet the terminology such as “Marital Rape” lacks its existence in the books of law.

What is the concept of Marital Rape?

Rape is an offence but marital rape is not an offence in India. Until 1970's, there were as such no laws determining the punishment for forceful sexual intercourse when the rapist and the victim are husband and wife respectively. In 1976, Nebraska stood the first state to abolish marital rape exception law. Poland, in 1932 was the first to have explicit laws on marital rape making it a criminal offence. In India, marital rape is an offence until the age of 18 years and after that no specific laws determine whether this concept is punishable or not. “Marital rape” if simply defined, means an act of sexual intercourse between husband and wife, where consent of the wife matters the least, still is unpunishable because of the legal status of marriage between the couple. The offence is not expressly declared to be punishable in India and hence stands as a controversial topic amongst different states.

After 2017 Supreme Court judgement, Gujarat High Court held that “a law that does not give married and unmarried women, equal protection, paves way that leads to the marital rape”⁴. While in July 2019, Delhi High Court dismissed a petition in which it was requested to the centre to declare the marital rape as a ground for divorce⁵. The Kerala High Court, this August, pronounced a judgement where it declared the marital rape as a good ground to claim divorce and said that treating wife's body as something owing to her husband and committing sexual act against her will is nothing but marital rape⁶. On the contrary the latest judgement has been given by the Chhattisgarh High Court where it declared the act of marital rape NOT to be an offence because of the absence of any provisions regarding the same in the Indian Penal Code.

There are about 32 similar countries globally who have not yet criminalised the marital rape till date, while Australia was the first common law country to pass reforms in 1976 declaring rape in marriage as a criminal offence. In 1980's, many common law countries including South Africa, Ireland, Canada, the United States, Malaysia, Ghana etc have abolished the marital rape

⁴ News article, available at <https://www.google.com/amp/s/www.thehindu.com/news/national/courts-continue-to-differ-in-views-on-marital-rape/article35909828.ece/amp/>. (Updated on 14th August 2021)

⁵ News article, available at <https://www.google.com/amp/s/www.hindustantimes.com/india-news/high-court-order-sexual-act-with-wife-is-not-rape-even-if-forced-101630001543023-amp.html>. (Updated on August 27, 2021)

⁶ News article, available at <https://www.google.com/amp/s/www.indiatoday.in/amp/india/story/kerala-high-court-marital-rape-sufficient-ground-to-claim-divorce-1837841-2021-08-06>. (Updated on August 6, 2021)

immunity. In 2002, Nepal got rid of this offence after its Supreme Court held that it went against the right of equal protection. According to the UN 2011 Women's report until 2017, out of 179 countries, 52 have amended their legislation with respect to marital rape, explicitly declaring it as an offence⁷. Currently, marital rape has been criminalised in 150 countries as of 2019 where unfortunately India is not amongst the same. India, being a federal nation has given the rights and authorities to the states to decide the legal matters within its boundaries. As mentioned above, different states have different views on marital rape, so let's have some emphasis on the recent judgement of the Chhattisgarh High Court.

Case Study

Dilip Pandey & Ors v. State of Chhattisgarh (CR.R. No. 177 of 2021)

The revision petition was filed by the three applicants against the order of the trial court dated 22-01-2021. The applicants were Dilip Pandey (37 years, Applicant No.1), Dinesh Kumar (41 years and brother of Applicant No. 1) and Smt Varsha Pandey (37 years and sister-in-law of Applicant No.1) against the State of Chhattisgarh through S.H.O Police Station Bemetara, District Bemetara CG. The petition is filed against the order of the trial court which framed charges under section 498-A, 376, 377 and 34 of the Indian Penal Code, against the applicant No. 1 and under section 498-A, IPC against the applicant No. 2 and 3.

Brief facts of the case are that the marriage of the complainant was solemnised with the applicant No. 1 on 08-06-2017. Soon after the marriage, the complainant was harassed by the applicants in the demand for dowry and money. She was abused and beaten by them. In addition to this, applicant No. 1 (husband) try to made unnatural physical relations with her by inserting finger and radish in her vagina, despite her protest for the same. After crossing the heights of tolerance, she filed a complaint against her in-laws at Bemetara Police Station. After investigation, a charge sheet was formed against the applicants regarding the above- mentioned offences and the matter went to the trial court. After judicial determination, the court framed charges against the applicants, mentioned in the charge sheet. Hence the applicants filed a revision petition in the High Court of Chhattisgarh.

⁷ News article, available at <https://www.google.com/amp/s/indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/lite/>. (Updated on August 31, 2017)

The argument took place in the court of law where the counsel for the petitioner and the counsel for the respondent produce their evidences and witnesses. The Counsel for the applicants began with the fact that the applicant No. 1 and the complainant were legally married couple and in India, the marital status immunises itself from any provisions mentioned under section 375 and 376 of the IPC, unless the female is under 18. Marital Rape is not an explicit offence as of yet after the female attains the age of 18 years and in the present case, the complainant is a fully fledged adult. Therefore, it does not fall within the purview of Exception 2 of Section 375 IPC and sexual intercourse with her by the applicant No. 1 would not constitute an offence of rape, even if it was by force or against her wish. Hence the Hon'ble Court declared the charge under section 376 of the IPC against the applicant No.1 as erroneous and illegal.

With respect to the charge of section 498-A, the reports show that after few days of marriage, the complainant was subjected to cruelty by her in-laws on demand of dowry, money and other articles. Father and mother of the complainant along with the neighbouring witnesses in their police statement also supported this fact. Therefore, the Hon'ble court confirms that the charge against the applicant with regards to section 498-A is valid.

Applicant No. 1 was also charged with the offence of unnatural sex covered in section 377 of the IPC. While determining the facts, the court referred to Gauhati High Court judgement on *Momina Begum v. Union of India and Ors.*⁸ that as a matter of fact, penetration of any object by the offender into the sex organ with an intention to derive sexual pleasure is sufficient to constitute the sexual connection against the order of nature necessary to contribute the offence under Section 377 of the IPC.

Section 377 of the Indian Penal Code, 1860 defines-

Unnatural Offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

⁸ Cr. Petition No. 98 of 2012

In the instant case, the complainant reported that her husband repeatedly, without her consent, made unnatural physical relation and apart from inserting fingers and radish into her private parts, did other things about which she was shameful to express openly. Inserting any object in the sex organ of the victim and derive sexual pleasure constitutes carnal intercourse against the order of nature and such act would attract the ingredients of the offence under Section 377. Hence the Hon'ble court sustained the charge of Section 377, IPC on Applicant No.1 and declared it as valid.

Conclusively, the applicant No.1 was discharged from Section 376 of the IPC while all the charges were sustained by the High Court. The judgement was delivered by Hon'ble Justice N.K. Chandravanshi on 23rd August, 2021.

Conclusion

Judiciary, the third organ of our constitution, is considered to be the home of justice where justice is done with the right and the wrong is punished. It is the legislature who designs a law as per the need of citizens and it is the judiciary who implements such law. In short, it safeguards the provisions of law and ensures that the society works within its ambit. But the question is that how law is interpreted. Law is dynamic and prospective in nature. It changes as per the requirements although amending a law needs numerous suggestions and is not as easy as we see.

When we say that law is everchanging, it means that it changes as per our needs but in many cases, it lacks to meet our expectations and Marital Rape is one such drawback. Till date, India did not recognise marital rape as an offence. All we have are the rape provisions up-to eighteen years of age and rest is blurred or hidden which we can say are the loop holes of law. Again, there is a war between law and morality. Prima facie, marital rape is ethically and morally wrong and should be punishable yet our law is silent on it which means that it is not yet considered as an offence and what is not an offence is unpunishable in the eyes of law. The law-makers in the initial stages have drafted the Indian Penal Code with limited provisions where the provisions of rape have been amended after the heinous crime of 2012 which was a dire requirement. Similarly, marital rape has taken a new place as an offence in the minds of people which was not initially pictured but now there is a requirement to amend the laws when it comes to the offence of rape after marriage.

The new era brought many changes along. A woman is given an equal status as that of men and unlike earlier times, she is not going to tolerate the harassment instead she is approaching the required authorities to seek justice. Unfortunately, in the case of marital rape, the justice and the lawful security is only available to the woman aged below eighteen as the law fails to recognise it as an offence after the mentioned age.

The law says, sexual act by a man with his own wife, wife not being under age of eighteen years is not rape. It means that the wife above the age of eighteen years has no right to give her consent for the sexual act due to the fact that the rapist is her lawful husband. The statement itself is against Article 14 of the Indian Constitution, where the consent of one person matter and consent of the other person does not matter, both being the person of same class and status.

A wife is immune from a forceful sexual act to a certain age and after attaining that age, her rights are no longer valid which is completely against the law and morality.

In 2013, a report was submitted by the Justice JS Verma Committee, which was set up after the barbaric incidence of 2012 Delhi gang rape. It recommended the removal of the marital rape immunity from the Indian Penal Code but the statute is yet to be amended. Where on one hand, Kerala High Court declared marital rape as a ground for divorce, on the other hand Chhattisgarh High Court discharged a person committing marital rape by saying that marital rape is yet to be declared as an offence in the statute.

Many maintain that because women have little or no legal remedy if they are sexually abused by their spouses, they are left susceptible to abuse within the marriage. Furthermore, it keeps married rapists in a culture of impunity, further isolating victims and sustaining abusive patterns.

Legislators and campaigners have worked to change the legislation in India to make marital rape a crime, in line with international human rights norms and acknowledging the significance of consent in a marriage. But despite strong resistance entrenched in deeply ingrained cultural attitudes and patriarchal traditions, progress has been gradual.

Summing up, I would like to say that marital rape is a serious issue our country is facing and is no longer an issue to be taken lightly. The law needs some serious amendments in benefit of women and must criminalise the act of marital rape.

