NON-CONSENSUAL SEX WITH A DIVORCED WIFE: A CRITIQUE ON *RAVINDER KAUR* V. *ANIL KUMAR*

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I. Introduction

> Divorce your wife and still you can enjoy the benefits of marital exemption! Be hopeful and go on having sex with her, anyhow! God is graceful, one or the other day the decree of divorce can be set aside; your marriage can be restored; and you may get the benefits of marital exemption, retrospectively!

The crucial issue in the case of *Ravinder Kaur* v. *Anil Kumar*[1] was: What is the legal status of a sexual intercourse fraudulently obtained by a man with his divorced wife, if later on the divorce decree is set aside? The court ruled: if the divorce decree is set aside the marriage restores as if it never ceased, therefore, the intercourse is legal even if it is performed before setting aside of the divorce decree. The present paper is an attempt to analyze the Supreme Court's decision in the light of the fundamental principles of the criminal jurisprudence as well as sections 375[2] and sections 493[3] of the Indian Penal Code, 1860 (hereinafter IPC).

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[1] (2015) 8 SCC 286
[2] S. 375, IPC defines Rape.
[3] S. 493, IPC prohibits and punishes a man for obtaining cohabitation and/or sexual intercourse by deceit.

This paper concludes that, the Supreme Court's decision in this case ignored the established principle of criminal jurisprudence, that, a criminal liability/responsibility of a person is determined by his/her acts. A person is liable for the results of his/her conduct; victim's "subsequent" conduct does not exonerate the accused from his liability. And if an act is an offence at a particular point of time, subsequent events/happening cannot convert the criminal act into an innocent act. This paper also concludes that the court failed to determine the exact scope of sections 375 and sections 493 IPC.

II. Facts of the case

The facts of the case in brief are that one Anil Kumar (the husband) preferred a petition under section 13 of the Hindu Marriage Act, 1955, seeking divorce from Ravinder Kaur (the wife). Proceedings were conducted in her absence and an *ex parte* decree of divorce was granted to him on January 08, 1994. But the wife was ignorant of the fact that an *ex parte* decree of divorce was granted to him and that the matrimonial relations between them had come to an end. Taking undue advantage of her ignorance, he continued conjugal relationship with her (by concealing the fact that their marriage was dissolved). The wife cohabited and had sexual intercourse with him under the belief that their marriage is subsisting. About five-and-half months thereafter he married another woman (Sunita Rani) on June 23, 1994 (between this period Ravinder Kaur and Anil Kumar stayed together and had sexual intercourse). On the date of this marriage Ravinder Kaur became aware of the *ex parte* divorce decree. She then immediately preferred an application for setting aside the said *ex parte* divorce decree. Her application was allowed by the district court on February 02, 1996 and as a consequence the matrimonial ties between them came to be restored, as if the marital relationship had never ceased.

On the facts stated above, she preferred a complaint against Anil Kumar under sections 376[4] IPC before Judicial Magistrate First Class, contending that the "sexual intercourse after the said *ex parte* divorce decree amounts to rape". But the court discharged him on the ground that the said *ex parte* divorce decree was set aside, the matrimonial ties between them came to be restored and as a result sexual intercourse by him with his wife did not amount to rape. The order of discharge was challenged in the high court, but the high court affirmed the discharge order. She then approached to the Supreme Court, but the Supreme Court declined to interfere.

[4] S. 376, IPC prescribes punishment for rape which is defined under S.375, IPC.

On the same factual premise, she then filed a second complaint against Anil Kumar under sections 493, 494[5], 495[6], 420[7], 506[8] read with 120-B[9] of the IPC. The Judicial Magistrate First Class did not entertain her complaint and dismissed it. She then filed a revision petition in the session's court. The court dismissed her revision petition. She then approached the High court, but the High court also dismissed her petition. The subject-matter of the case before the Supreme Court was the order of the high court. During the course of hearing in the Supreme Court, the council appearing on behalf of Ravinder Kaur pressed sections 493 and sections 494 of IPC only. The Supreme Court, therefore, examined the facts in the light of those sections only, along with a reference of section 376 of IPC under which the accused was previously discharged.

III. Decision of the Court

On the facts stated above, it was held that:

- Since the divorce decree is set aside, their marriage is restored as if it never ceased, therefore, his having sex with her comes within the benefits of marital exemption clause in section 375 IPC, and therefore, his act does not amount to rape.
- Since the marriage is restored, they become lawfully wedded husband and wife, and therefore, the question of "deceit of lawful marriage" does not arise at all. Hence, he has not committed an offence under section 493 IPC also.

The Supreme Court decided the issue as follows:[10]

> "We are of the considered view, that the setting aside of the *ex parte* decree of divorce dated January 08, 1994 (on February 19, 1996), it cannot be accepted that there was any break in the matrimonial relationship between the parties. Even the complaint filed by the appellant under section 376, IPC was not entertained (and the respondent was discharged), because it came to be concluded that the matrimonial ties between the appellant and the respondent were restored with the setting aside of the *ex parte* decree of divorce, as if the matrimonial relationship had never ceased. In sum and substance therefore, consequent upon the passing of

[5] S. 494, IPC prohibits and prescribes punishment for bigamy.
[6] S. 495, IPC prescribes enhanced punishment for bigamous marriage, if the fact of previous marriage is concealed from the person with whom subsequent marriage is contracted.
[7] S. 420, IPC prescribes punishment for cheating and dishonestly inducing delivery of property.
[8] S. 506, IPC prescribes punishment for criminal intimidation which is defined under S.503, IPC.
[9] S. 120-B, IPC prescribes punishment for criminal conspiracy which is defined under S.120-A, IPC.
[10] *Supra* note 1 at para 9.

> the order dated February 19, 1996 (whereby the Additional District Judge, Chandigarh, set aside the *ex parte* decree dated January 08, 1994) the matrimonial ties between the appellant and the respondent, will be deemed to have subsisted during the entire period under reference (January 08, 1994 to June 23, 1994). In fact, the accusation of the appellant, on the aforesaid premise, in the first complaint filed by the appellant against the respondent (under section 376, IPC) was not entertained, just because of the above inference. For exactly the same reason, we are satisfied that the charge against the respondent is not made out, under Section 493, IPC because the respondent could not have deceived the appellant of the existence of a "lawful marriage", when a lawful marriage indeed existed between the parties, during the period under reference."

IV. Principles of Criminal Jurisprudence Ignored

The decision of the Supreme Court in this case gives birth to various questions of vital importance that need consideration. First among these questions is: "Does the legality of an act done depend upon future uncertain event?" It is an established principle of criminal jurisprudence that while fixing criminal liability of a person for a particular act the first thing to be determined is whether the act was prohibited at the time when it was done. If the answer is positive, he/she is liable for the act, and if the answer is negative, he/she is not liable. Therefore, the position of law at the point of time when he/she does the prohibited act has to be taken into consideration. The legality of an act done does not depend upon future uncertain events. This means that in order to fix criminal liability of a person for his/her act; the act must have been prohibited when it was done. The fundamental principle of criminal law is that, by giving retrospective effect, an innocent act cannot be declared as an offence,[11] in the same way, an offence cannot be treated as an innocent act.[12]

In the present case, it is an admitted fact that sexual intercourse between Ravinder Kaur and Anil Kumar was performed during January 08, 1994 to June 23, 1994 *i.e.*, after the *ex-parte* divorce

[11] *Nullumcrimensine lege* (*i.e.*, there must be no crime except in accordance with fixed predetermined law) is the fundamental principle of criminal jurisprudence. This principle is incorporated in A. 20(1) of the Constitution of India. It reads: "(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence …".

[12] It is a well-established rule of law that, if an act, when it was done, was an offence according to the law in force at that time, the same cannot be treated as an innocent act due to subsequent change in the legal position. For example, there are many laws that are now repealed, but the offender violating the provisions of those laws when those laws were in force cannot claim exemption merely because those laws are subsequently repealed.

decree, and much before the said decree is set aside (on February 09, 1996). The question that remains to be examined is regarding the "legality of the sexual intercourse performed during the said period". The sessions court, the High court and even the Supreme Court held in favour of the legality of the said intercourse; the reason being that "the marriage between them is restored due to setting aside of the *ex-parte* decree of divorce". Undoubtedly the court's decision regarding the "legality of the said intercourse is correct", but it is humbly submitted that "the reasoning for the same is not based upon the correct understanding of law".

As stated above, "the legality of an act done does not depend upon the future uncertain event". Setting aside the said *ex-parte* divorce decree on February 02, 1996 was a future event so far sexual intercourse between January 08, 1994 and June 23, 1994 was concerned. And this future event was uncertain because during the said period no one could have predicted as to whether the wife may or may not approach the court for getting the decree set aside and even if she may have approached the court then also it cannot be predicted that the court may or may not have set aside the decree. Therefore, the legality of an act done (sexual intercourse in the present case) cannot be made to depend upon happening or not happening of future uncertain event. The order of setting aside the said *ex parte* divorce decree is a subsequent event and therefore, cannot retrospectively decide legality of the sexual intercourse already performed. The decision of the court in this case, therefore, is not based upon the sound principles of law. The decision is solely based on the future uncertain event (of setting aside the *ex parte* divorce decree) which may happen or may not happen. It is therefore submitted that the court should have decided the matter independently of the order setting aside the said *ex parte* divorce decree.

Actus non facit reum nisi mens sit rea is another fundamental principle of criminal jurisprudence. The expression *actus* means deed and deed is a "material result of human conduct".[13] This aspect makes it clear that criminal liability of a person depends upon the result of his/her act. It means that for fixing criminal liability of a person it must be established that the prohibited act (*actus reus*) coupled with required culpable mental state must be the result of his/her act. And once it is established that the prohibited act is done by the accused person he/she cannot be exonerated from his/her liability by reason of subsequent acts of others, including the victim. In the present case, getting the *ex parte* divorce decree set aside was the act of the victim of which the accused cannot take benefit. But the Supreme Court erred in giving such benefit to the accused.

[13] J.W. Cecil Turner(ed.), *Kenny's Outlines of Criminal law* 17 (Cambridge University Press, London, 1966).

The reasons given by the court in this case makes it clear the it may have given different decision if the wife would not have applied for setting aside the *ex parte* divorce decree or if she would have applied, but the district court would have rejected her application. And surprisingly such variation of decision would not have been due to the act of the accused, but due to the act of the victim. The decision of the Supreme Court in this case is, therefore, a deviation from the fundamental principles of criminal law, because the "Court did not take into consideration what the accused did", whereas the fundamental principle of criminal jurisprudence says that, "criminal liability of a person depends upon his/her act, and not the subsequent act(s) of others".

V. Belief of Lawful Marriage whether "Caused" or "Continued"

It would be interesting to speculate what could have been the decision of the court if the wife would not have applied for setting aside the *ex parte* divorce decree or, if she would have applied but the district court would have rejected her application. As stated above, if the said *ex parte* divorce decree would not have been set aside the decision of the court would have been different. It means the court would have held him guilty. The judgment in the present case makes it abundantly clear. The Court observed:[14]

> We are satisfied that the charge against the respondent is not made out, under Section 493 of the Indian Penal Code, because the respondent could not have deceived the appellant of the existence of a "lawful marriage", when a lawful marriage indeed existed between the parties, during the period under reference.

This, therefore, makes it clear that, if the said *ex parte* divorce decree would not have been set aside, the marriage would not have restored. Similarly, the question of restoration of matrimonial ties would not have arisen if the court would have decided the case independently of the order setting aside the said *ex parte* divorce decree. In either of the above situation, there would not have been a lawful marriage in existence "at the time when the accused obtained the cohabitation and sexual intercourse". And therefore, in the absence of existence of a lawful marriage, the court would have held him guilty under section 493, IPC. On this point, it is therefore submitted that the court also failed to correctly appreciate the scope of section 493, IPC. Section 493, IPC reads:

> Section 493: *Cohabitation caused by a man deceitfully inducing a belief of lawful marriage*. - Every man who by deceit causes any woman who is not lawfully

[14] *Supra* note 11.

> married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punishable with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine.

At the outset one thing must be kept in mind that, section 493, IPC does not prohibit cohabitation or sexual intercourse itself. What is prohibited under this section is cohabitation or sexual intercourse obtained by means of deceit of a particular type, ***i.e.***, causing belief of lawful marriage. The crux of offence under section 493, IPC is deceitfully causing a belief of lawful marriage, and the woman so deceived cohabits or has sexual intercourse with him in that belief. In the present case, it is therefore, necessary to see whether the element of deceit was present. And if at all there was a deceit, the next question is whether that deceit caused the belief of lawful marriage?

The term deceit is not defined in the IPC. But it is well established that silence amounts to deceit, if there is a duty to speak.[15] Here, the important question is that what is the criterion to decide that in particular circumstances there is a duty to speak and in other circumstances there is no duty to speak? In criminal law the duty must be imposed by fixed predetermined law. In India, there is no law that imposes a duty on a man to disclose to a woman that he is not her husband, even if she believes him as her husband. In this sense, in the present case, his remaining silent on the ***ex parte*** decree of divorce does not amount to deceit. And the for sake of argument, even if it is assumed that his remaining silent amounts to deceit then the above question, ***viz.***, whether that deceit caused the belief of lawful marriage needs to be answered for determining the liability of the accused under section 493, IPC.

It seems that the Supreme Court has not correctly appreciated the import of the wordings of section 493, IPC. At the outset, the section says, "Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him…" The wording of the section makes it evidently clear that the belief of lawful marriage must be caused, and it

[15] S.17 of the Indian Contract Act, 1872, defines 'fraud'. According to S.17 'fraud" means and includes "commission of acts specified under S.17 with intent deceive another". Explanation to S. 17 clarifies "when silence amounts to fraud". It reads: "Explanation.— mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, ***unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak***, or unless his silence is, in itself, equivalent to speech." [Emphasis added.].

must be caused by the accused. It naturally means that the section does not cover the case where a woman is already under such belief independently of the act or omission by the accused.

In the present case, it can at the most, be said that his concealment of the *ex parte* decree of divorce is indicative of his intention to continue her belief in the existence of a lawful marriage. But the expression "causes" does not mean "continues". A passerby, for example, cannot be said to cause mischief by fire if he, in spite of his knowledge that a small portion of a building has caught fire, does not inform it to the fire-brigade, and as a result the fire continues and the entire building along with the adjoining buildings are destroyed. In the case under scrutiny, though the accused fraudulently obtained cohabitation and sexual intercourse, but this does not mean that his fraud causes her to believe in the existence of lawful marriage. Her belief in the existence of lawful marriage, in fact, was due to her knowledge of solemnization of her marriage with him. His intention was to obtain cohabitation and sexual intercourse, but not to create a belief of lawful marriage because such belief was already in existence. At the most it can be said that the accused took undue advantage of her belief. But taking undue advantage of such belief is outside the scope of section 493, IPC. The offence under section 493, IPC is to deceitfully cause a woman to believe in the existence of lawful marriage and thereafter to enjoy the benefits of marriage. It is not an offence under section 493, IPC to take undue advantage (*viz.*, cohabitation or sexual intercourse) of a woman who was already under such belief, independently of his act or omission. Therefore, in the present case, the accused could not have been held liable under section 493, IPC even if the said *ex-parte* divorce decree would not have been set aside.

VI. Mistake of "Identity" or "Attribute"

The next question that needs to be examined is whether the act of the accused, in the present case, amounts to an offence of rape, since, at the time when sexual intercourse was performed he was not her husband and she had given her consent under the mistaken belief that he is her lawfully wedded husband. On this point, following observation of the Supreme Court is worth noting[16]

> Even the complaint filed by the appellant under section 376 of the Indian Penal Code was not entertained (and the respondent was discharged), because it came to be concluded, that matrimonial ties between the appellant and the respondent

[16] *Supra* note 7.

> were restored, with the setting aside of the ex parte decree of divorce, as if the matrimonial relationship had never ceased.

This observation of the court makes it clear that, in the present case, an offence of rape cannot be made out because the matrimonial ties between the appellant and the respondent were restored. It means, if the matrimonial ties would have not been restored the court would have held him guilty of rape. It is, therefore, humbly submitted that, this is another mistake on the part of the court to appreciate the correct import of the offence of rape also.

In the present case, Ravinder Kaur gave consent for sexual intercourse under the belief that the man, Anil Kumar, is her lawfully wedded husband but, in fact, due to the ***ex-parte*** divorce decree, the matrimonial ties between them came to an end. It means her consent to the sexual intercourse was under mistake. Now the question is whether such kind of mistake in giving consent for sexual intercourse is sufficient to nullify the consent and reduce the intercourse into an offence of rape. On this point, as stated above, the answer of the court is affirmative, however, the author differs from the opinion of the court and submits that the consent is valid and the sexual intercourse between them does not amount to the offence of rape. Clause fourthly of section 375, IPC is the relevant provision on this point.[17] Accordingly, a man is said to commit rape, if he has sexual intercourse or sexual acts described under clauses (a) to (d) of section 375, IPC under the circumstances falling under any of the seven following descriptions:—

> *Firstly*, - … …
> *Secondly*, - … …
> *Thirdly*, - … …
> *Fourthly*, - With her consent, when a 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.

Consent given under mistake of fact negatives consent, but it does not mean that each and every mistake negatives consent. In order to nullify consent, the mistake must be of 'Immediate relevance". And in case of consent for sexual intercourse, the fact of immediate relevance is knowledge of (1) "nature of the act" for which consent is given, and (2) "identity of the person" who is going to perform the act consented. It is the mistake in either of these facts that negatives

[17] The offence of rape on the point of clause fourthly is same in case of the newly amended law and the old law on which the present case is decided.

the consent.[18] Mistake in understanding other collateral aspects of the act or the attributes of the actor do not negate consent.[19]

Clause fourthly of Section 375, IPC deals with the second aspect, ***i.e.***, mistake of identity. According to clause fourthly of Section 375, IPC, mistake as to the identity of husband nullifies consent for sexual intercourse. Clause fourthly, thus, deals with the cases of mistake of identity, which is quite different from "mistake of attributes" of a person. "Mistake of identity", says Glanville Williams, "occurs only where the person under the mistake confuses two real people, "X" and "Y", by supposing that "X" is "Y". It is not a mistake of identity when you believe a poor man to be rich, or you think that a man is woman."[20] Mistake of identity, thus, requires involvement of at least three persons, one who has committed mistake and others regarding whose identity the mistake is committed. In the case of rape, those three persons must be; (1) the woman, with whom sexual intercourse is performed, (2) her lawfully wedded husband, and (3) the man performing sexual intercourse by impersonation, whom she believed as her lawfully wedded husband. In the present case, there was no confusion between the identities of two real persons. Therefore, her mistake in believing Anil Kumar as her husband is not a mistake regarding his "identity", but it is mistake regarding his "attribute" that he is her lawfully wedded husband. And such mistake is insufficient for nullifying consent for sexual intercourse; and

[18] Example of fraud leading the victim to commit "mistake as to the nature of the act" that negatives consent is the English decision in ***R.*** v. ***Flattery*** (1877) 2 QBD 410. And the example of fraud leading the victim to commit "mistake as to the identity of the actor" that negatives consent is the decision in ***R.*** v. ***Young*** (1878) 38 LT540. See also ***R.*** v. ***Elbekkay*** [1995] Crim LR 163.

[19] See ***Papadimitropoulos*** v. ***R.***(1957) 98 CLR 249. Facts in ***Papadimitropoulos*** are closely similar to the facts in the case under scrutiny. In both these cases the victims committed mistake in believing the man as their lawfully wedded husband, and in that belief they consented to the act of sexual intercourse. In ***Papadimitropoulos,*** the High Court of Australia held that mistake in such collateral things does not negative consent. The court stated: "Rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration: it is the consent to that which is in question: such consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape." Consent requires knowledge of the "nature of the act" and "identity of the actor" and it is the mistake in both or either of these two facts negatives consent. Mistake in any other fact is insufficient to negative consent. In ***R.*** v. ***Linekar*** [1995] 3 All ER 69, the accused person gave false promise of paying money to a prostitute and obtained her consent for sexual intercourse. She gave consent under the belief that he will pay her. It was held by the Court of Appeal in England that, her consent to the act of sexual intercourse was valid since the mistake was neither as to the "nature of the act" nor as to the "identity of the actor". See also the Canadian decision ***R.*** v. ***Petrozzi*** (1987) 35 C.C.C.(3d) 528; ***Bolduc*** v. ***The Queen*** [1967] S.C.R. 677. And also, the Appellate Court of California's decision in ***Boro*** v. ***Superior Court (People),*** 163 Cal. App. 3d 1224.

[20] Glanville Williams, ***Text Book of Criminal Law*** 567 (Universal Law Publishing Co., Delhi, 2nd edn., 1983).

therefore, the offence of rape cannot be said to be made out.[21] The opinion of the Supreme Court in this case is, therefore, founded on the wrong premise of law.

VII. Intercourse Obtained by Force

The *ratio* in the present case is that:

> Every sexual intercourse (now sexual acts also) performed by a man even after divorce, with his divorced wife, comes within the benefits of marital exemption clause under section 375, IPC if subsequently the divorce decree is set aside by a court of competent jurisdiction.

The decision in this case brought not only uncertainty in the field of criminal law, but also gave legal recognition to forcible sexual intercourse by a man with his divorced wife. The scope of marital exemption clause under section 375, IPC is wide enough to cover the cases of forcible sexual intercourse by a man with his wife. It means even if a man forcibly performs sexual intercourse with his divorced wife he will be exempted from the offence of rape if subsequently, the divorce decree is set aside.

As a consequence of the above decision, in the cases of forcible sexual intercourse by a man with his divorced wife, the law enforcement agencies and justice delivery systems will have to wait till the fate of the divorce decree is decided by a court of competent jurisdiction. Till then the intercourse cannot be treated as rape; and the man may go on committing forcible sexual intercourse indefinitely with the hope that one day the divorce decree may be set aside and the marriage will be restored. Such intercourse will be treated as rape only after all the remedies of setting aside the divorce decree are exhausted and the decree remains in force.

Section 376B, IPC on one hand imposes criminal liability on a husband for his having non-consensual sexual intercourse with his wife who is living separately, whether under a decree of separation or otherwise, whereas, on the other hand, the decision in the present case exempts a man having forcible sexual intercourse with his divorce wife if subsequently, the divorce is set aside. The decision, therefore, is not in line with the letter and spirit of law.

[21] P.H. Pendharkar and B.V. Ahire, "Sex Obtained by Fraud: An Analysis of Consent vis-à-vis Rape-Law" *Cri. L.J.(Jour)* 113 (2015).