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**CASE COMMENT**

**G. ACHYUT KUMAR V. STATE OF ODISHA (2020)**

CRLA NO. 940 OF 2019

(Decided on May 21, 2020)

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## **ABSTRACT**

*This case comment tries to evaluate the recent judgement passed by the Orrisa High court which speaks about how false promise of marriage does or does not amount to rape under section 375 of The Indian Penal Code, 1860. This case comment tries to support the judgement given by Honourable Justice S.K. Panigrahi and tries to substantiate every reason of the same in detail. It showcases and substantiates the reasons of why section 90 of the Indian Penal Code, 1860 should not be applied to section 375 of the Indian Penal Code, 1860. The comment also describes the opposing views and vindicates about the it.*

**THE RECENT** judgment passed by the Orrisa High court<sup>1</sup> has once again commenced an unforgettable debate on the legal issue of consensual and non-consensual sexual intercourse amounting to rape under section 375<sup>2</sup> of the Indian Penal Code, 1860 (Hereinafter IPC) based on false promises of marriage. This decision has shown a huge socio-political as well as legal impact nation-wide. This question that “Whether this type of false promise to marry induced sexual intercourse is rape or not?” has come again in front of the high court of Orissa after being answered by the Apex court in many cases. Marriage The HC of Orissa has considered many cases before coming to a definite judgment. This decision will affect the whole community and society at large. The current ruling given by the high court of Orrisa has been challenged quite often. Several experts, jurists, lawyers, and other learned persons have expressed diverse opinions criticizing as well as supporting the said judgment.

The present case became apparent through the Criminal Appeal filed by the senior counsel named Sri D.P. Dhal to the HC of Orrisa under justice S.K. Panigrahi to grant bail to his client (hereinafter the accused-appellant) named G. Achyut Kumar for the alleged blame of rape on the pretense of Marriage. It is claimed that establishing sexual relations in a pretense amounts to the absence of consent and the absence of consent during any sexual relation is illegal under section 375<sup>3</sup> & 376<sup>4</sup> of the IPC. The Criminal Complaint was filed in the year of 2019 dated 27<sup>th</sup> of November, the Counsel for the accused filed a petition regarding application for bail in December the matter was then heard and the prayer was rejected by the lower court. During the appeal, the lawyer for the accused also prayed to issue directions stating the same as

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<sup>1</sup> Criminal Appeal No. 940/2019. Decided by Honorable Justice S.K. Panigrahi.

<sup>2</sup> Section 375, The Indian Penal Code, 1860.

<sup>3</sup> Ibid

<sup>4</sup> Section 376, The Indian Penal Code, 1860.

frivolous and false. The facts of the case state that the victim was a 19 years old major from the ST community. The victim, as well as the accused, lived in the same village, the accused had also provided the victim with a mobile phone for regular communication. Furthermore, it is stated that the Accused-Appellant promised to marry the victim-respondent and took advantage of her innocence to establish sexual and intimate relationships. The matter was finally heard in May. The court has heard the matter from both the sides passed a verdict on May 18, 2020, with the findings that:

- Rape laws should not be used to regulate intimate relationships, especially in cases where women have agency and are entering a relationship by choice.
- The court also observed that the present case was riddled with some visible contradiction of facts.
- The court also recognized the misuse of provisions of such laws when the relationship turns sour.
- the automatic extension of provisions of Section 90<sup>5</sup> of I.P.C. to determine the effect of consent under Section 375 of I.P.C. deserves a serious relook.
- The false promise of marriage is not a component of section 375 of IPC. Section 375 clearly says when consent means no consent, and fake promise is not one of it. The law holding a false promise of marriage seems to be erroneous.

Marriage is a significant part of two individuals in life. It is a sacred union between two people. With marriage comes a lot of responsibilities. Marriage involves emotional as well as the spiritual union. Under section 5, Clause 2, and sub-clause (a) of the Hindu Marriage Act, 1955<sup>6</sup> the condition of “Valid Consent” plays a very important role. Mutual Consent is very important while establishing physical relationships before or after marriage. Obtaining consent for sexual intercourse on the pretext of the false promise of marriage attracts the conviction of the offense rape under IPC. Such consent is called "Misconception of fact" under section 90<sup>7</sup> of IPC, 1860. This automatically makes the accused guilty of the offense under section 375<sup>8</sup> Clause (3)<sup>9</sup> and (4)<sup>10</sup> of the IPC,1860. The impugned judgment also held that false promise of marriage is not a component of section 375 of IPC. Section 375 clearly says when consent means no consent, and fake promise is not one of it. The law holding the false promise of

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<sup>5</sup> Section 90, The Indian Penal Code, 1860.

<sup>6</sup> Section 5, The Hindu Marriage Act, 1955.

<sup>7</sup> The Indian Penal Code, 1860.

<sup>8</sup> The Indian Penal Code, 1860.

<sup>9</sup> Section 375, Cl (3), The Indian Penal Code, 1860.

<sup>10</sup> Section 375, Cl (4), The Indian Penal Code, 1860.

marriage seems to be erroneous and acquitted the accused. Having witnessed the judgment of G. Achyut Kumar, it becomes relevant to keep in mind the following considerations:

- Whether Orissa High court was justified in declaring the practice of obtaining consent for sexual intercourse through the false promise of marriage not a criminal offense under section 375 of the IPC i.e Rape?
- Whether Orissa High court was justified in acquitting the accused on the above offense?
- Whether the existing precedents which say the otherwise are sufficient to answer the question of "consent obtained by the false promise of marriage"?

The aforesaid mentioned questions can be critically answered by the few of the observations of the author commenting on the aforesaid verdict by the Orissa High Court. In 2014, the Hindu a famous newspaper undertook research which included an investigation which revealed the major nature of the sexual assault cases, it was found out that 25% of the cases involved and dealt with “breach of promises to marry”, it should be noted that in these 25% cases even though it is allowed for the aggrieved to seek redressal, courts are not inclined towards conviction only 2-5 cases result in a conviction. Even the women activists and many renowned lawyers have reflected their views on this by saying “Rape laws shouldn’t be used in this content even though it showcases a premium put on women’s chastity by the patriarchal society”<sup>11</sup> It can result in the conviction of rape under the Indian Penal code as such consent is said to fall under section 90<sup>12</sup> of The Indian Penal Code which is “Misconception of fact” and so the accused can be charged under section 375<sup>13</sup> clause (3)<sup>14</sup> and (4)<sup>15</sup> of the IPC. But it should also be noted that rape can be divided into three categories: Rape by force where consent is denied, statutory rape where consent cannot be obtained due to the condition of the victim, and lastly rape by fraud where consent is obtained by deceit. Consent by the false promise of marriage false under the third category.

Many courts have linked the definition of consent under section 90<sup>16</sup> of IPC to the meaning of consent under section 375<sup>17</sup> and have held that consent given under a misconception of fact makes is rape. According to the author, the linkage between the same is a complete fallacy. Indian Penal Code is a comprehensive code that lays down all the crimes and its punishments.

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<sup>11</sup> Rukmini S, “The many shades of Rape cases in Delhi”, *The Hindu*, June. 15, 2016.

<sup>12</sup> Section 90, The Indian Penal Code, 1860.

<sup>13</sup> The Indian Penal Code, 1860.

<sup>14</sup> Section 375. Cl (3), The Indian Penal Code, 1860.

<sup>15</sup> Section 375. Cl (4), The Indian Penal Code, 1860.

<sup>16</sup> Supra 13.

<sup>17</sup> Section 375, The Indian Penal Code, 1860.

It is an unambiguous, exhaustive, and thoroughgoing code that should not be up for such interpretations. Every individual referring to the provisions of the IPC needs to adhere to the texts and refrain from introducing new meanings and interpretations. Section 375<sup>18</sup> gives six clauses which can be divided into seven different distinctions of which describes the quality and nature of consent. The distinctions are given below:

1. Against the will which showcases no consent at all.
2. Without her consent.
3. With consent, when the consent is obtained by putting any victim's special person into danger and fear of death.
4. With the consent, but when the women believe the man to be her lawfully wedded husband when in reality he is not.
5. Consent is given but due to unsoundness of mind and unable to understand the nature of her consent.
6. With or without consent due to the age of 16.
7. Unable to communicate consent.

The first two points deal with cases where consent is completely absent. These two deal with acts done without express or implied consent but "none shows the element of consent absent"<sup>19</sup> whereas from the third point to the seventh point come under the bracket of any act committed under the purview of "within her consent". Therefore, the consent given under this is considered to be irrelevant or becomes irrelevant. Furthermore, putting the pretext of false marriage in these scenarios stand invalid. Putting is under clause 2 would be violence and insult to the provisions of section 375.<sup>20</sup>

Provisions of section 90<sup>21</sup> of the IPC come under the general exceptions and overriding the specific provisions eradicates the whole purpose of the provisions. This section can be only used where the word "consent" does not have a restricted and defended approach. Section 375<sup>22</sup> was amended and the definition of consent then included under section 375<sup>23</sup> which straight means that this definition overrides the definition provided under section 90<sup>24</sup> of the IPC.

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<sup>18</sup>, The Indian Penal Code, 1860.

<sup>19</sup> Mehul M. Gupta, "Rape by a False Promise to Marry: A case-law non-offense", *THE BAR & BENCH*, Jan.18, 2020, available at:

<https://www.barandbench.com/columns/rape-by-a-false-promise-to-marry-a-caselaw-non-offence>

<sup>20</sup> Supra 18.

<sup>21</sup> Supra 13.

<sup>22</sup> Supra 18.

<sup>23</sup> Ibid

<sup>24</sup> Supra 13.

One more interesting fact which has come to light is that if at all section 90<sup>25</sup> is taken into examination for section 375<sup>26</sup> it cannot be left undefined and open-ended, as a false assurance of marriage does not affect the mental ability of the victim to understand the nature and purpose of the situation. This concept was also well expressed by Glanville Williams in his Textbook of Criminal Law<sup>27</sup> that, “In rape, the issue is the woman's consent to sexual intercourse with this man. If she does not know that the act is one of sexual intercourse, or if she is mistaken as to the identity of the man, then she does not consent, but otherwise, she does...There is, therefore, no need to inflate the grave offense of rape to make it cover sexual deceits in general.”

This shows that the victim of the nature and purpose of the act i.e sexual act and relevance of the sexual act does not get distorted by a false promise to marry. Therefore, the meaning of "misconception of fact" under section 90<sup>28</sup> of the IPC needs to be given a restrictive meaning as if not any action would be considered under this purview. The act of deceiving to acquire consent and deceiving a person of the true nature and purpose of the act to motivate consent, The latter is rape by fraud and will come under the purview of rape even though both are duping and trickery. Section 90<sup>29</sup> does not explain the meaning of consent but explains what is not consent and what does not come under the ambit of consent.

Section 375<sup>30</sup> “requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.”<sup>31</sup>

There have been conflicting judgments on this regards and some of the major outcomes need to be taken into consideration. In the case of *Saleha Khatoon v. the State of Bihar and Other*<sup>32</sup>, the Patna High Court held that consent obtained by fraud or deception cannot be termed as consent and such consent comes within the ambit of the definition of rape under Section 375<sup>33</sup> of IPC. However, in the case of *Uday v. State of Karnataka*<sup>34</sup>, the Supreme Court held that

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<sup>25</sup> Ibid

<sup>26</sup> Supra 18.

<sup>27</sup> Glanville Williams, *Textbook Of Criminal Law* 559-560. (Universal Law Publishing, Delhi, 2<sup>nd</sup> Edition).

<sup>28</sup> Supra 13.

<sup>29</sup> Ibid

<sup>30</sup> Supra 18.

<sup>31</sup> *State of H.P. v. Mango Ram* (2000) 7 SCC 224

<sup>32</sup> *Saleha Khatoon v. the State of Bihar and Ors* 1988 (36) BLJR 678

<sup>33</sup> Supra 18.

<sup>34</sup> [2003 4 SCC 46]

“the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code”<sup>35</sup> The court also added that there is no straightened prescription for determining whether the consent given by a woman for sexual intercourse was under misconception fact. It is also seen in other cases that the court must look into the basic fact that whether the accused wanted to marry the victim or has malafide intentions since the start and had falsely promised to marry to satisfy this lust as the later falls in the ambit of deception. Therefore the court must carefully examine whether the consent was given after understanding the nature and consequences of the sexual act indulged in. There can times when the prosecutrix/victim may indulge in such activities due to love and affection and due to unfortunate circumstances, the accused could not marry her even if he wanted to. Therefore section 90<sup>36</sup> of the IPC cannot be taken into consideration to pardoning the act of the girl as well. In such circumstances, he cannot be convicted under section 375<sup>37</sup> of the IPC. This has been laid down in the case named *Deepak Gulati v State of Haryana*<sup>38</sup>. Another important case and its argument is “the consent of full-grown girl to the act of sexual intercourse on a promise of marriage cannot be treated as an act induced by a misconception of fact.”<sup>39</sup> This showcases that courts have ruled the same as the decision taken above in this case by citing relevant case laws.

In conclusion, allegations of rape affect the image and emotional well-being of the victim but a false complaint is filed, it affects the accused also. It leaves a lifelong scar. But according to the author, both views should be taken into consideration and the court should specifically examine the intentions of the accused before conviction. Many provisions like these are misused in today's time to take revenge and fulfill its vengeance against other individuals. The reasons can be a breakup, monetary assistance, hatred, etc. and for such an issue's women cannot be given a benefit of doubt. Indian rape laws give out a provision which is mentioned in section 114 A of the Evidence Act, 1872<sup>40</sup>, which binds the court to believe the victim and consider that as evidence. This provision is also taken for granted to spoil, destroy, and hurt someone's emotional well-being and falsely accuse the person. Therefore, before conviction

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<sup>35</sup> Ibid

<sup>36</sup> Supra 13.

<sup>37</sup> Supra 18.

<sup>38</sup> *Deepak Gulati v State of Haryana* (2013) 7 SCC 675.

<sup>39</sup> *Jayanti Rani Panda vs. State of West Bengal and Ors*, 1984 Cri.LJ 1535.

<sup>40</sup> Section 114, Cl (A), The Evidence Act, 1872.

the court to determine all factors and if intentions are said to be malafide to exploit girls and have sexual intercourse in the pretext of marriage, for this they should be convicted.