

REVIEW ARTICLE

Law of Rape: Sec 63 of Bharatiya Nyay Sanhita: Does it require amendment? Yes.**Gupta BD.**

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Abstract :

A single Judge bench of M. P. High Court has recently passed a judgment which is going to have long lasting repercussions in society and would particularly affect married women and would be married women. At the same time the Parliament has passed B.N.S. (Bharatiya Nyay Sanhita). The sec 63 and related sections about rape have given expansive definition of sexual intercourse. The referred judgment talks about this expansive definition of sexual intercourse and pronounces that now no sexual intercourse is unnatural. A liberty is given to husband in the form of Exception-2 to indulge in so many sexual acts which were unnatural and unlawful till date. In my view this has happened without the knowledge and free and fair consent of concerned women folk. Paper discusses these issues and gives an amicable short solution to resolve the problem.

Keywords: Consent in marriage by woman; Expansive meaning of sexual intercourse; Stakeholders, Long lasting repercussions.

Text :

Have you ever bothered what is the sexual intercourse in the marriage for which the consent is given for? So far, I also did not bother but like you presumed and assumed that it is for normal and natural (peno-vaginal) intercourse. I also presumed that women who entered into the wedlock and are entering also thought the same way (Presumption is mine).

But now I have to rethink. The reason behind this rethinking is this judgment.¹ The single Judge bench of the M. P. High Court delivered a landmark judgment which would have revolutionary effects about the sexual intercourse within marriage, if not looked into and amended.

We now see further.

From 1860, our IPC (Indian Penal Code) came into effect from this date, till 2013 things were normal and natural for me as a normal person(woman included) and as a married man. Definition of rape was simple and revolved around normal and natural peno vaginal sexual intercourse.² Since the passing of CLAA, 2013 (Criminal Law (Amendment) Act, 2013), which changed radically the definition of rape,³ and after this judgment¹ and passing of B.N.S.(Bharatiya Nyay Sanhita)⁴ things have changed drastically. I dare say they have become worst for man, society and particularly for the women folk of the country.

Now we see the judgement in reference in short. The case was that wife lodged an FIR (First Information Report) alleging that husband indulges in anal intercourse without her consent under IPC377 and 376 (2) (n). The husband filed the petition before the High Court to quash the said FIR. When this case was lodged and decided by the High Court the IPC 377 and 376 (2) (n) very much

existed in the law book of the country.

Both parties put forth arguments in favour of their point of views.

The judgment allowed the petition and ordered to quash the FIR.

The single Judge bench of the M.P. High Court put forth the following arguments in quashing the FIR and supporting the judgment (Not in verbatim)-

1. Apparently, there is repugnancy in these two situations in the light of definition of Section 375 and unnatural offence of Section 377. It is a settled principle of law that if the provisions of latter enactment are so inconsistent or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the latter.
2. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile- vaginal penetrative. It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore.
3. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment. Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman.
4. At this point, if the amended definition of Section 375 is seen, it is clear that two things are common in the offence of Section 375 and Section 377 firstly the relationship between whom offence is committed i.e. husband and wife and secondly consent between the offender and victim. As per the amended definition, if offender and victim are husband and wife then consent is immaterial and no offence under Section 375 is made out and as such there is no punishment under Section 376 of IPC.
5. In Navtej Singh Johar case the hon Supreme Court has

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decriminalise the anal intercourse between consenting adults.

6. Therefore, here in a present case there are two points- one new law of rape after CLAA,2013 makes IPC 377 redundant because the anal orifice is included in the definition of rape and there is repugnancy in the situation when everything is repealed under Section 375
7. In my opinion, the relationship between the husband and wife cannot be confined to their sexual relationship only for the purpose of procreation, but if anything is done between them apart from the deemed natural sexual intercourse should not be defined as 'unnatural'. Normally, sexual relationship between the husband and wife is the key to a happy connubial life and that cannot be restricted to the extent of sheer procreation. If anything raises their longing towards each other giving them pleasure and ascends their pleasure then it is nothing uncusomary and it can also not be considered to be unnatural that too when Section 375 IPC includes all possible parts of penetration of penis by a husband to his wife.

This author while commenting on the definition of rape under CLAA, 2013 voiced that the law is made in hurry and it would have many confusions and repercussions that now becoming true.⁵

Post Nirbhaya due to public outrage and hue and cry a committee was formed to look into the law of rape. The committee was headed by Justice J. S. Verma. It did have a woman member in Justice Leila Thomas. It is learnt that the committee received more than eighty thousand suggestions; many of them from woman activist groups. I feel that committee and various suggestions forwarded to committee were more focussed on the criminality and enhancement of punishment part in the offence of rape and some important points were missed.

I now discuss the larger repercussions beyond this individual case, parties there off and judgement which has come in front of us.

According to this judgement purpose of marriage is more than procreation on one hand and anything done between married couple apart from the deemed natural sexual intercourse should not be defined as unnatural. Further the judgment says that in the wider definition of rape under sec 375 which includes all parts of penetration of penis by husband to his wife. Prima facie now nothing remains unnatural. Before going into the discussion further I replicate the sec 63 of B.N.S.- 63. 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
- © 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:—

- (i) against her will;
- (ii) without her consent;
- (iii) 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;
- (iv) 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;
- (v) with her consent when, at the time of giving such consent, by 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;
- (vi) with or without her consent, when she is under eighteen years of age;
- (vii) when she is unable to communicate consent.

Explanation 1. For the purposes 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 eighteen years of age, is not rape.

For me this is the definition of rape. Does it means that it impliedly give blanket consent of wife to husband in marriage and makes all provisions of this definition legal under Exception-2? Ironically, yes.

You see till so far we were discussing sexual intercourse in addition to that in the Exception -2 there is a word "sexual acts".

Here the section 63 however does not define "sexual intercourse", neither it defines so called "sexual acts".

The Hindu Marriage Act, 1955 does refer consummation of marriage, cohabitation, conjugal rights and sexual intercourse.

But these terms are not defined under the law.

However, indirectly sec 67 and 68 of B.N.S. do say that (I quote)- "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 63.

These (a) to (d) I have replicated above.

The referred judgement has discussed part (a) of this definition that too partly; I will come to another part of it a little later, which deals with penetration of penis into various orifices of woman, probably because that was the only thing before the Court.

Does it mean that remainder part of definition of rape (b), (c) and (d) also fall under the Exception -2 if done by husband?

The whole hue and cry which became the genesis in changing definition of rape was the infamous Nirbhaya case where it was not only peno vaginal penetration but also insertion of object, sec (b) of sec 63 into the orifices of woman causing injuries to her.

Can husband insert 'any object' in the any of the orifices of his wife? Is law giving this right to husband? Has wife given consent for this while she is entering into the wedlock? Does she know about it? Are women folk of this country consulted before passing such law? Did they agree?

For me this is unfair to wife and should also be unlawful.

There is more than meet the eye if we again read the provision (a),(b),(d) and (d) of sec 63 of B.N.S. These sections not only talk of man alone but "any other person". Does it mean that here in present context husband can compel other person to do any of the acts prescribed in the above sections and be part of 'Exception -2'

For me these are also unfair to wife and also be unlawful.

Recently I came across the Supreme Court verdict which denied surrogacy to have a child to a single woman to save the sanctity of institution of marriage.⁶ Similarly, the Delhi high Court denied anticipatory bail to husband who was an accused of sexual violence.⁷ So on one hand we have such judgments and on the other hand we have judgment which we just discussed as well as the law of rape which is open to any type of violence against wife (woman) on the name of blanket consent by virtue of marriage.

Whatever is happening between consenting adults, husband and wife, man and woman, man and man and woman and woman does not matter to me. It does not affect society. But not defining natural and normal sexual intercourse in marriage and interpreting things happening in marriage via definition of rape and giving blanket right to husband is very very dangerous. I am sure most of the man and all women would agree.

I propose that law should directly define sexual intercourse. There should be wide and open debate between stake holder man and woman about this aspect. This becomes more pertinent when the new B.N.S. does not have any equivalent of old IPC 377.

Till then, suggest that Exception- 2 in the definition of rape can be suitably amended – Only peno-vaginal intercourse is the exception done by husband.

Conclusion:

The referred judgment has opened up a new vista in the relationship of husband and wife in marriage. The new law of rape included in the B.N.S. as sec 63 requires amendment. This is more pertinent because the B.N.S. does not have an equivalent of old IPC 377. Before law is further amended a fair debate on the issues raised in the paper is to be held amongst the stake holders, particularly woman folk.

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