

WHEN RENEGE BECOMES RAPE: REVISITING THE 'FALSE PROMISE' OF MARRIAGE DOCTRINE

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ABSTRACT

If a man obtains consent for sexual intercourse from a girl under a promise to marry her, can such "consensual sex" be retrospectively called rape if he fails to tie the knot? Indian courts would reply in affirmative. According to them, a 'false promise' of marriage would amount to a 'misconception of fact' and consent, thus obtained, would be vitiated by Section 90 of IPC. However, if the accused did intend to fulfil his promise but could not do so because of some circumstances beyond his control, he may escape conviction because it would not amount to 'false promise' but a 'breach of promise'. This article contends that a 'false promise' of marriage cannot be said to be a 'misconception of fact' as such a promise doesn't relate either to nature or to quality or consequence of the act. Furthermore, it is asserted that the distinction between 'false promises' and 'breach of promises' is a vague and ambiguous one in the sense that it is practically very difficult to distinguish between the two in reality.

"If a man seduces a virgin[a] who is not betrothed and lies with her, he shall give the bride price for her and make her his wife."

Exodus 22:16-17, English Standard Version (ESV).

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I. Introduction

KUNDAN SHAH'S *KYA KEHNA* was the highest grossing Bollywood film of the year 2000, and had won several awards and accolades. In addition to the commercial success, the film also received critical acclaim for tackling the taboos of pre-marital sex and pre-marital pregnancy with such simplicity and elegance. The crux of the story is the sexual encounter of one Priya Bakshi with a rich playboy Rahul. The girl believed that the guy was in love with her, whereas the guy was concerned only as to the satiation of his senses. The girl, later, gets pregnant. She and her family plead the rich playboy to marry her. As you would expect, he rejects the marriage offer and ridicules them.

Now, if a small tweak is made to the story, you would have a completely different plot. Suppose, Rahul, the rich playboy, had promised to marry Priya before they engaged in the sexual act. The story would now revolve around court proceedings wherein Rahul had been charged with the offence of rape. Because, in India, if a man promises to marry a girl prior to having sexual intercourse with her, and it is proved that he never intended to fulfil the promise, he could get convicted under Section 375 of the Indian Penal Code (*hereinafter* IPC). However, if the accused is able to prove that he did intend to fulfil his promise but could not do same because of some circumstances beyond his control, he may escape conviction because it would not amount to false promise but a 'breach of promise'.¹

The idea was first propounded in *Jayanti Rani Panda v. State of West Bengal*² wherein the court observed that in such cases, consent cannot be said to be vitiated so as "to pardon the act of the girl and fasten criminal liability on the other, *unless the Court can be assured that from the very inception the accused never really intended to marry her*" [*emphasis supplied*]. The principle later evolved into a strong

¹*Deelip Singh v. State of Bihar*, (2005) 1 SCC 88 [*hereinafter* *Deelip*].

²1984 Cri LJ 1535 (Cal) [*hereinafter* *Jayanti Rani Panda*].

legal precedent in *Deelip Singh v. State of Bihar*.³ *Deelip* was quickly followed by *Yedla Srinivasa Rao v. State of Andhra Pradesh*⁴ and it was the perfect opportunity for the court to correct the flaws of *Deelip*, yet the Supreme Court not only affirmed the position of law established in *Deelip* but further solidified and entrenched this wrong jurisprudence in India. Thereafter, Supreme Court⁵ and High Courts⁶ in several judgments have relied upon this principle to decide cases where consent had been allegedly obtained under a promise to marry.

This article contends that 'false promise' of marriage does not amount to 'misconception of fact' nor does it vitiate consent. Furthermore, it is asserted that the distinction between 'false promise' and 'breach of promise' is impractical, and ascertainment of the real intention of the promisor is largely shaped by the personal prejudices of the judges. However, the authors are not oblivious to the reprehensible consequences that such 'false promises' of marriage may bring forth for women, and, thus, appropriate measures to tackle such problems are also suggested.

II. False Promise to Marry does not Amount to 'Misconception of Fact'

Consent, for the purposes of Section 375 of the IPC, 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.⁷

³(2005) 1 SCC 88.

⁴(2006) 11 SCC 615 [hereinafter *Yedla*].

⁵See *State of UP v. Naushad* (2013) 16 SCC 651; *Deepak Gulati v. State of Haryana* (2013) 7 SCC 675.

⁶See *Anil v. State of Haryana*, 2014 SCC OnLine P&H 15054; *Sri Pintu Malakar v. State of Tripura*, 2014 SCC OnLine Tri 300; *Gurpreet Singh v. State of Punjab*, 2014 SCC OnLine P&H 1388; *State v. Rajesh Buraria*, 2013 SCC OnLine Del 2561; *Mahafuja Banu v. Md. Asadul Islam*, (2013) 1 CAL LT 109 (HC); *Ravi v. State*, 2010 Cri LJ 3493; *Satyendra Kumar v. State of Jharkhand*, (2010) 1 JLJR 147 (HC).

⁷See Explanation 2 appended to Indian Penal Code, 1860 (Act 45 of 1860), s. 375.

However, if consent is given under misconception of fact by the prosecutrix, such consent cannot be said to be voluntary and would be vitiated by Section 90 of IPC.⁸

The doctrine of 'false promise' of marriage rests on the understanding that a false promise of marriage can be considered to be a 'misconception of fact' and consent, thus obtained, would be vitiated by Section 90 of IPC. To ascertain whether misconception regarding the intention of the other person with regards to marriage would be a 'misconception of fact' so as to vitiate consent, one must ascertain what is meant by the term 'fact'. According to common law cases, only those facts which are related to the 'nature or quality of the act' or 'identity of the other person' may vitiate consent in cases of rape. This position has been maintained throughout a string of cases such as *R v. Clarence*,⁹ *R v. William*¹⁰ and *R v. Jheeta*¹¹ and has been most notably affirmed in the case of *R v. Linekar*.¹² The United Kingdom has also incorporated this principle in Section 76 of the Sexual Offences Act, 2003 which creates a presumption that if consent occurs under the circumstances that the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act, it would be presumed that there was no consent. It must be understood by Indian courts that a promise to marry affects neither the nature nor quality nor purpose of the act of sexual intercourse. The case on point is *R v. Linekar*¹³ where accused engaged in sexual activities with the complainant who was a prostitute and refused to pay the agreed sum of money. It was found

⁸Section 90 reads- "Consent known to be given under fear or misconception.-A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception..."

⁹ (1877) 2 QBD 410.

¹⁰[1923] 1 KB 340.

¹¹[2007] EWCA Crim 1699.

¹²[1995] 2 CR App R 49.

¹³*Ibid.*

that the accused didn't have the agreed sum with him while he made the agreement and later he was charged with rape. However, the court rightly said that the false promise to pay didn't relate to nature, purpose or quality of the act and hence consent obtained on the basis of that promise cannot be said to be untrue consent. Similarly, if we substitute false promise to pay money with promise to marry, we will find that the promise to marry would not affect nature or quality of the act.

It must also be considered that in cases where a promise of marriage is extended to the prosecutrix before sexual intercourse, the prosecutrix still has a choice to refuse the act or give assent to it. She has an option of judging for herself the ups and downs of each decision and as long as this decision to choose remains with her, her decision to go further with the prospect of sexual intercourse remains consensual. An offer of marriage doesn't affect the rational decision-making process of the woman. If the woman does not take into account the consequences of the act of engaging in sexual intercourse, the law shall not convert her bad decision into an act of rape. *Secondly*, in cases of rape, the mental framework of the victim in aftermath of intercourse is immaterial and what matters is only whether she gave consent prior to and during the commission of the act. Even in cases of false promises to marry, there is consent at the time of the commission of the act and it is only later that the consent is alleged to be vitiated. However, the law is only concerned whether there was consent at the time of the commission of the offence or not and as there is always consent at the time of intercourse in cases of marriage promises, the sexual act cannot be said to be rape.

Hence, on this line of reasoning, it was categorically said in *Uday v. State of Karnataka*¹⁴ that "*the consent given by a [girl] 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*

¹⁴(2003) 4 SCC 46.

misconception of fact. A false promise to marry is not a fact within the meaning of the Code” [emphasis supplied]. However, the Supreme Court in Deelip overshadowed the ruling in Uday with its own explanation of the above-quoted lines. The Court admitted that “a promise to marry without anything more will not give rise to “misconception of fact” within the meaning of Section 90,” but it clarified that “a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent.”

Apart from nature, purpose and quality of the act, courts have also considered the misconception as to the consequence of the act as a factor while deciding such cases. For example, in *R v. Williams*¹⁵ a music teacher, who had sexual intercourse with a girl under the pretence that he had to perform an operation to enable her to produce her voice properly, was rightly convicted of rape. The misconception as to the consequence of the act, that it would produce proper voice, was immediately relevant to the act. However, it must be understood that the consequences of the act should not be far-fetched ones and shall have immediate relevance to the act. Therefore, to say that in ‘false promise’ of marriage cases, the girl is mistaken as to the consequence of the act, that it would result in her marriage with the promisor, would be a patent far-fetching of this principle. Such misconception of the girl has no immediate relevance to the act and has only an extraneous relation with the consequences of the act.

Furthermore, the argument that false promises or all forms of deception would come within the scope of misconception of fact is capable of being stretched to illogical extremes. For example, if a person tells a woman that he is unmarried, while actually, he isn’t, and on the basis of this representation the woman gives her consent to engage in sexual intercourse, would that person be branded as a

¹⁵[1923] 1 KB 340.

rapist by law? Similarly, if a person falsely promises to provide a job to a woman and on this basis has intercourse, would he be guilty of rape? Perhaps, a reading of the judgments in *Girish Kumar Sharan v. State of Jharkhand*¹⁶ and *Vijay Mahajan v. State of Haryana*,¹⁷ though not actually involving the exact set of facts, suggests otherwise.

III. 'False Promise' and 'Breach of Promise': The ambiguity in Law

It is also submitted that the distinction between 'false promises' and 'breach of promises' is a vague and ambiguous one in the sense that it is practically very difficult to distinguish between the two in reality. In fact, in a recent decision of Calcutta High Court,¹⁸ while Indrajit Chatterjee, J. noted that "*it [was] difficult [for him] to say that when the accused gave the proposal to marry the victim he intended not to fulfil the same and as such the promise to marry was a mere hoax,*" his sister Judge, Indira Banerjee, J. was able to conclude, on the same set of facts, that the accused had no intention to fulfil his promise of marriage. Later, when the matter was referred to a Third Judge due to divergence in opinion, Joymalya Bagchi, J., relying on the exact same evidence, decided that there was no proof that the accused had promised to marry the prosecutrix prior to their sexual intercourse.¹⁹

Almost all such cases are marked by utter confusion when it comes to the determination of the intention of the accused when he had made the promise to marry. Another concrete example would be the judgment pronounced in *State of UP v. Naushad*.²⁰ In this case, the Allahabad High Court, setting aside the judgment of the trial court, had acquitted the accused since it failed to find proof beyond reasonable doubt that the accused had no intention to marry the

¹⁶ (2010) 3 AIR Jhar R 481.

¹⁷ (2004) 1 RCR (Cri) 981.

¹⁸ *Lachmi v. State of West Bengal*, 2015 Cri LJ 2220.

¹⁹ *Lachmi v. State of West Bengal*, (2016) 1 CAL LT 443 (HC).

²⁰ (2013) 16 SCC 651 [hereinafter *Naushad's Case*].

prosecutrix from the very inception. The Supreme Court reversed the acquittal order after noting the following: "...the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. *After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her...*" [emphasis supplied] It remains unclear how the court was able to deduce that the accused had no intention to marry the prosecutrix from the very beginning, from the fact that the accused refused to marry the prosecutrix after she had got pregnant.

Perhaps, the only reason why the courts choose to create a difference between false promises and breach of promise of marriage is because those who are morally blameworthy do not go unpunished when the accused promised to marry but he never intended to marry right from the beginning. The language employed by the court is highly suggestive of this implication. A person who obtains consent under a promise of marriage, though he never intended to marry the girl, appears to be morally blameworthy because such a person gives an impression of being a philanderer to the Court. On the other hand, a person who fails to marry the girl due to certain circumstances beyond his control appears to be morally justifiable. However, it must be noted that there is considerable difference between moral blameworthiness and criminal culpability because morality and law fall in different domains. It is submitted that it would be both morally and legally wrong to make a morally blameworthy person legally culpable and to subject him to the stigma of being a 'rapist' while at best he is a seducer.

IV. Misplaced Emphasis on Age and Social Status of the Prosecutrix

In a recent judgment pronounced in *Ratheesh v. State of Kerala*,²¹ the Kerala High Court failed to accept that a well-educated lady having a degree in Engineering could be easily deceived to engage in sexual intercourse on a promise of marriage. Similarly, in 2014, the Bombay High Court while hearing an anticipatory bail application, refused to believe that a twenty four year old educated woman would enter into a sexual relationship merely on an alleged promise of marriage.²² Likewise, the Delhi High Court, in a 2013 decision, noted that when a grown up girl engages in sexual intercourse with her friend or colleague, who has promised to marry her, she does so at her own peril, and she must understand that there can be no certainty that the guy would actually marry her.²³ The Court, thus, concluded that an act of sexual intercourse grounded on a promise of marriage would not become rape if the man fails to tie the knot.

A general trend can be traced out from these recent decisions. While the precedent established in *Deelip* still holds good, few exceptions are being carved out. Thus, if it can be established that the girl was mature enough, well-educated, and socially well-placed, then that could weaken the prosecution's case. It is also to be noted that both in *Dileep* and *Yedla*, the prosecutrix was 16-17 years of age. The Courts therein have stressed upon the idea that girls of tender age are more susceptible to sexual exploitation on false promises of marriage. In *Yedla*, the Court also emphasized on the social status of the prosecutrix, while ascertaining the guilt of the accused in the following manner: "*in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what the consequences may result for indulging into such acts and when the accused promised to marry but he never intended to marry right from the beginning*

²¹ 2017 SCC OnLine Ker. 200.

²² *Mahesh Balkrishna Dandane v. State of Maharashtra*, 2015 ALL MR (Cri) 2805.

²³ *State v. Ashish Kumar*, 2013 SCC OnLine Del 5182.

then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375."

The emphasis on such factors indeed has noble intentions. The entire object of this doctrine is to avoid sexual exploitation of vulnerable women. It cannot be denied that socially disadvantaged women, girls of tender age, differently-abled women, etc. are more likely to be sexually exploited through a promise of marriage. However, despite the vulnerabilities, these women are legally entitled to consent to sexual intercourse. Though the prevention of their sexual exploitation is crucial, the route taken by Indian Courts does not seem to be driven by law. The solution to such problems should have been arrived at through a proper recourse to the law of the land. For example, taking into account the social realities of India, the Criminal Law (Amendment) Act, 2013, raised the age of consent to 18 from 16. It apparently caters well to the problem of young girls being sexually exploited through lures of all kinds.

The Amendment Act also widens the scope of Section 376-C of the penal code and punishes a person who "*abuses [his] position of authority or fiduciary relationship to 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 does not amount to the offence of rape but is punished with rigorous imprisonment for a term ranging from five to ten years. In this regard, reference shall be made to the previously mentioned decision of Jharkhand High Court in *Girish Kumar Sharan v. State of Jharkhand*,²⁴ wherein the accused, a public servant, had obtained the consent for sexual intercourse from the prosecutrix in exchange for an offer of job, the High Court rightly held that the accused could not be punished under Section 376 of IPC formerly seducing the prosecutrix, however, his act fell within the definition of the offence punishable under Section 376-B of IPC.²⁵

²⁴ (2010) 3 AIR Jhar R 481.

²⁵ Prior to substitution by Act 13 of 2013, Section 376-B read as: "*Intercourse by public servant with woman in his custody. – Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of*

Apart from the legislative measures, the government can also take initiatives to educate and empower vulnerable classes of women so that they become capable of taking informed decisions as to matters concerning their sexual rights. Sex education instructions in schools, policies of local self-governments, communication programmes of local health centres, etc. can play a vital role in this regard. Also, the government can work in partnership with organizations that have already done a commendable job in this area, like the Delhi-based NGO CREA.

V. The *de minimis* Approach to the problem of 'False Promise' of Marriage

The *de minimis* or minimalist approach is an attribute of every modern criminal justice system. It essentially means that in order to prevent a *harm*, criminalisation should be the last resort. In other words, if civil remedies, or other methods of regulation, are capable of preventing the particular harm, no criminal remedies shall be created. Another extension of this principle can be that the harshest forms of criminalisation – like the offences that are punished with capital punishment or life imprisonment – shall be reserved for the most shocking actions. The object of these principles is to prevent the situations where a majority of the population is facing criminal charges, or where the people are being met with punishments much harsher than the harm committed by them. In light of the aforesaid, it is to be noted that according to a Crime Investigation Department report released in November 2013, 'sex after a false promise of marriage' was recorded as the leading category within registered rape cases in Maharashtra.²⁶

In the instant case, it is not being suggested that the persons who deceive women so as to have sexual intercourse with them, on

a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

²⁶ V. Narayan, "Sex after false promise of marriage leads cases of rape in Maharashtra" *The Times of India*, Nov. 18, 2013.

the basis of false promises, shall go unpunished. The obvious civil remedy, in this regard, would be a suit for Breach of Contract. Moreover, a proper mechanism also exists within the penal code itself to discipline such seducers: the offence of cheating as defined in Section 415 of IPC.²⁷ Even few decisions have been pronounced in line with this mechanism. For instance, in a 1997 decision,²⁸ the Bombay High Court observed that the engagement of the accused in sexual intercourse through a 'false promise' of marriage would be covered within the mischief of cheating. Similarly, in *Mir Wali Mohammad v State of Bihar*,²⁹ wherein the fact situation was similar to that of *Naushad's Case*, the Patna High Court held that though an offence of rape was not established, the act of the accused would amount to cheating as defined in Section 415 of IPC.

The Supreme Court in *Deelip* took no notice of the aforesaid High Court decisions. It is also to be noted that the Patna High Court in *Mir Wali Mohammad* also takes note of the Calcutta High Court decision in *Jayanti Rani Panda*, which was also relied upon in *Deelip* to form the basis of 'false promise' of marriage doctrine. The Patna High Court, on the other hand, was of the opinion that the actual holding of *Jayanti Rani Panda* was that a false promise of marriage would not amount to 'misconception of fact' under Section 90 of IPC and engagement in sexual intercourse on the basis of a 'false promise' of marriage would not constitute as the offence of rape as defined in Section 375 of IPC.³⁰ The patent contradiction arises because of the fact that the judgment delivered in *Jayanti Rani Panda* is an ambiguous one, and contains inconsistent observations.

²⁷ Section 415 reads- Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or *intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".* [emphasis supplied]

²⁸ *Atmaram Mahadu More v. State of Maharashtra*, (1998) 100 (1) Bom LR 666 [hereinafter *Atmaram Mahadu More*].

²⁹ (1990) 2 PLJR 375 [hereinafter *Mir Wali Mohammad*].

³⁰ *Id.* at para. 36.

A reference must also be made to a recent decision of Madras High Court,³¹ wherein on a typical fact situation involving a 'false promise' of marriage, the trial court had convicted the accused of the offence of cheating – though he was charged under both, Section 417 and Section 376 of IPC. The trial court decision was apparently *per incuriam* the law established in *Deelip*. However, the Madras High Court after citing two other High Court decisions³² from the pre-*Deelip* era that echoed the sentiments of the above discussed decisions of *Atmaram Mahadu More* and *Mir Wali Mohammad* and decided that the trial court had come to the correct conclusion. The Court never explains why the law dictated in *Deelip* was not applicable to the instant case. It need not be pointed out that the law in this regard is becoming grayer. The Courts, on a particular 'false promise of marriage' fact situation, might convict the accused of the offence of rape, or of cheating, or might set him free taking into account the social status and the age of the prosecutrix.

VI. Marriage, Morality and Sex

Kya Kehna was so successful because it was the tale of the struggle of a young girl and her family against the society. It is not actually about the rich playboy, and how he had apparently exploited the female protagonist. Rather, the plot concerns itself more as to how the Indian society looks down upon a girl who gets pregnant without being married. However, we shall not engage in any delusions here. It was a fictional world. In the real world, one cannot expect the support of parents while carrying a child in womb and the biological father has refused to marry. In the real world, there also exist innumerable inequalities and vulnerabilities. Priya was well-educated; she belonged to an urban upper-middle class family. One cannot simply expect a girl belonging to a weaker section to exhibit similar courage.

But, *Kya Kehna* is the only way forward; after all, fiction is the mirror that predicts the future. If we actually aspire to live in an

³¹*M. Selvakumar v. All women Police Station*, 2013 (1) MLJ (Crl) 523.

³²*Ravichandran v. Mariyammal*, 1992 Cri LJ 1675; *Mailsami v. State*, 1994 Cri LJ 2238.

India where no woman is sexually exploited on a promise of marriage, the obvious solution is to empower vulnerable women, so as to enable them to exercise their sexual rights like the privileged sections of the society do. The courts, through the doctrine of 'false promise' of marriage, are not empowering women; they are rather ensuring that they remain chained within the shackles of the institution of marriage, forever and forever. Perhaps what prompt the judges in such cases of false promises of marriage to become judicially active are their personal emotional convictions on morality, marriage and sex. The bias in the language used by the judges is reflective of this assumption. But, it must be understood that this popular morality can also be seen as an extension of patriarchy.

VII. Conclusion

We often find judgments in which the Court is willing to acquit the accused, who by way of a compromise, agrees to marry his victim.³³ In those cases, what drives the court is the patriarchal notion that 'marriage condones rape'. Similarly, saying that not marrying someone makes the otherwise consensual act rape is a backwards extension of the above notion; because the social construction behind both the arguments is another notion which says that 'marriage is the only justification for sex'. Even, when the Courts refuse to accept that the prosecutrix could have been swayed by a promise of marriage, they make sure to enlighten the parties that pre-marital sex is immoral.³⁴ Moreover, the courts covertly convey that marriage is the only yearning of women in this nation. In today's times, when progressive elements of the society are raising their strong voices for the annihilation of patriarchy, this example of patriarchy shall not go unnoticed.

³³See *Md. Jahirul Maulana v. State of Assam*, 2016 Cri LJ 3971 at para. 9.

³⁴See *State v. Ashish Kumar*, 2013 SCC OnLine Del 5182 at para. 35.