

(1985) 01 P&H CK 0121
In the Punjab And Haryana At Chandigarh
Case No : Criminal Appeal No. 78 SB of 1984

Dr. Rishi Dev Anand

APPELLANT

Vs

The State of (U.T. Chandigarh)

RESPONDENT

Date of Decision : 16-01-1985

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (1985) 01 P&H CK 0121

Hon'ble Judges : K.P.S. Sandhu, J

Bench : Single Bench

Advocate : Harbans Singh, Mr. M.P. Gupta and Mr. R.S. Marya, for the Appellant;
H.S. Brar and Mr. Satinder Singh, for the Respondent

Final Decision : Dismissed

Judgement

K.P.S. Sandhu, J.—Appellant Dr. Rishi Dev Anand stands convicted and sentenced u/s 376 of the Indian Penal Code to rigorous imprisonment for one year and a fine of Rs. 2000, in default further rigorous imprisonment for six months, and u/s 420 of the Indian Penal Code to rigorous imprisonment for two years and a fine of Rs. 1000, in default further rigorous imprisonment for three months, by the Sessions Judge, Chandigarh, vide his order dated 4th February, 1984. The substantive sentences of imprisonment have been ordered to run concurrently and the entire fine, if realised, has been ordered to be paid to Shrimati Devinder Kaur, prosecutrix. The Appellant has challenged his conviction and sentence through Criminal Appeal No. 78-SB of 1984 whereas Shrimati Davinder Kaur has filed Cr R No. 1041 of 1984 for the enhancement of sentence and for payment of compensation to her This judgment of mine would dispose of both the cases as they arise out of one and the same judgment.

2. The facts of this case are unusual and the questions to be determined are rather interesting. The Appellant in the year 1960 was working as a teacher in New Era College, Sector 22, Chandigarh. Shrimati Devinder Kaur PW 2 was a student in that college in the aforesaid year. The Appellant was one of her

teachers. He used to teach her even at her house. That is how she developed relations with him. He left for England in the year 1963 for higher studies. Shrimati Devinder Kaur after doing her B.Sc. (Ed.) from Kuru-kshetra University also went to England in August, 1965, for higher studies. She joined Westham College of Technology, London-15. The Appellant was also a student in the same department which Shrimati Devinder Kaur had joined. Intimacy between them developed further and ultimately in August, 1965, the Appellant and Shrimati Devinder Kaur married each other at the Southall gurdwara according to the Sikh rites. The marriage ceremony was witnessed by Dr. R. K. Behal and Dr. Sukhdev Singh Purewal at the Southall gurdwara. After marriage the Appellant and Shrimati Devinder Kaur shifted to London and stayed there as husband and wife. In the year 1967 Shrimati Devinder Kaur gave birth to a baby girl. In August, 1968, the Appellant came back and stayed in India from August, 1968, to October, 1958, and again joined Shrimati Devinder Kaur in the U.K. The Appellant had come to India after doing Ph.D. in Chemistry as he wanted to assess his prospects of employment here since job conditions in England were not very good. In the year 1969 the Appellant was offered a job in Chemistry Department of Panjab University by the Vice Chancellor Accordingly, he came back again to India to avail himself of the offer. He joined the Chemistry Department of Panjab University in August, 1969. In January, 1970, the Appellant again visited the U K. and stayed with Shrimati Devinder Kaur up to April, 1970. Shrimati Devinder Kaur after doing her Ph.D. in Chemistry in December, 1972, came to India and joined the Appellant in February, 1973, and stayed with him in flat No. 26 in the university campus and latter on shifted along with him to flat No. 23.

3. According to immigration laws, the Appellant had lost his status as an immigrant in the U.K. after the expiry of two years of his return from the U.K. He suggested to Shrimati Devinder Kaur that she should go back to the U.K. so that her status as an immigrant could be retained as he was not satisfied with the service conditions in India and that he may some time go to the U.K. to settle there. In consequence of the suggestion Shrimati Devinder Kaur PW again went to England in February, 1975, but she returned to India the same year in July. On her return she learnt that the Appellant was trying to get Readership in the National Council of Education and Research at Mysore which he ultimately succeeded in getting. The Appellant went to join his new job at Mysore in August, 1975, and left behind Shrimati Devinder Kaur in flat No. 23 In September, 1975, Shrimati Devinder Kaur also left for Mysore on 8th September, 1975, and joined the Appellant there. In October, 1975, both the Appellant and Shrimati Devinder Kaur came back to Chandigarh as there were vacations and stayed at Chandigarh for three weeks. Their daughter was studying in Carmel Convent at Chandigarh. From Chandigarh Shrimati Devinder Kaur again left for the U.K. in November, 1975, with her daughter at the suggestion of the Appellant. In the middle of the year 1977 Shrimati Devinder Kaur was informed by the Appellant that he had decided to shift to Chandigarh again. On learning this Shrimati Devinder Kaur

gave up her job in the U.K. and come back to Chandigarh in August, 1977 along with her daughter. After her return to India Shaimati Devinder Kaur started living with her parents at Kharar. She used to send her daughter to the School from Kharar. The Appellant was again allotted flat No. 44 in the university campus. Shrimati Devinder Kaur again started living with the Appellant in that flat in the university campus and cohabited with the Appellant up to December, 1977, in the aforesaid flat in the university campus. Shri G S. Sohal PW 8, a Lecturer in Punjab University, used to reside in a flat opposite to flat No 44. In January, 1978, the Appellant and Shrimati Devinder Kaur shifted to flat No. 43 and Shrimati Devinder Kaur stayed there with the Appellant till July, 1978. She was leading a normal sexual life with the Appellant during all this period.

4. In July, 1978, Shrimati Devinder Kaur left for England at the persuasion of the Appellant and returned from London in April, 1979, and joined the Appellant again in flat No 43 in the university campus at Chandigarh. She cohabited with the Appellant as wife up to August, 1979. Around the month of June or July, 1979, the attitude of the Appellant towards Shrimati Devinder Kaur became rather odd. He started telling her that he had obtained a decree of divorce and that she was no more his wife. However, Shrimati Devinder Kaur did not believe it and did not take the matter seriously. She continued leading normal sexual life with the Appellant as before. As the attitude of the Appellant towards her started getting worse, Shrimati Devinder Kaur enquired from Dr. R.K. Behal in London through a letter whether the Appellant could get divorce in the given circumstances. Dr. R.K. Behal told her not to take such things seriously and further advised her that if she wanted to verify about the divorce she should go to the Chandigarh courts to find out the exact position.

5. In August, Shrimati Devinder Kaur went to stay with her father at Kharar. In the end of August, 1979, she came back to the house of the Appellant and found that it was locked. She was told that the Appellant had vacated the house and nobody could tell her about his whereabouts. Ultimately Shrimati Devinder Kaur came to know that the Appellant was living in Ashok Vihar in New Delhi. After ascertaining his address she went to the residence of the Appellant in Ashok Vihar, New Delhi. She knocked at the door of the house when a lady came out and told Shrimati Devinder Kaur that she was Mrs. Kamal Anand, wife of the Appellant. The Appellant in the meantime also came out of the house and started rebuking Shrimati Devinder Kaur. Shrimati Devinder Kaur came back to Chandigarh and filed an application for the restitution of conjugal rights in the Court of the Sub-Judge First Class, Chandigarh. In the written reply in the application for the restitution of conjugal rights the Appellant disclosed that he had obtained an ex-parte decree of divorce from a Delhi Court. Shrimati Devinder Kaur maintained that had she known about the decree of divorce which was passed on 16th February, 1977, she would not have allowed the Appellant to have sex with her. In August, 1980, she filed an application for getting the ex-parte decree of divorce set aside. Shrimati Devinder Kaur owned a Vespa scooter No. CHU-9934. She had purchased the same in foreign exchange in the year

1973. In 1978 when she was about to leave for the U.K. the Appellant asked her to transfer the scooter in the name of his nephew Navin Chander Kaura as he wanted to raise a loan for the purchase of car and that he could not get the loan if any vehicle stood in his or his wife's name. On this representation Shrimati Devinder Kaur transferred the scooter in the name of Navin Chander Kaura aforesaid without getting any consideration for the same. Two months thereafter the Appellant got the scooter transferred in his own name from his nephew Shrimati Devinder Kaur had brought numerous articles from the U.K. which were kept in the house of the Appellant in the university campus. They were worth about Rs. 70,000. These were also never returned by the Appellant to Shrimati Devinder Kaur.

6. On 13th October, 1980, Shrimati Devinder Kaur met the Inspector General of Police, Chandigarh, and lodged complaint Exhibit PC under her own signatures. She produced before the police a certified copy of the decree of divorce obtained by the Appellant against her and a certified copy of the application filed by her under Rule 13 of Order 9 of the CPC for getting the decree set aside. The judgment is Exhibit PD, the decree is Exhibit PE and the application for setting aside the decree of divorce is Exhibit PF. She also gave a list of articles, Exhibit PG, to the police which were alleged to have been retained by the Appellant. Shrimati Devinder Kaur also produced photographs. Exhibit P1 is the photograph of the Appellant and Exhibit P2 is the photograph of Mrs. Kamal Anand while Exhibit P3 is the photograph of Anita daughter of Devinder Kaur born out of the loins of the Appellant and photograph Exhibit P4 relates to the Appellant, Shrimati Devinder Kaur and their daughter Anita. This photograph was taken in London. These photographs were also taken into possession by the police. Fifty letters Exhibits P5 to P54 were also taken into possession by the police from the residence of the Appellant at Ashok Vihar, New Delhi. Shrimati Devinder Kaur also produced the receipts and cash memo of the articles purchased by her which were allegedly retained by the Appellant. They are Exhibits P55 to P66. The Appellant was granted pre arrest bail and due investigation of the case he was sent up for trial.

7. When examined u/s 313 of the Code of Criminal Procedure, the Appellant denied the prosecution allegations and pleaded innocence. He, however, filed a detailed written statement which is at pages 497 to 503 of the file wherein he admitted the factum of his marriage with Shrimati Devinder Kaur but, according to him, the marriage was performed at Delhi. He further stated that Shrimati Devinder Kaur was aware of the decree of divorce obtained by him against her. In defence he examined Balbir Singh Senior Clerk, S S P office, Chandigarh. DW1. He brought the summoned record containing the complaint made by Shri M S Kundu against Sub-Inspector Daya Nand DW2 Mohinder Singh Kundu proved complaint Exhibit DB dated 14th August, 1985, made by him to the Inspector General of Police, Chandigarh, against Sub-Inspector Daya Nand PW12. DW3. Shri Jai Singh, Superintendent of Police, C. I. D., Haryana, Chandigarh, stated that he remained posted as D. S. P. in U. T., Chandigarh, from July to September,

1983, that Sub Inspector Daya Nand PW12 was also serving in the U. T. police, that he received complaint Exhibit DB through the Senior Superintendent of Police, Chandigarh, that this complaint was made by M. S. Kundu, and that he held preliminary inquiry into the complaint. He further stated that he did not record the statement of Sub-Inspector Daya Nand. DW4 Shri S K. Bhandari, Lecturer, Panjab University Evening College, Chandigarh, stated that he knew the Appellant since the year 1977 He used to live in house No. 27, Sector 16, Chandigarh, with his brother. Thereafter, he shifted to teachers' flat No. 43 in the Panjab University campus. He used to see the Appellant after he had shifted to the university campus. His daughter Nitty also used to reside with him there He further stated that he did not see Devinder Kaur PW with the Appellant during that time and that he learnt in the year 1978 that the Appellant had married a second time, his second wife being Shrimati Kamal, a lecturer in Delhi. Shri Surinder Mohan Sehgal, Lecturer in Chemistry, Arya College, Ludhiana, DW5 stated that the Appellant was known to him since the year 1961. They were classmates and were old friends. He knew Shrimati Devinder Kaur prosecutor. She is the first wife of the Appellant. They were married at Delhi before the Appellant left for the U. K. In 1977 the Appellant used to reside with his brother in Sector 16, Chandigarh. The witness had his house in Sector 15, Chandigarh. Flat No. 43 had been allotted to the Appellant in the beginning of 1978 and he left that flat most probably in the month of July, 1979. Nitty daughter of the Appellant used to reside with him when he was living in Sector 16. She also shifted to flat No. 43 along with the Appellant He never saw Shrimati Devinder Kaur PW living with the Appellant from 1977 to 1979. DW6 Amarjit, Clerk, House Allotment Section, Panjab University, Chandigarh, stated on the basis of the record that flat No 11 was allotted to Shrimati Asha Verma on 21st March, 1969, and that the same was vacated by her on 25th April, 1977. Flat No. E-1/77 was occupied by Shrimati Asha Verma on 10th February, 1978. Then she shifted to house No. E/1-81 on 3rd May, 1978. DW7 Ranbir Singh Sub-Inspector, Police Station, Ashok Vihar, New Delhi, brought first information report No. 486 dated 2nd(sic) September, 1980, lodged by Shrimati Devinder Kaur PW. Its copy is Exhibit DC This first information report was ultimately cancelled DW8 Shri Sahailender Nigam, Junior Management Grade Officer, State Bank of India, Sector 17, Foreign Exchange Section, Chandigarh, stated that Shrimati Devinder Kaur PW had encashed foreign exchange in the form of travellers cheques valuing 180 pounds sterling on 7th February, 1973, and 20 pounds sterling on 5th March, 1973, in Indian rupees from his branch. He further stated that 180 pounds were encashed for Rs. 3354 40 in 1973 and that 20 pounds were encashed for Rs. 370 on 5th July, 1973. Shrimati Devinder Kaur at that time had shown her passport No. III 9597. The bank had issued a certificate to her on 14th January, 1975, for the first transaction and no certificate was asked for in respect of the other transaction DW9 Shri Joginder Singh Deputy Superintendent of Police stated that he remained posted first as Inspector of Police and then as Deputy Superintendent of Police at Chandigarh from January, 1975, to 31st October, 1983. that Sub-Inspector Daya Nand was also posted in the police at Chandigarh and that he did

not hold any inquiry against him on the complaint of Shri M. S. Kondu DW10 Jagdish Chander, Ahalmad of the Court of Shri Jaspal Singh, Additional District and Sessions Judge, Delhi, stated on the basis of the record that suit No. 250 of 1975 instituted by Rishi Dev Anand against Shrimati Devinder Kaur on 18th July, 1975, was decided on 16th February, 1977. It was a petition for divorce u/s 13 of the Hindu Marriage Act. DW11 Bachitar Singh Inspector of Police, Traffic Staff, Chandigarh, stated that in September, 1981, he was posted in Police Station West, Chandigarh, that a complaint from Shrimati Devinder Kaur was received by him and that he had marked the same for inquiry to Assistant Sub-Inspector Piara Singh. DW12 Assistant Sub Inspector Piara Singh stated that he was posted as such in Police Station West, Chandigarh, in 1981, and that on 29th September, 1981, the application filed by Shrimati Devinder Kaur was marked to him. He held the inquiry and submitted his report to the Station House Officer. DW13 Anita Anand daughter of the Appellant stated that she had gone to England in November, 1975, along with her mother Shrimati Devinder Kaur PW that she returned from the U. K. in August, 1977, with Shrimati Devinder Kaur. She further stated that the Appellant, her father, was then serving in the NCERT at Delhi. Before leaving for the U. K. Anita Anand was studying in Carmel Convent, Sector 9, Chandigarh She was then left by Shrimati Devinder Kaur with the Appellant in Delhi She returned to Chandigarh in the first week of September, 1979. At Chandigarh she used to live with the elder brother of the Appellant. The Appellant also used to stay there A flat was allotted to the Appellant in the university campus but the same was not occupied by him since it did not face the sun and the Appellant was a patient of asthma. She further stated that Shrimati Devinder Kaur PW did not stay with them at Chandigarh though she had been meeting her occasionally. In the U K Anita Anand used to stay with Mr. Behal in 22 Brantwood Road, Baren Hurst Kent. Shrimati Devinder Kaur PW used to stay separately at Liverpool Shrimati Devinder Kaur had shown a newspaper to this witness in which a notice had been published regarding the filing of the divorce petition against Shrimati Devinder Kaur by the Appellant. This happened in the year 1977. Shrimati Devinder Kaur was accompanied by Mr Kapoor when she came to show the newspaper to this witness. Anita Anand, however, stated that she did not remember the name of the newspaper.

8. The prosecution, in order to bring home the charge to the Appellant, examined lady doctor Meenal PW1. She medically examined the prosecutrix on 1st April, 1982 In fact, her evidence is of no consequence PW2 is Shrimati Devinder Kaur (sic) herself. PW3 Jaswant Singh draftsman prepared site plan Exhibit PK relating to flats Not 43 and 44 in the Panjab University campus. PW4 Sir i Chand Assistant Sub Inspector stated that he was posted at Police Station, Ashok Vihar, New Delhi, on 3rd June, 1981, when Sub-Inspector Daya Nand PW12 came to him in connection with the investigation of the present case and sought the help of the local police. He had search warrants issued by Shri R L Jindal, Metropolitan Magistrate, Tis Haziri, Delhi, addressed to the Station House Officer, Police Station, Ashok Vihar. The Station House Officer deputad this witness to assist

Sub Inspector Daya Nand in the execution of the search warrants. He along with Sub-Inspector Daya Nand went to house No A-22-B/- 114 MIG Flats, Ashok Vihar Phase 5, which was locked. Two witnesses of the locality were summoned and the lock of the house was broken open. Shrimati Devinder Kaur was also accompanying them. She pointed towards various articles lying in the house which were taken into possession. The house was re-locked and the key was deposited in the malkhana. The articles were taken into possession vide memo Exhibit PL. PW 5 Maya Ram Clerk, D. C Office, Chandigarh, stated on the basis of the record that scooter No. CHU 9934 was registered for the first time on 7th August, 1973, in the name of Shrimati Devinder Kaur wife of Dr. R D Anand. On 12th July, 1978, the ownership of the same was transferred in the name of one Navin Chander Kaur. On 16th August, 1978, it was again transferred to the name of Dr Rishi Dev Anand son of Mulkh Raj Anand. At present the registration of the scooter stood is the name of Rishi Dev Anand Appellant. PW6 G. S. Bindra Senior Assistant, Panjab University Construction Office, stated that flat No. 44 in the Panjab University campus was occupied by the Appellant from 22nd October, 1977, to 23rd December, 1977. He had issued certificate Exhibit PM which shows that flat No 21 was occupied by the Appellant from 24th May, 1974, to 12th January, 1976, that flat No 43 was occupied by him from 2nd(sic) December, 1977, to 21st August, 1979, and that certificate Exhibit PM to this effect was issued by him. Mrs Usha Verma Lecturer, Central Asisn(sic) Study Department, Panjab University, PW 7 stated that she had been working in the university as such since 1968. She knew the Appellant and Shrimati Devinder Kaur. PW Both of them had occupied flat No. 23 in 1973. Initially the Appellant used to reside there. Subsequently Shrimati Devinder Kaur joined him there. This witness was then residing in flat No. 11 in the same building. There were occasional courtesy visits between the Appellant and his wife on one hand and the family of Mrs Usha Verma on the other. She stated that the Appellant and Shrimati Devinder Kaur were leading normal marital life as husband and wife. Flats Nos 43 and 44 were also situated in the same building. The Appellant later on shifted to these flats in due course of time. Up to February, 1975, Shrimati Devinder Kaur stayed with the Appellant and then left for the U.K. She returned from therein July, 1975 and joined the Appellant. In November, 1975, she again went to England with her daughter. She again returned from there and joined the Appellant in August, 1977. She lived with the Appellant up to July, 1978, when she again left for the U K alone. In 1979 she again returned from the U. K. in the month of April. This witness sometimes saw Shrimati Devinder Kaur living with the Appellant after that upto July, 1979. Shri Gurbus Singh Sohal, Lecturer, Panjab University, PW 8 stated that he had been working as a Lecturer in Panjab University in 1966. He knew the Appellant for the last ten or 11 years. He also knew Shrimati Devinder Kaur. PW. This witness used to reside in university flats in 1972. The Appellant also used to reside in a flat close to the flat of this witness. In 1977 the Appellant was occupying flat No. 44 where he used to live with Shrimati Devinder Kaur. This witness was then occupying flat No. 43 opposite to the flat of the Appellant. He had family relations with the Appellant. Shrimati Devinder Kaur and the

Appellant used to lead a normal married life. This witness shifted from flat No 43 in December, 1977. Shrimati Devinder Kaur returned from the U K two/three months before that. The Appellant had then occupied flat No 43. Both Devinder Kaur and the Appellant visited the family of this witness twice after that. This witness had seen the Appellant and Devinder Kaur living together in the earlier part of 1978 PW 9 Prof O. P. Vig stated that he had issued certificate Exhibit PO to the police stating that the Appellant was working in the Department of Chemistry in the Punjab University at the relevant time and had nominated his wife Shrimati Devinder Kaur Anand for the full share of his provident fund deposits in case of his death. The certificate was taken into possession by the police. PW 10 Shri Anant Ram, Office Superintendent General, Panjab University, Chandigarh, stated that he issued certificate Exhibit PR to the police to the effect that the Appellant while working as Lecturer in the Department of Chemistry was allotted flat No 44 on 25th April, 1972, and he shifted to flat No. 26 on 19th May, 1972, and then shifted to flat No. 23 on 24th May, 1975, and vacated the same on 12th March, 1976. He occupied flat No. 44 on 22nd October, 1977, and on 23rd December, 1977, he shifted to flat No. 43 which he vacated on 21st August 1979. PW 11 Shri Brij Bhushan, Superintendent Establishment, Panjab University, Chandigarh, stated that certificate Exhibit PT was issued by Shri M. G. Sharma now Deputy Registrar, Panjab University, Chandigarh. He identified his signatures and handwriting. PW 12 Daya Nand Sub-Inspector investigated the case. He took into possession various aforementioned articles. He also visited Ashok Vihar, New Delhi, and took into possession various articles and (sic) from flat No A-22-B/114 MIG Flats, Ashok Vihar. He also submitted a final report u/s 173 of the Code of Criminal Procedure.

9. As regards the charge u/s 420 of the Indian Penal Code, the material evidence, is only that of Shrimati Devinder Kaur herself. She has stated that she had purchased Vespa scooter No. CHU 9934 in foreign exchange in 1973 and that she transferred the scooter in the name of Navin Chander Kaur, nephew of the Appellant, without consideration on the representation made by the Appellant that he was to get a loan for the purchase of car and that the loan could be got only if no vehicle stood in his name or in that of his wife. I am of the view that it would not be safe to sustain the conviction of the Appellant under this charge on the short ground that Shrimati Devinder Kaur had admittedly sworn an affidavit at the time of the transfer of the scooter that she had received the consideration for the scooter. Apart from this, the evidence of Shrimati Devinder Kaur that she purchased the Vespa scooter in foreign exchange in 1973 also stands belied by the evidence of Shri Sahailender Nigam DW 8 who has stated that the bank had issued a certificate to Shrimati Devinder Kaur regarding the foreign exchange for the first time in the year 1973. Consequently I give the benefit of doubt to the Appellant, acquit him of the charge u/s 420 of the Indian Penal Code and set aside his conviction and sentence under this charge. The fine imposed on him under this charge, if paid, would be refunded to him.

10. As far as the charge u/s 376 of the Indian Penal Code is concerned, the

learned trial Judge has come to a finding that the Appellant has committed an offence u/s 376 of the Indian Penal Code as defined in clause "Fourthly" of Section 375 of the Indian Penal Code which reads as under:

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.

11. The case of the prosecutrix is that she consented to have sexual relations with the Appellant since she was ignorant of the fact that the Appellant had obtained a decree of divorce against her and she genuinely believed him to be her husband and that had she known about the decree of divorce she would have never agreed to sexual intercourse with the Appellant. I do not think that in view of this evidence clause "Fourthly" of Section 375 of the Indian Penal Code is attracted to the facts of the case. Strength to this view can be sought from a Single Bench judgment of the Mysore High Court reported as A Krishna Raj v. State of Mysore 1969 Mys L. J. 304, wherein it was held as under:

It will be seen that in order that "Fourthly" may be attracted, the consent by the woman must have been given because she believes that the offender is another man to whom she is or believes herself to be lawfully married "Fourthly" will not be applicable in the present case, because consent by Shanthakumari to the accused having sexual intercourse with her was not given under the belief that the accused was another person to whom she believed herself to be married. Shunthakumari believed that she had been married to the accused. This is not a case in which her consent was given in the belief that the accused was some other person to whom she believed herself to be lawfully married. The deception, if any, practised by the accused is not that type of deception contemplated by "Fourthly." Therefore, the conviction u/s 376, the basis that "Fourthly" of S. 375 of the I. P. C. was applicable, will have to be set aside.

To my mind, if clause "Fourthly" had been intended to cover such a case the language would have been "With her consent, when the man knows that he is not her husband, and that her consent is given because she believes him to be her husband."

12. Mr Manmohan Singh, Learned Counsel for the complainant, has very fairly conceded that the provisions of clause "Fourthly" of Section 375 of the Indian Penal Code are not attracted to the facts of the present case. However, he has very strenuously contended that the case of the Appellant is covered by clause "Secondly" of Section 375 of the Indian Penal Code because, according to him, the consent given by the prosecutrix is not the one which is envisaged by the definition of "consent" as contained in Section 90 of the Indian Penal Code. According to him, obviously the consent was given by the prosecutrix because she did not know or believe that the Appellant had obtained a decree of divorce and that she gave this consent under misconception of the fact that the Appellant was her husband. On the other hand, Mr. Harbans Singh Senior Advocate,

Learned Counsel for the Appellant, has contended with all the vehemence at his command that in the first instance the prosecutrix knew that the Appellant had got a decree of divorce, secondly, even if she was ignorant of this fact, she indulged in sexual intercourse with the Appellant with her free consent as envisaged by Section 375 of the Indian Penal Code To substantiate his first assertion that the prosecutrix Shrimati Devinder Kaur knew about the divorce the Learned Counsel has taken me through the contents of letter Exhibit DA dated 27th June, 1979, which was admittedly been written by Dr. R. K. Behal from the U.K. in reply to a letter dated 16th June, 1979, written by Shrimati Devinder Kaur prosecutrix to him. Dr. R K. Behal had written in letter Exhibit DA to Shrimati Devinder Kaur that she was a very simple lady and liable to believe whatever the Appellant told her. He had further suggested in the letter that the Appellant had often been telling lies to her and that if she wanted to know anything about the divorce she should go to the Courts at Chandigarh and try to find out the exact position. To my mind, this letter does not spell out that Shrimati Devinder Kaur had knowledge of the decree of divorce. It clearly shows that the Appellant never showed her the decree of divorce. It appears that the Appellant never seriously intended to convey to Shrimati Devinder Kaur the fact of the having obtained the decree of divorce I am of the view that from this document it can hardly be concluded that Shrimati Devinder Kaur prosecutrix had the knowledge of the decree of divorce.

13. The second contention of Mr. Harbans Singh, Learned Counsel for the Appellant, is that the definition of consent is contained in Section 375 of the Indian Penal Code and that we cannot refer to Section 90 of the Indian Penal Code for the purpose. He has in the first instance placed reliance on a Supreme Court authority reported as *Tukaram and Another Vs. The State of Maharashtra*, wherein their Lordships were pleased to hold as under:

The section itself states in clauses Thirdly and Fourthly as to when a consent would not be a consent within the meaning of clause Secondly. For the proposition that the requisite consent was lacking in present case, reliance on behalf of the State can be placed only on clause. Thirdly so that it would have to be shown that the girl had been put in fear of death or hurt and that was the reason for her consent. To this aspect of the matter the High Court was perhaps alive when it talked of "passive submission" but then in holding that the circumstances available. In the present case make out a case of fear on the part of the girl, it did not give a finding that such fear was shown to be that of death or hurt, and in the absence of such a finding, the alleged fear would not vitiate the consent.

In the case before the Supreme Court the prosecutrix gave her consent because she was put in fear. In this situation, their Lordships were pleased to hold that it is only the fear of death or injury which is to be considered in order to come to a conclusion whether the consent was free or not I am afraid that the ratio of this authority is not applicable to the facts of the present case.

14. Mr. Harbans Singh has next placed reliance on a Single Bench authority of

Nagpur High Court reported as AIR 1955 121 (Nagpur) , wherein it has been held as under:

The consent of a woman of over 18 years of age to a sexual intercourse obtained by putting her in fear of death or of hurt is no defence to an accused person but where the fear to which the woman is subjected is neither of death nor of hurt, but of being arrested, when as a matter of fact there is no warrant of arrest against her, the consent though obtained by fraud, is nonetheless consent....

Consequently, the learned Single Judge held that the consent obtained by fraud did not bring the case within the mischief of Section 376 of the Indian Penal Code But, with respect, I differ with the ratio of this authority. I am of the view that Section 375 of the Indian Penal Code cannot be divorced from Section 90 of the Indian Penal Code and that the definition of consent as contained in Section 90 of the Indian Penal Code is relevant for coming to a conclusion whether the prosecutrix was a consenting party I am of the view that the case of the Appellant is squarely covered by clause "Secondly" of Section 375 of the Indian Penal Code, As observed earlier, prosecutrix Devinder Kaur did not know or believe that the Appellant had obtained a decree of divorce and she gave her consent only under the misconception that she was the wife of the Appellant. The Appellant knowing the nature of the prosecutrix had every reason to believe that the consent was given by her in consequence of such a misconception. I have, therefore, no hesitation in coming to a finding that the case of the Appellant is covered by clause "Secondly" of Section 375 of the Indian Penal Code and that the conviction of the Appellant u/s 376 of the Indian Penal Code has been rightly recorded by the learned trial Judge Consequently the conviction and sentence of the Appellant u/s 376 of the Indian Penal Code is maintained But for the aforesaid modification this appeal fails and is hereby dismissed Mr. Manmohan Singh does not press the revision petition which also stands dismissed.