

IN THE SUPREME COURT OF INDIA
(CIVIL APPELLATE JURISDICTION)
WRIT PETITION (C) NO. 382 OF 2013

IN THE MATTER OF:

Independent Thought

Petitioner

Versus

Union of India

Respondent

COUNTER AFFIDAVIT ON BEHALF OF THE RESPONDENT

I, J. P. Agrawal, Joint Secretary (Judicial), Ministry of Home Affairs, New Delhi do solemnly affirm and state as under:

1. That in my official capacity as mentioned above, I am fully conversant with the facts of the case and competent to swear the present Counter Affidavit on behalf of the respondent.
2. I have gone through the contents of the Writ Petition and the Annexures filed with the petition and have understood the contents thereof. I have also perused the records pertaining to the case and I am filing this affidavit in reply on the basis of the record of the case. I deny each and every averment raised by the petitioner except what is specifically admitted.

PARAWISE REPLY:-

- 1 to 6.** That the contents of paras (1) to (6) of the Writ Petition do not require to be replied by the answering Respondent.
- 7.** That in reply to para 7 of the Writ Petition it is hereby submitted that as per section 2(a) of the Prohibition of Child Marriage Act, 2006 (PCMA) 'child' means a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age. Section 3(i) of the PCMA makes every child marriage 'voidable' at the option of the contracting party who was a child at the time of marriage. For annulling a child marriage, the contracting party has to file a petition before appropriate Court and until the degree of nullity has been granted by the Court, child marriage subsists. Hence child marriage is 'voidable' but 'not void'. It is a fact that the child marriages do take place in India. It is also a fact that there is implicit social sanction to child marriage due to prevailing social and economical conditions in various parts of the country.
- 8 & 9.** In reply to paras (8) and (9) of the Writ Petition, it is submitted that the social, economic and educational development in the country is still uneven and child marriages are still taking place. It has been therefore, decided to retain the age of 15 years under exception 2 of section 375 of Indian Penal Code so as to give protection to husband and wife against criminalizing the sexual activity between them.

- 10.** The interest of the girl child has been protected by the various provisions of the Criminal Law (Amendment) Act, 2013. Exception 2 of section 375 provides protection to private affairs of a husband and wife, keeping in view the existing social setup in many parts of the country.
- 11 to 16.** The contents of paras (11) to (16) of the Writ Petition are not required to be replied by the Ministry of Home Affairs. The petitioner is responsible for the correctness of the statement made there.
- 17 & 18.** That in reply to paras 17 & 18 it is submitted that the age of consent has been increased from 16 years to 18 years through the Criminal Law (Amendment) Act, 2013, as per description given under clause sixthly to section 375 of IPC to provide more protection to the girl child considering the changing scenario of the country.
- 19.** That the contents of para 19 of the Writ Petition are not required to be replied by the Ministry of Home Affairs. The petitioner is responsible for the correctness of the statement made therein.
- 20 & 21.** It is true that the minimum age for marriage of a female is 18 years and punishment has been provided in the Prohibition of Child Marriage Act, 2006 to discourage child marriages. However, it is also a fact that a large section of the Indian society, which is living in rural areas, continues to

follow such practices as a part of their tradition. As per the data collected in National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalizing the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical. Even the Prohibition of Child Marriage Act, 2006 under sections 9 and 10 has prescribed a punishment of up to 2 years or with a fine of upto Rs 4 lakhs or both. Hence it was not the intention of the law makers to subject the husband in a child marriage to the offence of rape under the Indian Penal Code. Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 of IPC has been retained considering the basic facts of the still evolving social norms and issues.

22 & 23. That the contents of paras 22 and 23 of the Writ Petition require no reply as the petitioner has quoted the extract of the report of the Law Commission of India.

24 & 25. That The Law Commission of India, which reviewed the rape laws extensively in its 172nd Report, has stated that the Commission is not satisfied with the suggestion that the Exception to Section 375 of the Indian Penal Code, 1860

should be deleted since that may amount to excessive interference with the marital issues. The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

26. That the contents of para 26 of the Writ Petition require no reply from the Ministry of Home Affairs as the petitioner has quoted the suggestions given for amending the Criminal Law.
27. That in reply to contents of para 27 of the Writ Petition it is hereby submitted that the law-makers took a pragmatic view regarding the issue of 'Marital Rape'. Marriage being a social institution is the bedrock of any society and hence ought to be protected. Exception 2 of section 375 of IPC envisages that if the marriage is solemnized at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under the IPC. There are, however, appropriate provisions in the Prohibition in the Child Marriage Act, 2006, the Hindu Marriage Act and the Indian Penal Code which prohibit and discourage the marriage of minors.
28. That with regard to the contents of para 28 of the Writ Petition, the Ministry of Home Affairs has no comments. The petitioner is responsible for the correctness of the statement.

- 29 & 30.** That with regard to the contents of paras 29 & 30, the Ministry of Home Affairs has no comments. The petitioner is responsible for the correctness of the statement.
- 31.** That in reply to contents of para 31 of the Writ Petition, the Ministry of Home Affairs has no comments. The petitioner has quoted the provision of the Convention of the United Nations on the Elimination of all forms of Discrimination against Women.
- 32.** That in reply to contents of para 32 of Writ Petition, it is submitted that the Criminal Law (Amendment) Act, 2013 was prepared on the basis of wide ranging consultations with various stakeholders and the provisions have been amended on the basis of general consensus.
- 33.** That in reply to contents of para 33 of the Writ Petition it is submitted that the age of consent described in clause *sixthly* of section 375 and the Exception 2 under section 375 of the IPC have different connotations and cannot be considered together. Exception 2 of section 375 exclusively deals with husband and wife. The third/other person mentioned in clauses (a) to (d) of section 375 are expressly excluded and if any person other than the husband has sexual intercourse with the woman, it would amount to rape.

Reply to Grounds:-

- 1.** That the contents of para 1 of the Grounds need no comments.

2. That in reply to para 2 of the Grounds, it is submitted that the Ministry of Home Affairs has no comments. The petitioner is responsible for the correctness of the statement.
3. That in reply to the contents of the para (3) of the Grounds, it is submitted that the age of consent and the Exception 2 under section 375 of IPC have different contexts and cannot be considered together. Exception 2 of section 375 exclusively deals with husband and wife and inserted in the IPC considering the social reality of the society. This provision does not provide a freehand to marry with the girls below the age of 18 yrs. There are appropriate provisions in various enactments like the Prohibition of Child Marriage Act, 2006 etc. to prohibit and discourage child marriages. Severe punishment has been prescribed for such an offence.
- 4 & 5. That in reply to contents of paras 4 & 5 of the Grounds it is submitted that the amendment to the Law is the constitutional mandate to the legislature. The Indian Penal Code, 1860 is a general code and provides punishment for the offences in general without caste, creed and religion. On the other hand, it is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 of the IPC has been provided considering the social realities of the nation.
6. That in reply to the contents of para 6 of the Grounds, it is submitted that the Ministry of Home Affairs has no

comments. The petitioner is responsible for the correctness of the statement.

7. That in reply to the contents of para 7 of the Grounds, it is submitted that the age of consent prescribed in proviso 6 to section 375 and the Exception 2 under section 375 of the IPC have different contexts and cannot be considered together. Exception 2 of section 375 exclusively deals with husband and wife. There is no contradiction between the two as the same have their own objectives. It is not necessary to have uniformity as criteria for determining the age of persons in different context. Therefore, the laws are not unconstitutional.
8. That in reply to the contents of para 8 of the Grounds, it is submitted that the recommendations of the Law Commission are recommendatory in nature and are not binding on the Government. The recommendations of the Law Commission were considered in consultation with various stakeholders.
9. That in reply to the contents of para 9 of the Grounds, the Ministry of Home Affairs has no comments. The petitioner is responsible for the correctness of the statement.
- 10 & 12. That in reply to the contents of para 10 & 12 of the Grounds, it is submitted that, it is the duty of the Legislature to legislate the legislation based on the social realities.. There appear to be no contradictions as the laws quoted have their own objectives. It is not necessary to

have uniformity in criteria for determining age of person in different contexts. Therefore, the laws are not unconstitutional.

- 11.** That in reply to the contents of para 11 of the Ground, the Ministry of Home Affairs has no comments.
- 13.** That in reply to the contents of para 13 of the Grounds, the Ministry of Home Affairs has no comments. The petitioner is responsible for the correctness of the statement.
- 14.** That in reply to the contents of para 14 of the Grounds, it is submitted that the marriages are voidable at the option of any of the contracting party, being a child bride or child bridegroom, by filing a petition under section 3(3) of the Prohibition of Child Marriage Act, 2006. Section 13(2) (iv) of the Hindu Marriage Act provides a ground for divorce to a female child only on the ground that her marriage (whether consummated or not) was solemnized after she attained the age of 15 years but before attaining the age of eighteen years. It has also undergone change by virtue of the said section 3(3) of the Prohibition of Child Marriage Act, which gives right not only to female child but also to male child to get their marriage declared void thereunder.
- 15 & 16.** That in reply to the contents of paras 15 & 16 of the Ground, it is submitted that it is true that the marriages involving girls below the age of 18 years have been prohibited under the Prevention of Child Marriage Act, 2006.

There has been implicit social sanction to child marriage in various parts of the country. It is only with economic and social development and education that this social evil could be eradicated. Hence child marriages have been made voidable at the instance of parties to marriage so that children born of child marriage remain legitimate.

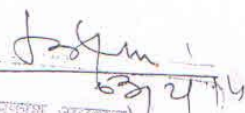
17 to 20. That in reply to the contents of paras 17 to 20 of the Ground, it is submitted that the marriages are voidable at the option of any of the contracting party, a child bride or child bridegroom, by filing a petition under section 3(3) of the Prohibition of Child Marriage Act., 2006. Section 13(2) (iv) of the Hindu Marriage Act provides a ground for divorce to female child only on the ground that her marriage (whether consummated or not) was solemnized after she attained the age of 15 yrs but before attaining the age of eighteen years which has also undergone change by virtue of the said Section 3(3) of the Prohibition of Child Marriage Act, which gives right not only to female child but also to male child to get their marriage declared void there under.

Thus the legislature intends to discourage child marriages, its solemnization and its promotion and child marriages are therefore made punishable under section 9, 10 & 11 of the said Act as also under section 18 of the Hindu Marriage Act. The efforts are made to prohibit child marriages in a discreet manner by ensuring that the society tends to look down upon such marriages as being not proper, desirable and valid. Exception 2 to Section 375 IPC (10)

cannot be related with the matter that the government is not willing to stop child marriages but it is purely based on the fact that the marriage is the bedrock of any society and hence needs to be protected. Criminalizing all child marriages would in effect make the children born of these unions illegitimate which may lead to other social tensions.

PRAYER:

A & B. That in reply to contents of paras A and B of the prayer clause, it is submitted that the Criminal Law (Amendment) Act, 2013 was enacted on the basis of the 172nd Report of the Law Commission, the recommendations of Justice Verma Committee on Criminal Law and the 167th Report of the Parliamentary Standing Committee on Home Affairs on the Criminal Law (Amendment) Bill, 2012 and with wide ranging consultation with various stakeholders. The age of consent prescribed in proviso 6 of section 375 of IPC have different connotations and cannot be considered together. Exception 2 of section 375 exclusively deals with husband and wife based on the traditional social structure of the country. Therefore, the said provision cannot be said to be unconstitutional.


(जय प्रकाश जाजवाल)
(JAI PRAKASH JAIJWAL)
संयुक्त सचिव / Joint Secretary
गृह मंत्रालय
Ministry of Home Affairs
भारत, सरकार / Govt. of India

DEPONENT

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VERIFICATION:

Verified at New Delhi on this day of February, 2014, that the contents of the above counter affidavit from paragraphs 1 to 20 are true and correct to the best of my knowledge based on the related files and the legal advice on the issues involved, no part of it is false and nothing material has been concealed there from.

for use

Jai Prakash Agrawal
03/2/14

DEPONENT

(जय प्रकाश अग्रवाल)
(JAI PRAKASH AGRAWAL)
संयुक्त सचिव / Joint Secretary
गृह विभाग
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भारत सरकार / Govt. of India

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