

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (C) No. 382 of 2013

IN THE MATTER OF:-
Independent Thought

...PETITIONER

VERSUS

Union of India

...RESPONDENT

WRITTEN SUBMISSIONS
ON BEHALF OF THE PETITIONER

- 1) Vide the Criminal Law (Amendment) Act, 2013, the age of consent for sexual intercourse by a girl, which was hitherto 16 years, has been increased to 18 years¹. However, Exception 2 to Section 375 IPC still retains the age of consent as 15 years. As a result, there is a huge gap of 3 years in the age of consent for a married girl child, vis-a-vis an unmarried girl child.
- 2) The Petitioner humbly submits that Exception 2 to Section 375 IPC is discriminatory and violates Article 14 of the Constitution. The said provision classifies girl children below the age of 18 years into two categories: (i) namely those who are married, and (ii) those who are not married. A husband can have sexual intercourse with his wife, if she is above the age of 15 years irrespective of her consent. However, for all other purposes the age of consent is 18 years. The Petitioner

¹ See Clause Sixthly of Section 375 IPC.

submits that this classification has no rationale nexus with the object sought to be achieved. The rationale for increasing the age of consent to 18 years in 2013 [from the earlier age of 16 years- which was the age of consent since 1940] is that a girl below the age of 18 years is considered incapable of realizing the consequences of her consent; she is treated as a minor under law and, therefore, mentally and physically not mature enough to give a valid consent. Therefore, consent by a girl less than 18 years of age is no consent under law. If this is the object for increasing the age of consent to 18 years in 2013, then marriage of girl at the age of 15/16/17 years does not make the girl mature enough [mentally or physically] for the purpose of consent. Thus, the law is *ex-facie* discriminatory as the classification has no rational nexus with the object.

3) The reason given by the Respondents in the Counter Affidavit for prescribing a lower age of consent in case the girl is married at 15/16/17 years are *interalia* as follows:-

- i) 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 IPC so as to give protection to husband and wife against criminalizing the sexual activity between them.
- ii) As per 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.

- iii) 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.
 - iv) 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.
 - v) 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.
 - vi) 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 IPC has been provided considering the social realities of the nation.
4. The Petitioner respectfully submits that the reasons given by the Respondents to justify a lower age for a girl child to be able to give consent only because she is married, are not sustainable in law. The Counter Affidavit does not explain how, by virtue of marriage at the age of 15 years [or 16 years or 17 years], the girl child would be physically and mentally fit to give consent.
5. Parliament regards a girl child less than 18 years as incapable of giving consent, because she is a child/juvenile under law and is not physically/ mentally in a position to understand the effects of consent. Therefore, simply because some marriages

in India are being performed at an age lower than 18 years, it is not a justification to lower the age of consent to as low as 15 years. Parliament cannot permit the exploitation [in the name of marriage] of a girl child simply because some girls are married at an age less than 18 years.

6. The said Exception violates Article 15 of the Constitution as it fails to protect the rights of a girl child, between 15 and 18 years. In fact, pregnancy at that young age can seriously harm the girl child. The said exception ignores the fact that sexual intercourse at that young age can cause adverse health effects, not only to the girl, but also to the child [in case the girl child has a baby before the age 18 years]. A child of that age is not physically or mentally mature to make appropriate decisions, which is recognized by Parliament itself by various other legislations. Therefore, Parliament could not have taken away the protective umbrella over the girl child, simply because the parents of the girl child have given her in marriage at the age of 15/16/17 years. In fact, the need for protection is much higher at that age. By virtue of Article 15, Parliament was required to protect the interests of girl child rather than justifying such violations in guise of tradition. Being signatory to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), State is bound to respect and act towards eliminating all forms of

discrimination. Article 2 of the Convention mandates that the States Parties condemn discrimination against women in all its forms and agree (f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women. Thus, Parliament has acted contrary to its international obligations.

- 7) Exception 2 is also violative of Article 21 of the Constitution. Article 21, includes Right to live with dignity and freedom to make choices about one's body. The Exception 2 violates the right of a girl child, aged between 15 and 18 years, as she no longer has a right to choose what she wishes to do with her body. The Exception closes all doors for the girl child for her protection. Rights of parents cannot be absolute and best interest of the child has to take primacy. It is the duty of State to protect the right to live with human dignity of the girl child between ages 15 years and 18 years, which the State has failed to do.
- 8) Parliament has failed to take note of other enactments, like the Prohibition of Child Marriage Act, 2006, Juvenile Justice (Care and Protection of Children) Act, 2000 and most importantly Protection of Children from Sexual Offences Act, 2012 [POCSO]. All the said Acts regard a girl less than 18 years

as a child. POCSO specifically bars all sexual activities with girl children below the age of 18 years and the offence is aggravated if the accused is related through marriage. In its attempt to protect status quo, Parliament has chosen not to increase the age of consent in case of a married girl from 15 to 18 years thereby impinging on the Fundamental Rights of the girl child. If a girl is not mentally and physically fit to give consent till she reaches 18 years, her marriage at age of 15 years or 16 years or 17 years does not change the situation.

- 9) In fact in the Criminal Law (Amendment) Ordinance, 2013, [at page 65 @ 72 of Paper Book], Exception 2 to Section 375 IPC had laid down minimum age as 16 years. However, Parliament has gone back to 15 years in the Criminal Law (Amendment) Act. Though, in Counter Affidavit, the Respondents say that the age was reduced from 16 years to 15 years after wide ranging consultation, no such material is brought on record. Wide ranging consultations, in any way, cannot justify such a hostile discrimination and a retrograde step. There is absolutely no justification to go back from 16 years to 15 years. The age of 15 years in Exception to Section 375 was fixed in 1940. Over the years [with education and development] Parliament should have increased the age in the Exception 2 to Section 375 IPC.

- 10) Parliament has failed to take note of recommendations made by the 84th and 172nd Law Commissions. The 84th Law Commission Report had recommended that the age of consent for all girl children should be increased to 18 years, irrespective of marriage. The 172nd Report, made in 2000, suggested that the age of consent should be 16 years, but specifically opined that there should be no distinction in the age of consent, merely because the girl is married. Justice Verma Committee has remained silent on the issue of raising the age of consent from 16 years to 18 years under clause *Sixthly* of Section 375 IPC; however, Parliament has by the 2013 Amendment increased the age of consent to 18 years to bring in uniform consistency with other legislations that deal with welfare and protection of children below the age of 18. Furthermore, the Criminal Law (Amendment) Ordinance 2013 as well as the Criminal Law (Amendment) Bill 2012 considered increasing the age to 16 years as far as Exception 2 to Section 375 I.P.C is concerned. The Parliament however chose to retain the age of consent as 15 years in case of a married girl child despite recommendations from various stake holders to increase this age to 18 years.
- 11) Age of consent under Section 375 IPC has been increased from 1860 onwards. The historical development may, for convenience, be indicated in the form of a chart as follows:

Year	Act	Age of Consent under Section 375, 5 th Clause I.P.C	Age under Exception 2 to Sec. 375 I.P.C	Minimum Age of Marriage of a Child
1860	-	10 years	10 years	-
1891	Act 10 of 1891 (After the Amendment of IPC)	12 years	12 years	-
1925	(After the Amendment of IPC)	14 years	13 years	-
1929	(After Passing of Child Marriage Restraint Act)	14 years	13 years	14 years
1940	After the Amendment of the I.P.C and Child Marriage Act.	16 years	15 years	15 years
1978	-	16 years	15 years	18 years
2013	-	18 years	15 years	18 years

- 13) Thus, the age of consent for sexual intercourse has been increased from 10 years in 1860 to 16 years in 1940. Now the same has been increased to 18 years by way of Criminal Law (Amendment) Act, 2013. The gap between the age of consent for a married girl was not there from 1860 to 1925. The gap was only 1 year from 1925 to 2013 i.e. last 88 years. However, now the gap is 3 years, which is wholly arbitrary and discriminatory and violates the rights of girl children between 15 to 18 years of age. The 2013 Amendment is consistent with other legislations when it increasing the age of consent from 16 years to 18 years. However, there is no lawful justification

given to retain the age of consent for married girls at 15 years, especially when Child Marriage Act, 2006 provides that the girl should be at least 18 years of age at the marriage.

- 14) This Hon'ble Court in *Satyawati Sharma (Dead) by Lrs V. UOI* (2008) 5 SCC 287 has held as follows

"29. It is trite to say that legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent."

- 15) In the present case also, the rationale for classification has become legally unsustainable. Merely because some marriages take place at the age of 15 years, Parliament cannot violative the Constitutional Rights guaranteed to every girl child.

FILED BY

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