Independent Thought vs Union Of India on 11 October, 2017

Equivalent citations: AIR 2017 SUPREME COURT 4904, AIR 2018 SC (CRIMINAL) 229, (2017) 12 SCALE 621, (2017) 4 CURCRIR 54, (2017) 4 KER LJ 11, 2017 (4) KLT SN 42 (SC)

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Bench: Madan B. Lokur, Deepak Gupta

REPO

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

Independent Thought .….Pe

versus

Union of India and Anr. ….Res

JUDGMENT

Madan B. Lokur, J.

1. The issue before us is limited but one of considerable public importance – whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and W.P. (C) No. 382 of 2013 Page 1 discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2. We make it clear that we have refrained from making any observation with regard to the marital

rape of a woman who is 18 years of age and above since that issue is not before us at all. Therefore we should not be understood to advert to that issue even collaterally.

The writ petition

3. The petitioner is a society registered on 6th August, 2009 and has since been working in the area of child rights. The society provides technical and hand-holding support to non-governmental organizations as also to government and multilateral bodies in several States in India. It has also been involved in legal intervention, research and training on issues concerning children and their rights. The society has filed a petition under Article 32 of the Constitution in public interest with a view to draw attention W.P. (C) No. 382 of 2013 Page 2 to the violation of the rights of girls who are married between the ages of 15 and 18 years.

4. According to the petitioner, Section 375 of the IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalized under the IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under the IPC.

5. Learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by W.P. (C) No. 382 of 2013 Page 3 this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 of the IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution. Law Commission of India – 84th Report

6. Learned counsel for the petitioner drew our attention to the 84 th report of the Law Commission of India (LCI) presented on 25 th April, 1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in paragraph 2.18, 2.19 and 2.20 of the

report. The view is that since the Child Marriage W.P. (C) No. 382 of 2013 Page 4 Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and the IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. These paragraphs read as follows:

> 2.18. Section 375, fifth clause. – The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse without consent. The fifth clause of section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.
>
> 2.19. History. – The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows:-

Year	Age of consent under sec. 375, 5th clause, I.P.C.	Age mentioned in the Exception to sec. 375, I.P.C	Minimum age of marriage under the Child Marriage Restraint Act,
1860……	10 years	10 years	__
1891 (Act 10 of 1891) (after the amendment of I.P.C.	12 years	12 years	__
1925 (after the amendment of I.P.C.)	14 years	13 years	__
1929 (after the passing of the Child Marriage Act)	14 years	13 years	14 years
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 years	15 years	15 years
1978……	16 years	15 years	18 years
[as of 2017]*	[Age of consent under Sec. 375, Sixthly of the IPC - 18 years]	[15 years]	[Minimum age of marriage under the PCMA, 2006 – 18(F)/21(M) years]

*The bracketed portion in this row has been inserted by us.

> 2.20. Increase in minimum age. – The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of Section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is

prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited. (Emphasis supplied by us).

Law Commission of India – 172nd Report

7. The issue was re-considered by the LCI in its 172 nd report presented on 25th March, 2000. In that report, it is recommended that an exception be added to Section 375 of the IPC to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved.

8. Apparently at the stage of discussions, the recommendation of the LCI (still at the stage of proposal) did not find favour with an NGO called Sakshi who suggested deletion of the exception. According to the NGO, "where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law." Therefore, there is no reason W.P. (C) No. 382 of 2013 Page 6 why a concession should be made in the matter of an offence of rape/sexual assault only because the wife happens to be above 15/16 years of age. The LCI did not agree with the NGO and the reason given is that if the exception that is recommended is deleted, it "may amount to excessive interference with the marital relationship." In other words, according to the LCI the husband of a girl child who is not below 16 years of age can sexually assault and even rape his wife and the assault or rape would not be punishable - and if it is made punishable, then it would amount to excessive interference with the marital relationship. (It may be mentioned that Exception 2 to Section 375 of the IPC has not increased the age to 16 years from 15 years as recommended by the LCI but has retained it at 15 years. According to the counter affidavit filed on behalf of the Union of India, the age of 15 years has been kept to give protection to the husband and the wife against criminalizing the sexual activity between them).

Counter affidavit of the Union of India

9. Since we have adverted to the counter affidavit filed by the Union of India opposing the writ petition, we propose to make a very brief reference to it. A somewhat more detailed reference is made to the counter affidavit of the Union of India at a later stage.

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10. For the present, the counter affidavit of the Union of India refers to the National Family Health Survey - 3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate

court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can petition for a divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow 'legitimized' by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

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Documentary material

11. Apart from but in addition to the legal issue, learned counsel for the petitioner and learned counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life.

(a) Reference was made to a report "Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms". This report was prepared in March 2011 under the supervision of UNICEF India.

(b) Reference was also made to a report "Reducing Child Marriage in India: A Model to Scale up Results". This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India. The report contains statistics of widowed, separated and divorced girls who were married between 10 and 18 years of age based on Census 2011.

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(c) Reference was also made to a useful study "Economic Impacts of Child Marriage: Global Synthesis Report" released in June 2017. This report is a collaborative effort by the International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment;

(iv) labour force participation, earnings and welfare, and (v) women's decision-making and other impacts. The economic cost of child marriages and implications has also been discussed in detail in the report. A child marriage is defined as a marriage or union taking place before the age of 18 years and this definition has been arrived at by relying on a number of conventions, treaties and international agreements as well as resolutions of the UN Human Rights Council and the UN General Assembly.

(d) Another extremely useful report referred to is "A Statistical Analysis of Child Marriage in India based on Census 2011". This report is prepared by a collaborative organization called Young Lives and the National Commission for the Protection of Child Rights and was released quite recently in

June 2017.

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12. This refers to the consequences of child marriage in Chapter 5. Broadly, it is stated :

> "Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights." .....
>
> "The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives. Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalization. The impact of early marriage on girls - and to a lesser extent on boys - is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities - they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often W.P. (C) No. 382 of 2013 Page 11 in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being

challenged.

> Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being reproductive health and educational opportunity along with consequences described earlier." (Emphasis supplied by us).

13. There is a specific discussion in the Statistical Analysis on the impact of early child birth on health in which it is stated that "girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes." It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were W.P. (C) No. 382 of 2013 Page 12 less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

14. There is also a useful discussion on violence, neglect and abandonment; psychosocial disadvantage; low self-esteem; low education and limited employability; human trafficking and under-nutrition, all of which are of considerable importance for the well-being of a girl child. We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by learned counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age. In-depth Study on all forms of violence against women

15. On 6th July, 2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the "In-depth Study on all forms of violence against women". In the chapter relating to violence against women within the family and harmful traditional practices, early W.P. (C) No. 382 of 2013 Page 13 marriage was one of the commonly identified forms of violence.1 Similarly, early marriage was considered a harmful traditional practice 2 - a thought echoed a year later in the Study on Child Abuse: India 2007 (referred to later) by the Government of India.

16. An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that "Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection." Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and

dowry or “honour” related violence etc.3

17. On the concern of appropriate legislation to deal with issues of violence against women, the right of a woman to bodily integrity and legislations that allow early marriages, the Secretary General had this to say:

> “The treaty bodies have expressed concerns about the scope and coverage of existing legislation, in particular in regard to:
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> 1 Paragraph 111 2 Paragraph 118 3 Paragraph 222 W.P. (C) No. 382 of 2013 Page 14 definitions of rape that require use of force and violence rather than lack of consent; definitions of domestic violence that are limited to physical violence; treatment of sexual violence against women as crimes against the honour of the family or crimes against decency rather than violations of women’s right to bodily integrity; use of the defence of “honour” in cases of violence against women and the related mitigation of sentences; provisions allowing mitigation of sentences in rape cases where the perpetrator marries the victim;

inadequacy of protective measures for trafficked women, as well as their treatment as criminals rather than victims; termination of criminal proceedings upon withdrawal of a case by the victim; penalization of abortion in rape cases; laws that allow early or forced marriage; inadequate penalties for acts of violence against women; and discriminatory penal laws.”4 (Emphasis supplied by us) National Policy and National Plan

18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking “serious measures” to speedily abolish the practice of child marriage. Clause 11 reads:

> 4 Paragraph 277 W.P. (C) No. 382 of 2013 Page 15 “11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.

b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society. c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished.”

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the IPC, as it existed in 2006, to decriminalize marital rape of a girl child.

20. The National Charter was followed by the National Policy for Children notified on 26th April, 2013. The National Policy explicitly recognized in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.

21. The large 'to do list' in the National Policy led to the National Plan W.P. (C) No. 382 of 2013 Page 16 of Action for Children, 2016: Safe Children – Happy Childhood. The National Plan appears to have been made available on 24 th January, 2017. While dealing with child marriage, it is stated as follows:

> "In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children's basic rights to health, education, development, and protection and is also used as a means of trafficking of young girls.

Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child. It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years."

22. The National Plan of Action for Children recognizes that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risks for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.

23. A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realizes the dangers of early marriages, it is merely dishing out W.P. (C) No. 382 of 2013 Page 17 platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

Human Rights Council

24. The Report of the Working Group on the Universal Periodic Review for India (issued on 17th July, 2017 without formal editing) for the 36th Session of the Human Rights Council refers to recommendations made by several countries to remove the exception relating to marital rape from the definition of rape in Section 375 of the I.P.C. In other words, the issue raised by the petitioner has attracted considerable international attention and discussion and ought to be taken very seriously by the Union of India.

25. In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing – all of which should ordinarily be of paramount importance to everybody, particularly the State.

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26. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

27. We can only express the hope that the Government of India and the State Governments intensively study and analyze these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which 'encourages' sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future. Provisions of the Indian Penal Code (IPC)

28. Section 375 of the IPC defines 'rape'. This section was inserted in the IPC in its present form by an amendment carried out on 3 rd February, 2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of W.P. (C) No. 382 of 2013 Page 19 the seven descriptions mentioned in the section. (A woman is defined under Section 10 of the IPC as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause 'Sixthly' of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. This is commonly referred to as 'statutory rape' in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.

29. However, Exception 2 to Section 375 of the IPC provides that it is not rape if a man has sexual intercourse with a girl above 15 years of age and if that girl is his wife. In other words, a husband can

have sexual intercourse with his wife provided she is not below 15 years of age and this is not rape under the IPC regardless of her willingness or her consent.

30. However, sexual intercourse with a girl under 15 years of age is rape, whether it is with or without her consent, against her will or not, whether it is by her husband or anybody else. This is clear from a reading of Section 375 of the IPC including Exception 2.

31. Therefore, Section 375 of the IPC provides for three circumstances relating to 'rape'. Firstly sexual intercourse with a girl below 18 years of W.P. (C) No. 382 of 2013 Page 20 age is rape (statutory rape). Secondly and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. Thirdly sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 of the IPC (non-consensual sexual intercourse).

32. The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under the IPC since such non-consensual sexual intercourse is not rape for the purposes of Section 375 of the IPC. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under the IPC to commit a lesser 'sexual' act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 of the IPC. In other words, the IPC permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd report adverted to W.P. (C) No. 382 of 2013 Page 21 above.

Protection of Human Rights Act, 1993

33. The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in international conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW). Protection of Women from Domestic Violence Act, 2005 (DV Act)

34. Section 3 of the Protection of Women from Domestic Violence Act, 2005 (for short 'the DV Act') provides that if the husband of a girl child harms or injures or endangers the health, safety, life, limb or well being, whether mental or physical, of his wife including by causing physical abuse and sexual abuse, he would be liable to have a protection order issued against him and pay compensation to his wife. Explanation I (ii) of Section W.P. (C) No. 382 of 2013 Page 22 3 defines 'sexual abuse' as

including any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman. Prohibition of Child Marriage Act, 2006 (PCMA)

35. One of the more important legislations on the subject of protective rights of children is the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). For the purposes of the PCMA, a 'child' is a male who has not completed 21 years of age and a female who has not completed 18 years of age and a 'child marriage' means a marriage to which either contracting party is a child.

36. Section 3 of the PCMA provides that a child marriage is voidable at the option of any one of the parties to the child marriage – a child marriage is not void, but only voidable. Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalized under this section if he marries a girl child. Section 10 of the PCMA provides that whoever performs, conducts, directs or abets any child W.P. (C) No. 382 of 2013 Page 23 marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees; Section 11 of the PCMA provides punishment for promoting or permitting solemnization of a child marriage; and finally Section 13 of the PCMA provides that the jurisdictional judicial officer may injunct the performance of a child marriage while Section 14 of the PCMA provides that any child marriage solemnized in violation of an injunction under Section 13 shall be void.

37. It is quite clear from the above that Parliament is not in favour of child marriages per se but is somewhat ambivalent about it. However, Parliament recognizes that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalizing it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under the IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012. Protection of Children from Sexual Offences Act, 2012 (POCSO)

38. The Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') is an important statute for the purposes of our discussion.

W.P. (C) No. 382 of 2013 Page 24 The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes a reference to data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children. The data collected by the NCRB was corroborated by the Study on Child Abuse: India 2007 conducted by the Ministry of Women and Child Development of the Government of India.

39. While the above Study focuses on child abuse, it does refer to the harmful traditional practice of child marriage and in this context adverts to child marriage as being a subtle form of violence

against children. The Study notes that there is a realization that if issues of child marriage are not addressed, it would affect the overall progress of the country.

40. The above Study draws attention to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to which India is a signatory. Article 16.2 thereof provides "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for W.P. (C) No. 382 of 2013 Page 25 marriage and to make the registration of marriages in an official registry compulsory." 5

41. The above Study also makes a reference to gender equity to the effect that discrimination against girls results in child marriages and such an imbalance needs to be addressed by bringing about attitudinal changes in people regarding the value of the girl child.

42. The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognizes that the best interest of a child should be secured, a child being defined under Section 2(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the Convention on the Rights of the Child (the CRC). The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development 5 India became a signatory to the CEDAW Convention on 30th July, 1980 (ratified on 9th July, 1993) but with a reservation to the extent of making registration of marriage compulsory stating that it is not practical in a vast country like India with its variety of customs, religions and level of literacy. Nevertheless, the Supreme Court in the case of Seema (Smt.) v. Ashwani Kumar, (2006) 2 SCC 578 directed the States and Central Government to notify Rules making registration of marriages compulsory. However, the same has not been implemented in full.

W.P. (C) No. 382 of 2013 Page 26 of the child". Finally, the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". This is directly in conflict with Exception 2 to Section 375 of the IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime – on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

43. Under Article 34 of the CRC, the Government of India is bound to "undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity". The key words are 'unlawful sexual activity' but the IPC declares that a girl child having sexual intercourse with her husband is not 'unlawful sexual activity' within the provisions of the IPC, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 of the CRC.

44. Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of W.P. (C) No. 382 of 2013 Page 27 any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 of the IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called 'aggravated penetrative sexual assault' in the POCSO Act) is made an offence for the purposes of the POCSO Act.

45. Section 3 of the POCSO Act defines "penetrative sexual assault". Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

46. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have W.P. (C) No. 382 of 2013 Page 28 not committed rape as defined in Section 375 of the IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

47. There is no real or material difference between the definition of rape in the terms of Section 375 of the IPC and penetrative sexual assault in the terms of Section 3 of the POCSO Act.6 The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (under Section 376(1) of the IPC) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for 6 3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.....

375. Rape.—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

(c) 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, W.P. (C) No. 382 of 2013 Page 29 'aggravated' rape under Section 376(2) of the IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the IPC – the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the IPC.

48. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3 rd February, 2013. This section reads:

> 42-A. Act not in derogation of any other law.—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.
>
> The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency.

49. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 of the IPC and W.P. (C) No. 382 of 2013 Page 30 Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 of the IPC which read:

> 5. Certain laws not to be affected by this Act.—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.
>
> 41. "Special law".—A "special law" is a law applicable to a particular subject.

50. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)

51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15(3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27 W.P. (C) No. 382 of 2013 Page 31 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

Brief summary of the existing legislations

52. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 of the IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to W.P. (C) No. 382 of 2013 Page 32 be cared for, protected and appropriately rehabilitated or restored to society. All these 'child-friendly statutes' are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

Article 15(3) of the Constitution

53. Article 15(3) of the Constitution enables and empowers the State to make special provision for the benefit of women and children. The Constituent Assembly debated this provision [then Article 9(2) of the draft Constitution] on 29th November, 1948. Prof. K.T. Shah suggested an amendment to the said Article ("Nothing in this article shall prevent the State from making any special provision for women and children") so that it would read: "Nothing in this article shall prevent the State from making any special provision for women and children or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment." The view expressed was:

"Sir, it must be distinguished from the preceding article. I read it, at any rate, that this is a provision for discrimination in favour of women and children, to which I have added the Scheduled Castes or backward tribes. This discrimination is in favour of particular classes of our society which, owing to an unfortunate legacy of the past, W.P. (C) No. 382 of 2013 Page 33 suffer from disabilities or handicaps. Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established.

The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer." The amendment was negatived by Dr. Ambedkar in the following manner:

"With regard to amendment No. 323 moved by Professor K.T. Shah, the object of which is to add "Scheduled Castes" and "Scheduled Tribes" along with women and children, I am afraid it may have just the opposite effect.

The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public.

For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes when there is a general school in the village open to the children of the entire community. If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it. I therefore think that it is not a desirable amendment." The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into W.P. (C) No. 382 of 2013 Page 34 society and to take them out of patriarchal control. But a similar integration could not be achieved by making special provisions for Scheduled Castes and Scheduled Tribes – it would have the opposite effect and further segregate them from the general public.

54. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children – a form of affirmative action to their advantage. This intention has been recognized by decisions of this Court and of some High Courts. The earliest such decision is of the Calcutta High Court in Sri Mahadeb Jiew v. Dr. B.B. Sen7 in which it was said that: "The special provision for women in Article 15(3) cannot be construed as authorizing a discrimination against women, and the word "for" in the context means

"in favour of"."

55. In Government of A.P. v. P.B. Vijayakumar8 affirmative action for women (and children) was recognized in paragraphs 7 and 8 of the Report in the following words:

> "The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have 7 AIR 1951 Cal 563 8 (1995) 4 SCC 520 W.P. (C) No. 382 of 2013 Page 35 been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women..... What then is meant by "any special provision for women" in Article 15(3)? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation." ....(Emphasis supplied by us)

56. Yusuf Abdul Aziz v. State of Bombay 9 is a Constitution Bench decision of this Court in which the constitutional validity of Section 497 of the IPC was challenged on the ground that it unreasonably 'exempts' a wife from being punishable for an offence of adultery and therefore should be interpreted restrictively. Rejecting the contention that Article 15(3) of the Constitution places any restriction on the legislative power of Parliament, it was said:

> "It was argued that clause (3) [of Article 15 of the Constitution] should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited."

57. The view that Article 15(3) is intended to benefit women has also 9 1954 SCR 930 W.P. (C) No. 382 of 2013 Page 36 been accepted in Cyril Britto v. Union of India10 wherein it was held that prohibition from arrest or detention of women in execution of a money decree under Section 56 of the Civil Procedure Code is a special provision calculated to ensure that a woman judgment-debtor is not put to the ignominy or arrest and detention in civil prison in execution of a money decree and that this provision is referable to Article 15(3) of the Constitution. A similar view was taken in respect of the same provision in the Civil Procedure Code in Shrikrishna Eknath Godbole v. Union of India.11

58. It is quite clear therefore that Article 15(3) of the Constitution cannot and ought not to be interpreted restrictively but must be given its full play. Viewed from this perspective, it seems to us that legislation intended for affirmative action in respect of a girl child must not only be liberally construed and interpreted but must override any other legislation that seeks to restrict the benefit

made available to a girl child. This would only emphasize the spirit of Article 15(3) of the Constitution.

Right to bodily integrity and reproductive choice 10 AIR 2003 Ker 259 11 PIL No. 166/2016 decided on 21st October, 2016 W.P. (C) No. 382 of 2013 Page 37

59. The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognized in the context of privacy in State of Maharashtra v. Madhukar Narayan Mardikar12 wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman. It was said:

> "The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law." (Emphasis supplied by us)

60. In Suchita Srivastava v. Chandigarh Administration 13 the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In paragraph 22 of the Report it was held:

> 12 (1991) 1 SCC 57 13 (2009) 9 SCC 1 W.P. (C) No. 382 of 2013 Page 38 "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.

Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can

also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices." (Emphasis supplied by us)

61. In issues of criminal law, investigations and recording of statements, the bodily integrity of a witness has been accepted by this Court in Selvi v. State of Karnataka14wherein it was held in paragraph 103 of the Report:

> "The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined." (Emphasis supplied by us) 14 (2010) 7 SCC 263 W.P. (C) No. 382 of 2013 Page 39

62. Ritesh Sinha v. State of Uttar Pradesh 15 was a case relating to the collection of a voice sample during the course of investigation by the police. Relying of Selvi it was held that: "In a country governed by the rule of law, police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction."

63. Finally, in Devika Biswas v. Union of India16 it was observed that "Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person." This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in Suchita Srivastava "…. the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question."

64. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

15 (2013) 2 SCC 357

16 (2016) 10 SCC 726

Rape or penetrative sexual assault

65. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of the IPC) or aggravated

penetrative sexual assault (an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act) the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of the IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

66. There have been several decisions rendered by this Court highlighting the horrors of rape. In State of Karnataka v Krishnappa17 an 8 year girl was raped and it was held in paragraph 15 of the Report:

> "Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience." (Emphasis supplied by us) 17 (2000) 4 SCC 75 W.P. (C) No. 382 of 2013 Page 41

67. In Bodhisattwa Gautam v. Subhra Chakraborty18 it was observed by this Court that rape is a crime not only against a woman but against society. It was held in paragraph 10 of the Report that:

> "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article
>
> 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects." (Emphasis supplied by us)

68. About a month later, it was pithily stated in State of Punjab v. Gurmit Singh19 "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female." (Emphasis supplied by us)

69. There are several decisions in which similar observations have been made by this Court and it is not necessary to multiply the cases. However, 18 (1996) 1 SCC 490 19 (1996) 2 SCC 384 W.P. (C) No. 382 of 2013 Page 42 reference may be made to a fairly recent decision in State of Haryana v.

Janak Singh20 wherein reference was made to Bodhisattwa Gautam and it was observed in paragraph 7 of the Report:

> "Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under Article 21 of the Constitution of India." (Emphasis supplied by us)
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> 70. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child – and yet it is not a criminal offence in the terms of Exception 2 to Section 375 of the IPC but is an offence under the POCSO Act only. An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of the IPC notwithstanding that

20 (2013) 9 SCC 431 W.P. (C) No. 382 of 2013 Page 43 the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

71. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 of the IPC, it is worth noting the view expressed by the Committee on Amendments to Criminal Law chaired by Justice J.S. Verma (Retired). In paragraphs 72, 73 and 74 of the Report it was stated that the out-dated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim." The relevant paragraphs of the Report read as follows:

> "72. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual W.P. (C) No. 382 of 2013 Page 44 matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'.

> 73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'
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> 74. Our view is supported by the judgment of the European Commission of Human Rights in C.R. v UK [C.R. v UK Publ.

ECHR, Ser.A, No. 335-C] which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act 1994." (Emphasis supplied by us)

72. In Eisenstadt v. Baird21 the US Supreme Court observed that a "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

73. On a combined reading of C.R. v. UK and Eisenstadt v. Baird it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated 21 405 US 438, 31 L Ed 2d 349, 92 S Ct 1092 W.P. (C) No. 382 of 2013 Page 45 penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent. Harmonizing the IPC, the POCSO Act, the JJ Act and the PCMA

74. There is an apparent conflict or incongruity between the provisions of the IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the IPC and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole.

75. The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka – the State Legislature has inserted sub-Section (1A) in Section 3 of the PCMA (on obtaining the assent of the President on 20th April, 2017) declaring that henceforth every child marriage that is solemnized is void ab initio. Therefore, the husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the W.P. (C) No. 382 of 2013 Page 46 same or shared household for rape under the IPC. The relevant extract of the Karnataka amendment reads as follows:

> "(1A) Notwithstanding anything contained in sub-section (1) [of Section of the PCMA] every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio".

76. It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an W.P. (C) No. 382 of 2013 Page 47 unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Thirdly, Exception 2 to Section 375 of the IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

78. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnization of a child marriage violates the W.P. (C) No. 382 of 2013 Page 48 provisions of the PCMA is well-known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 of the IPC encourages violation of the PCMA? Perhaps 'yes' and looked at from another point of view, perhaps 'no' for it cannot reasonably be argued that one statute (the IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains - what exactly is the artificial distinction intended to achieve? Justification given by the Union of India

79. The only justification for this artificial distinction has been culled out by learned counsel for the petitioner from the counter affidavit filed by Union of India. This is given in the written submissions

filed by learned counsel for the petitioner and the justification (not verbatim) reads 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.

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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.

80. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 of the IPC. Besides, they completely side track the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 of the IPC all the more arbitrary and discriminatory.

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81. During the course of oral submissions, three further but more substantive justifications were given by learned counsel for the Union of India for making this distinction. The first justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband

either expressly or by necessary implication. The second justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The third justification is that paragraph 5.9.1 of the 167th report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

82. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being W.P. (C) No. 382 of 2013 Page 51 married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

83. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.22 that:

> "But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid." 22 [1964] 6 SCR 846 W.P. (C) No. 382 of 2013 Page 52

84. Similarly, in Rattan Arya v. State of Tamil Nadu 23 it was observed that judicial notice could be taken of a change in circumstances. It was held:

> "It certainly cannot be pretended that the provision is intended to benefit the weaker sections of the people only. We must also observe here that whatever justification there may have been in 1973 when Section 30(ii) [of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960] was amended by imposing a ceiling of Rs 400 on rent payable by tenants of residential buildings to entitle them to seek the protection of the Act, the passage of time has made the ceiling utterly unreal. We are entitled to take judicial notice of the enormous multifold increase of rents throughout the country, particularly in urban areas. It is common knowledge today that the accommodation which one could have possibly got for Rs 400 per month in 1973 will

> today cost at least five times more. In these days of universal, day to day escalation of rentals any ceiling such as that imposed by Section 30(ii) in 1973 can only be considered to be totally artificial and irrelevant today. As held by this court in Motor General Traders v. State of A.P.24 a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14." (Emphasis supplied by us)

85. In Anuj Garg v. Hotel Association of India 25 this Court was concerned with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or an intoxicating drug is consumed by the public. While upholding the view of 23 (1986) 3 SCC 385 24 (1984) 1 SCC 222 25 (2008) 3 SCC 1 W.P. (C) No. 382 of 2013 Page 53 the Delhi High Court striking down the provision as unconstitutional, this Court held in paragraphs 46 and 47 of the Report:

> "It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.
>
> No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases." (Emphasis supplied by us)
>
> 86. Similarly, it was observed by this Court in Satyawati Sharma v.

Union of India26 in paragraph 32 of the Report that legislation which might be reasonable at the time of its enactment could become unreasonable with the passage of time. It was observed as follows:

> "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 equality 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." (Emphasis supplied by us)

26 (2008) 5 SCC 287 W.P. (C) No. 382 of 2013 Page 54 There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of the IPC has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.

87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

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88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172 nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

89. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might W.P. (C) No. 382 of 2013 Page 56 become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born out of early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an

interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.

90. The view that marital rape of a girl child has the potential of destroying the institution of marriage cannot be accepted. Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable. A divorce may destroy a marriage but does it have the potential of destroying the 'institution' of marriage? A judicial separation may dent a marital relationship but does it have the potential of destroying the 'institution' of marriage or even the marriage? Can it be said that no divorce should be W.P. (C) No. 382 of 2013 Page 57 permitted or that judicial separation should be prohibited? The answer is quite obvious.

91. Looked at from another perspective, the PCMA actually makes child marriages voidable and makes the parties to a child marriage (other than the girl child) punishable for an offence under the said Act. For someone who supports the institution of marriage, nothing could be more destructive of the institution of marriage than the PCMA which makes a child marriage voidable and punishable on the one hand and on the other, it otherwise collaterally legitimizes the pernicious practice of child marriages. It is doubtful if the Parliamentary Standing Committee intended such a situation along with its attendant adverse and detrimental impacts and so we leave it at that.

92. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalizing sexual intercourse under the IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of the IPC but he would W.P. (C) No. 382 of 2013 Page 58 nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an 'aggravated' form of rape the punishment is for a minimum period of 10 years imprisonment which may extend to imprisonment for life (under the IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of the IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

Application of special laws

93. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over the IPC as provided for in Sections 5 and 41 of the IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special W.P. (C) No. 382 of 2013 Page 59 laws concerning a

special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as the IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

94. A rather lengthy but useful discussion on this subject of special laws is to be found in Life Insurance Corporation of India v. D.J. Bahadur 27 in paragraphs 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the 27 (1981) 1 SCC 315 W.P. (C) No. 382 of 2013 Page 60 Industrial Disputes Act, 1947 would be a special law vis-à-vis the Life Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, the LIC Act is the special statute". It was held as follows:

> "In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission — the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to. What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is an

> industrial dispute between the Corporation and its workmen qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, W.P. (C) No. 382 of 2013 Page 61 the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law." The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court including Sections 5 and 41 of the IPC.
>
> (i) The JJ Act
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> 95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not W.P. (C) No. 382 of 2013 Page 62 be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution.

Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

96. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognized and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child friendly atmosphere in the Special Court but also child friendly W.P. (C) No. 382 of 2013 Page 63 procedures, some of which are given in subsequent sections of the statute. Once again

the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

97. However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes the IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though the IPC decriminalizes the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

98. Prima facie it might appear that since rape is an offence under the IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of the IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of rape under the IPC and the definition of penetrative sexual assault under the W.P. (C) No. 382 of 2013 Page 64 POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 of the IPC. In sum, marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

Harmonious and purposive interpretation

99. The entire issue of the interpretation of the JJ Act, the POCSO Act, the PCMA and Exception 2 to Section 375 of the IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject matter. Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions W.P. (C) No. 382 of 2013 Page 65 and give force and life to the intention of the Legislature. It was said in Seaford Court Estates Ltd. v. Asher28 that:

> "A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language

> of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

100. Similarly, in Collector of Customs v. Digvijaya Singhji Spinning & Weaving Mills29 it was said that where an alternative construction is open, that alternative should be chosen which is consistent with the smooth working of the system which the statute purports to regulate. It was said that:

> "It is one of the well-established Rules of construction that "if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature". It is equally well-settled principle of construction that "Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system"." 28 [1949] 2 K.B. 481 affirmed in [1950] A.C. 508 29 AIR 1961 SC 1549 W.P. (C) No. 382 of 2013 Page 66

101. That a constructive attitude should be adopted in interpreting statutes was endorsed in Jugal Kishore v. State of Maharashtra30 when it was said that:

> "….. Unless the Acts [Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958], with the intention of implementing various socio-economic plans, are read in such complementary manner, the operation of the different Acts in the same field would create contradiction and would become impossible. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the court."

102. Finally, from the purposive and harmonious construction point of view as well as the social context point of view, we may only draw attention to the opinion expressed by the Constitution Bench in Abhiram Singh v. C.D. Commachen31 by one of us (Lokur, J) to supplement our view. It is not necessary to repeat the observations made and conclusions given therein.

103. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

30 1989 Supp (1) SCC 589

31 (2017) 2 SCC 629

104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day – Akshaya Trutiya - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.

Conclusion

105. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is – this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the IPC – in the present case W.P. (C) No. 382 of 2013 Page 68 this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years – this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of the IPC – this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus.

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106. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

107. We express our gratitude to Mr. Gaurav Agrawal, Advocate and Ms. Jayna Kothari, Advocate for the effort that they have put in and the able assistance that they have given us for the purpose of

deciding this case.

.....J
New Delhi; (Madan B. Lokur)
October 11, 2017

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 382 OF 2013

INDEPENDENT THOUGHT ...PETITIONER(S)

Versus

UNION OF INDIA & ANR. ...RESPONDENT(S)

JUDGMENT

Deepak Gupta, J.

1. I have gone through the extremely erudite and well written judgment of my learned brother Lokur, J.. I fully agree with both the reasoning given by him and the conclusions arrived at. However, I am expressing my own views in this separate concurring judgment wherein I have given some other reasons while reaching the same conclusion.

2. “Whether Exception 2 to Section 375 of the Indian Penal Code, in so far as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down” is the question for consideration in this writ petition.

3. At the outset, it may be mentioned that in the main petition the challenge is laid to the entire Exception 2. However, during the course of arguments Mr. Gaurav Agarwal, learned counsel for the petitioner, Independent Thought, a registered Society and Ms. Jayna Kothari, learned counsel for the intervener, the Child Rights Group, submitted that they are limiting their challenge to Exception 2 only in so far as it deals with the girl child aged 15 to 18 years.

4. Section 375 of the Indian Penal IPC (for short 'IPC') defines rape and reads as follows:

> "375. Rape.- 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 c. 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:— First.—Against her will.
>
> Secondly.—Without her consent.
>
> Thirdly.—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.
>
> Fourthly.—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.
>
> W.P. (C) No. 382 of 2013 Page 72 Fifthly.—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.
>
> Sixthly.—With or without her consent, when she is under eighteen years of age.
>
> Seventhly.—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 fifteen years of age, is not rape."

5. A husband who commits rape on his wife, as defined under Section 375 of the IPC, cannot be charged with the said offence as long as the wife is over 15 years of age. It may be made clear that this Court is not going into the issue of "marital rape" of women aged 18 years and above and the discussion is limited only to "wives" aged 15 to 18 years. A man is guilty of rape if he commits any act mentioned in Section 375 IPC, without the consent of the women if she is above 18 years of age. If a man commits any of the acts mentioned in Section 375 IPC, with a girl aged less than 18 years, then the act will amount to rape even if done W.P. (C) No. 382 of 2013 Page 73 with the consent of the victim. However, as per Exception 2 of Section 375 IPC, if the man is married to the woman and if the "wife" is aged more than 15 years then the man cannot be held guilty of commission of the offence defined under Section 375, whether the wife consented to the sexual act or not.

6. Section 375 of the IPC creates three classes of victims:

> (i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated under Section 375 IPC are committed with or without consent of the victim, the man committing such an act is guilty of rape.
>
> (ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 IPC no offence is committed. The man can be held guilty of rape, only if the sexual act is done in absence of legal and valid consent.

(iii) The third category of victims is married women. The exception exempts a man from being charged and convicted under Section 375 IPC for any of the acts contemplated W.P. (C) No. 382 of 2013 Page 74 under this section if the victim is his "wife" aged 15 years and above.

To put it differently, under Section 375 IPC a man cannot even have consensual sex with a girl if she is below the age of 18 years and the girl is by law deemed unable to give her consent. However, if the girl child is married and she is aged above 15 years, then such consent is presumed and there is no offence if the husband has sex with his "wife", who is above 15 years of age. If the "wife" is below 15 then the husband would be guilty of such an offence.

7. The issue is whether a girl below 18 years who is otherwise unable to give consent can be presumed to have consented to have sex with her husband for all times to come and whether such presumption in the case of a girl child is unconscionable and violative of Articles 14, 16 and 21 of the Constitution of India. THE LEGISLATIVE BACKGROUND

8. The IPC was enacted in the year 1860 and the age given in Exception 2 of Section 375 has been changed from time to time. Till 1929, no minimum age of marriage was legally fixed. It was only after passing of the Child Marriage Restraint Act, 1929 (for short 'the Restraint Act') that the minimum age for marriage was fixed. The Restraint Act was repealed by the Prohibition of Child Marriage Act, 2006 (for short 'the PCMA'). A chart showing the ages of consent, W.P. (C) No. 382 of 2013 Page 75 from time to time, under clause Sixthly of Section 375 IPC, in Exception 2 to Section 375 IPC and the Restraint Act/PCMA is as follows:

Year	IPC	Age of Consent under Section 375, 6th Clause I.P.C	Age under Exception 2 to Sec. 375 I.P.C	Minimum Age of Marriage under the Restraint Act/PCMA
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

9. A perusal of the aforementioned chart clearly shows that when the IPC was originally enacted in the year 1860, the age of consent under clause Sixthly of Section 375 IPC and under Exception 2 of Section 375 IPC was 10 years. In this regard, the IPC was amended in 1891 and the age under both the provisions was raised to 12 years. In 1925, the age of consent was raised under clause Sixthly to 14 years but under the Exception 2 the age was retained at 13 years. In 1929, the Child Marriage Restraint Act was enacted. Section 3 of this Act provided that the W.P. (C) No. 382 of 2013 Page 76 minimum age of the girl child, to be eligible for marriage, was 14 years. In 1940, the IPC was again amended and the age of consent under clause Sixthly was raised to 16 years, but under Exception 2 to Section 375 IPC, the age was raised to 15 years and the minimum age of marriage under the Restraint Act was also 15 years. In 1978, the IPC was again amended and the age of consent was raised to 16 years but under Exception 2 to Section 375 IPC, no change was made. In 1978, the minimum age for marriage of the girl child was raised to 18 years but no consequential amendment was made in the IPC. In 2013, after the unfortunate "Nirbhaya" incident took place, the Parliament raised the age of consent under clause Sixthly to 18 years. The minimum age for marriage of a girl

child remained at 18 years, but no change was made in Exception 2 to Section 375 IPC and a girl child who was married before the minimum age of marriage, could be subjected to sexual intercourse (forcible or otherwise) by her husband and if she was over 15 years of age, the husband could not be charged with any offence.

10. At this stage, reference may be made to the Hindu Marriage Act. In the Hindu Marriage Act, as originally enacted in 1955, the minimum age for marriage of a bride was 15 years and of a groom 18 years. The Hindu Marriage Act was amended in 1978 and the minimum age of marriage for a bride was enhanced to 18 years and for a groom to 21 years. Identical amendment was made in the Restraint Act.

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11. The Child Marriage Restraint Act, 1929 was repealed by the Prohibition of Child Marriage Act, 2006 and this Act defines a child as follows:

> "2. Definitions.—In this Act, unless the context otherwise requires,—
>
> (e) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age."

12. Section 3 of the PCMA makes child marriages voidable at the option of the contracting party who is a child and reads as follows:

> "3. Child marriages to be voidable at the option of contracting party being a child.—(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:
>
> Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.
>
> (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.
>
> (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.
>
> (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the

marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed." W.P. (C) No. 382 of 2013 Page 78

13. It would be pertinent to note that under the Restraint Act the punishment under Section 3 for a male aged 18 years to 21 years, contracting a child marriage was simple imprisonment, which could extend up to 15 days or with fine up to Rs.1000/- or both and under Section 4, if a male over 21 years contracted a marriage with a female child, the punishment was simple imprisonment which could extend up to 3 months. Section 5 provided punishment of simple imprisonment up to 3 months and fine with regard to those who performed, conducted or directed any child marriage. Similar provisions existed in Section 6 with regard to the punishment of parents or guardians, who acted to promote child marriage or permitted it to be solemnized or negligently failed to prevent the child marriage to be solemnized. Surprisingly, the proviso to Section 6 provided that no women could be punished with imprisonment. The punishments provided under the Restraint Act were virtually illusory and no minimum punishment was prescribed.

14. The Restraint Act was repealed and replaced by the PCMA. The provisions of the PCMA are slightly more stringent. Under Section 9 of the PCMA, if a male adult above 18 years of age contracts a child marriage, he can be sentenced to rigorous imprisonment up to 2 years or fine which may extend up to one lakh rupees or both. However, no minimum sentence is provided even under this Act. Section 10 of the PCMA provides punishment for those persons who perform, W.P. (C) No. 382 of 2013 Page 79 conduct, direct or abet a child marriage and the same sentence is provided. As far as the guardians and parents are concerned, the punishment for them is provided under Section 11 and it is the same. Again, the proviso lays down that no woman shall be punishable with imprisonment. Though this Court is not dealing with this question directly in the present petition, it is obvious that a woman would be placed in the forefront by any person who gets a child marriage conducted. Such a woman cannot be sentenced to undergo imprisonment and at the most, a fine can be levied. The punishments provided are neither sufficiently punitive nor deterrent. Therefore, the PCMA has been breached with impunity. I think the time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage. More stringent punishments should be provided and some minimum punishment should definitely be provided especially to those mature adults who promote such marriages and who perform, conduct, direct or abet any such marriage. Otherwise, this legislation will never act as a sufficient deterrent to prevent or even reduce child marriages.

15. Under Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, a "juvenile" or "child" was defined to mean a person, who had not completed 18 years of age. The Juvenile Justice (Care and Protection of Children) W.P. (C) No. 382 of 2013 Page 80 Act, 2015 defines a child under section 2(12) to mean a person who has not completed 18 years of age.

16. Under the Protection of Women from Domestic Violence Act, 2005, a child has been defined under Section 2(b) to mean any person below the age of 18 years.

17. Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. This provision deals with girls below the age of 15 years who are got married. Such a girl is required to repudiate her marriage before she attains majority and she can only repudiate the marriage if the marriage has not been consummated. This virtually makes mockery of the PCMA. Therefore, even in a marriage which is void under PCMA, the girl will have to obtain a decree for dissolution of her marriage, that too before she attains the age of majority and only if the marriage has not been consummated. Another anomalous situation is that if the husband has forcible sex with such a girl, the marriage is consummated and the girl child is deprived of her right to get the marriage annulled.

18. Similarly under Section 13(2)(iv) of the Hindu Marriage Act, 1955, a Hindu girl can file a petition for divorce on the ground that her marriage, whether W.P. (C) No. 382 of 2013 Page 81 consummated or not, was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years. This is also not in consonance with the provisions of PCMA, according to which marriage of a child bride below the age of 15 years is void and there is no question of seeking a divorce. A void marriage is no marriage. Another anomaly is that whereas a child bride, who is above 15 years under PCMA, can apply for annulment of marriage up to the age of 20 years, under Section 13(2)(iv) of the Hindu Marriage Act, a child bride under the age of 15 years must repudiate the marriage after attaining the age of 15 years but before she attains the age of 18 years, i.e. even before she attains majority. The question that remains unanswered is who will represent or help this child, who has been forced to marry to approach the Courts.

19. It is obvious that while making amendments to various laws, some laws are forgotten and consequential amendments are not made in those laws. After the PCMA was enacted both the Hindu Marriage Act, 1955 and the Dissolution of Muslim Marriages and Divorce Act, 1939 also should have been suitably amended, but this has not been done. In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.

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20. Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before. It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890 a minor has been defined to mean a person, who has not attained majority under the Majority Act. Under Section 4(a) of the Hindu Minority and Guardianship Act,

1956 a minor has been defined to mean a person who has not completed the age of 18 years. Under the Representation of the People Act, 1951 a person is entitled to vote only after he attains the age of 18 years.

21. Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his property. The property of such a minor can be sold or transferred only if such sale or transfer is for the benefit of the minor and after the permission of the court. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract.

22. Keeping in view the mounting crimes against children, regardless of the sex of the victim, Parliament enacted the Protection of Children from Sexual Offences W.P. (C) No. 382 of 2013 Page 83 Act, 2012 (for short 'POCSO'), which came into force on 14.11.2012. The Statement of Objects and Reasons of this Act reads as follows:

> "STATEMENT OF OBJECTS AND REASONS 1. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.
>
> 2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.
>
> 3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development.

Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial

process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation." W.P. (C) No. 382 of 2013 Page 84

23. POCSO is a landmark legislation for protection of child rights and to prevent the sexual abuse and exploitation of children. This Act deals with sexual offences committed against a child and a child has been defined to be a person below the age of 18 years under Section 2(d). POCSO does not define rape, but it defines penetrative sexual assault under Section 3 and aggravated penetrative sexual assault under Section 5 and the punishments are provided for them under Section 4 and 6 respectively. Section 7 of the POCSO defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment. Chapter III of the POCSO deals with use of children for pornographic purposes with which we are not concerned in the instant case. This Act creates Special Courts to deal with offences against children. Section 42 of the POCSO is very important for our purpose and it provides that where an offence is punishable both under POCSO and under IPC, then the offender found guilty would be liable for that punishment, which is more severe.

24. Section 42 and Section 42A of the POCSO read as follows:

> "42.Alternate punishment. - Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to W.P. (C) No. 382 of 2013 Page 85 punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree." "42A. Act not in derogation of any other law. – The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

25. Section 42A provides that the provisions of POCSO shall be in addition to and not in derogation of the provisions of any other Act. Therefore, the legislature, in its wisdom, thought that POCSO would supplant and would be in addition to the other criminal provisions and where there was any inconsistency, the provisions of POCSO would override any other law to the extent of inconsistency.

26. Another important provision to which reference may be made is Section 198(6) of the Code of Criminal Procedure (for short 'the Code'). The same reads as follows:

> "198. Prosecution for offences against marriage:

> xxx xxx xxx (6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence." The age "eighteen" was substituted for "fifteen" by Act 5 of 2009 w.e.f.

31.12.2009. A perusal of the aforesaid provision also makes it clear that a W.P. (C) No. 382 of 2013 Page 86 complaint with regard to commission of offence under Section 375 IPC punishable under Section 376 IPC can be taken cognizance of by a court within one year of the commission of the offence even where "the wife" is below 18 years of age. It is, therefore, apparent that while amending Section 198 of the Code, the legislature was visualising that there can be marital rape with a "wife" aged less than 18 years but was prescribing a limitation of one year, for taking cognizance of such an offence. However, no consequential amendment was made to Exception 2 of Section 375 IPC.

WHO IS A CHILD?

27. If one analyses the provisions of all the laws which have been referred to above, it is apparent that the legislature, in its wisdom, has universally enacted that a person below the age of 18 years is deemed to be a child unable to look after his or her own interests. It would be very important to note that, in 2013 the IPC was amended, post the unfortunate "Nirbhaya" incident and the age of consent under clause Sixthly of Section 375 IPC was increased to 18 years. The position as on date is that under the Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, Child Marriage Restraint Act, 1929, Protection of Women from Domestic Violence Act, 2005, The Majority Act, 1875, The Guardians and Wards Act, 1890, The Indian Contract Act, 1872 W.P. (C) No. 382 of 2013 Page 87 and many other legislations, a person below the age of 18 years is considered to be a child unable to look after his or her own interests.

28. As far as marriage laws are concerned, as far back as 1978, the minimum age of marriage of a girl child was increased to 18 years. The Restraint Act, was replaced by the PCMA wherein also marriage of a girl child aged below 18 years is prohibited. However, Section 3 of the PCMA makes a child marriage voidable at the option of that party, who was a child at the time of marriage. The petition for annulling the child marriage must be filed within 2 years of the child attaining majority. Therefore, a girl who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. Similarly, a male child can get the marriage annulled before attaining the age of 23 years. Even when the child is minor, a petition for annulment can be filed by the guardian or next friend of the child along with the Child Marriage Prohibition Officer. Unfortunately, both the number of prosecutions and the number of cases for annulment of marriage filed under PCMA are abysmally low. THE ILL EFFECTS OF A CHILD MARRIAGE

29. A lot of material has been placed before us both by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned Counsel appearing for the Intervener, to indicate that child marriage is not in the W.P. (C) No. 382 of 2013 Page 88 interest of the girl child. In my opinion, it is not necessary to refer to all the material cited by learned counsel. The fact that child marriage is a reprehensible practice; that it is an abhorrent practice; that it violates the human

rights of a child, cannot be seriously disputed. I am not oblivious to the harsh reality that most of the child brides are even below the age of 15 years. There is a practice in many parts of the country where children, both girls and boys, are married off, even before they attain puberty. They are innocent children, who do not even understand what marriage is. The practice which is widely prevalent is that a girl who is married pre-puberty is normally kept at her parents' home and is sent to her matrimonial home after she attains puberty in a ceremony which is commonly referred to as 'gauna'. Can the marriage of a child aged 3-4 years, by any stretch of imagination, be called a legal and valid marriage?

30. A Child marriage will invariably lead to early child birth and this will adversely affect the health of the girl child. In a report by the UNICEF 32, there is an article on ending child marriage and the ill effects of child marriage have been set out thus:-

> "Married girls are among the world's most vulnerable people. When their education is cut short, girls lose the chance to gain the skills and knowledge to secure a good job and provide for themselves and their families. They are socially isolated. As I observed among my former schoolmates who were forced to get married, the consciousness of their isolation is in itself painful.
>
> 32 Report of UNICEF "ON THE STATE OF THE WORLD'S CHILDREN 2016".

A fair chance for girls - End Child Marriage by Angelique Kidjo W.P. (C) No. 382 of 2013 Page 89 Subordinate to their husbands and families, married girls are more vulnerable to domestic violence, and not in a position to make decisions about safe sex and family planning – which puts them at high risk of sexually transmitted infections, including HIV, and of pregnancy and childbearing before their bodies are fully mature. Already risky pregnancies become even riskier, as married girls are less likely to get adequate medical care. During delivery, mothers who are still children are at higher risk of potentially disabling complications, like obstetric fistula, and both they and their babies are more likely to die."

31. In a study conducted on child marriages in India, based on the census of 201133, it was found that 3% girls in the age group of 10 to 14 years were got married and about 20% girls were married before attaining the age of 19 years. Unfortunately, this report deals with girls below the age of 19 years and not 18 years, but the report does indicate that more than 20% girls in this country are married before attaining the age of 18 years. Therefore, more than one out of every 5 marriages violates the provisions of the PCMA and the Hindu Marriage Act, 1955.

32. The World Health Organisation, in a Report34 dealing with the issue of child brides found that though 11% of the births worldwide are amongst adolescents, they account for 23% of the overall burden of diseases. Therefore, a child bride is more than doubly prone to health problems than a grown up woman. 33 A Statistical analysis of CHILD MARRIAGE IN INDIA, Based on Census 2011 published by Young Lives and National Commission for Protection of Child Rights (NCPCR) 34 World Health Organisation Report on "Early Marriages, Adolescent and Young Pregnancies", Sixty-Fifth World Health Assembly dated 16th March, 2012 W.P. (C) No. 382 of 2013 Page 90

33. In the Report of the Convention on the Rights of the Child 35, certain recommendations have been made and the relevant portion of the Report is as follows:-

> "Harmful Practices
>
> 51. The Committee is deeply concerned at the high prevalence of child marriages in the State party, despite the enactment of the Prohibition of Child Marriage Act (PCMA, 2006). It is further concerned at barriers impeding the full implementation of the PCMA, such as the prevalence of social norms and traditions over the legal framework, the existence of different Personal Status Laws establishing their own minimum age of marriage applicable to their respective religious community as well as the lack of awareness about the PCMA by enforcement officers. It is also concerned about the prevalence of other harmful practices against girls such as dowry and devadasi.
>
> 52. The Committee urges the State party to ensure the effective implementation of the Prohibition of Child Marriage Act (PCMA, 2006), including by clarifying that the PCMA supersede the different religious-based Personal Status Laws. It also recommends that the State party take the necessary measures to combat dowry, child marriage and devadasi including by conducting awareness-raising programmes and campaigns with a view to changing attitudes, as well as counselling and reproductive education, to prevent and combat child marriages, which are harmful to the health and well-being of girls."

34. The General Assembly of United Nations adopted a Resolution 36, relevant portion of which, reads as follows:

> "Expressing concern about the continued prevalence of child, early and forced marriage worldwide, including the fact that there are still approximately 15 million girls married every year before they reach 18

35 Report of the United Nations Committee on the Rights of the Child (CRC) on the Convention of the Rights of the Child, dated 13th June, 2014 , dealing with India 36 Resolution adopted by the United Nations General Assembly on 19th December, 2016 on "Child, early and forced marriage", Seventy-first session, Agenda Item 64(a) W.P. (C) No. 382 of 2013 Page 91 years of age and that more than 720 million women and girls alive today were married before their eighteenth birthday. Recognizing that child, early and forced marriage is a harmful practice that violates, abuses or impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls, and underscoring the human rights obligations and commitments of States to promote and protect the human rights and fundamental freedoms of women and girls and to prevent and eliminate the practice of child, early and forced marriage."

35. In the National Family Health Survey-4, 2015-201637 some startling figures are revealed. It was found that at the time of carrying out the survey in 2014, amongst women in the age group of 20-24 years, almost 26.8% women were married before they attained the age of 18 years, i.e. more than one out of 4 marriages was of a girl child. In the urban areas the percentage is 17.5% and it rises to 31.5% in the rural areas.

36. In the National Plan of Action for Children, 201638, the Government of India itself has recognised the high rate of child marriages prevalent in the country and the fact that a child marriage violates the basic rights of health, development and protection of the child. Relevant portion of the report reads as follows:

> "A large number of children, especially girls are married before the legal age in India. According to NFHS 3 (2005-06), 47.4 percent of women in the age 20-24 were married before 18, the percentage being higher for rural areas. The situation has improved in 2013-14 as the RSOC data shows that 30.3 percent women in the age 20-24 were

37 India Fact Sheet- Issued by Government of India, Ministry of Health and Family Welfare 38 Drawn up by the Ministry of Women and Child Development, Government of India, (Published on 14th January, 2017) W.P. (C) No. 382 of 2013 Page 92 married before their legal age. Early marriage poses various risks for the survival, health and development of young girls and to children born to them. It is also used as a means of trafficking."

37. In a Report39 based on the Census, 2011, the consequences of child marriages have been dealt with in the following terms:

> "5.1 Consequences Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education; and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.
>
> The prevalent practice of child marriage has detrimental consequences for both boys and girls, but has more grave and far-reaching adverse effects on girls. Within a patriarchal family structure, girls have relatively little power, but young and newly married women are particularly powerless, secluded and voiceless. Adolescent girls

have little choice about whom and when to marry, whether or not to have sexual relations, and when to bear children. This is well elaborated in a study of girls in the age group 10-16 years. It was found that they were oppressed in several ways such as:

• They had to submit unquestioningly to the parents' decision regarding their marriage.

- They were over-burdened with household chores.
- They had limited knowledge of their body and its functioning.
- They were unaware of sexual changes, contraception, child bearing and rearing.

39 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi W.P. (C) No. 382 of 2013 Page 93 • They dropped out of school on attaining puberty.

• They had no time for leisure and social interaction.

• They were discriminated in matters of food intake and expressing their views within the family.

Imagine the fate of a young girl with the above profile if she is to face marital life and its challenges during adolescence. The adolescent married girl is more at risk. She is less likely to be allowed out of the house, to have access to services and usually, not be given space or freedom to exert agency. Within the marital home, which in majority of the cases is a joint family, she will probably not have much communication with her husband, and will end up socially isolated, with very little contact with her parental home."

38. This Report40 also notices upswing of female deaths during pregnancy in the age groups of 15-19 years and attributes these deaths to the death of teenage mothers. The relevant portion of the report reads as follows:

> "Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalisation....."

39. This Report41 deals with various other aspects and some apposite observations are as follows:

> "A young girl who is still struggling to understand her own anatomy, when forced to make conjugal relations, often shows signs of post-traumatic stress and depression owing to sexual abuse by her

40 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR), June 2017, New Delhi 41 A Statistical Analysis of Child Marriage in India, Based on Census, 2011 (Published by Young Lives and National Commission for Protection of Child Rights(NCPCR) June 2017, New Delhi W.P. (C) No. 382 of 2013 Page 94 older partner. Neither the bodies of these young brides nor their innocent little minds are prepared, therefore, forced sexual encounters can lead to irreversible physical and psychological damage. A study conducted in 2013 showed that young girls are three times more likely to experience marital rape." This report reveals a shocking aspect that girls below the age of 18 years are subjected to three times more marital rape as compared to the grown up women.

40. A perusal of the various reports and data placed before us clearly shows that marriage of the child not only violates the human rights of a child but also affects the health of the child.

41. Reference may be made to certain decisions cited before us. The Delhi High Court in Association for Social Justice & Research v. Union of India & Ors. 42, was dealing with a case where a girl aged between 16 to 18 years was married off to a man stated to be over 40 years of age. The Court noted the ill effects of child marriage and gave a direction that the child will remain with her parents and her marriage will not be consummated till she attains the age of 18 years. Thereafter, a Full Bench of the Delhi High Court in Court on its own motion (Lajja Devi) & Ors. v. State & Ors.43, while dealing with the provisions of PCMA and also referring to the provisions of Sections 375 and 376 IPC and after noticing the judgment passed in the case of Association For Social Justice & Research (supra), again reiterated that child marriage is a social evil, which endangers the 42 [2010 (118) DRJ 324(DB)] W.P. (C) No. 382 of 2013 Page 95 life and health of the child. The ill effects of child marriage have been summarised in the following manner:

> "(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
>
> (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
>
> (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
>
> (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
>
> (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality."
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> 42. The Full Bench, with regard to Section 375 IPC before its amendment in 2013, made the following observations:

> "32. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages."

43. A Full Bench of Madras High Court in T. Sivakumar v. Inspector of Police44, dealt with the provisions of the PCMA. It held that a marriage contracted 44 H.C.P. No. 907 of 2011, vide its judgment dated 3rd November, 2011 W.P. (C) No. 382 of 2013 Page 96 with a female less than 18 years and more than 15 years is not a void marriage but is only a voidable marriage. However, the Court went on to hold that stricto sensu the marriage could not be called a valid marriage since the child bride had the option of getting the marriage annulled till she attains the age of 20 years. It held as follows:

> "The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" stricto sensu as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights." Reference to these judgments has been made only for the purpose of highlighting the concern shown by the Courts with regard to child marriage and the manner in which the Courts have consistently held that the child marriage is an evil which should be avoided.
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> THE KARNATAKA EXPERIENCE
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> 44. A writ petition45 was filed in the Karnataka High Court, raising the issue of validity of child marriages. In its order dated 10th November, 2010 the Karnataka High Court noted as follows:
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> 45 Writ Petition No.11154/2006 (GM-RES-PIL), Muthamma Devaya & Anr. v. Union of India & Ors.
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> W.P. (C) No. 382 of 2013 Page 97 "The narration of facts in the present writ petition is heart rendering.

The photographs appended to the writ petition have been a cause of deep distress to us. The photographs reveal, the marriage of minor girls, not yet in their teens, to fully grown men. In one of

the photographs, the girl has been made to stand on a chair, so that she could garland her tall and fully grown groom. Forced marriage of the girl child, one realises, is one of the manifestations of cruelty, possibly without any equivalent comparison. It seems that the practice is common place in this part of the world. It may have remained unchecked for a variety of reasons including, poverty, lack of education, culture and ignorance. We are of the view that allowing the evil to continue without redressing it, would make us a party to the disgraceful activity."

45. After making the aforesaid observations, the Karnataka High Court constituted a four Member committee, headed by Dr. Justice Shivraj V. Patil, former Judge of this Court, to expose the extent of practice of child marriage. The Committee was also requested to suggest ways and means to root out the evil of child marriage from society and to prevent it to the maximum extent possible. The Core Committee submitted its report and made various recommendations. One of its recommendations was that marriage of a girl child below the age of 18 years should be declared void ab initio. Pursuant to the report of the Core Committee, in the State of Karnataka an amendment was made in the PCMA and Section 1(A) has been inserted after sub-section 2 Section 3, which reads as under:

> "(1A) Notwithstanding anything contained in sub-section (1) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio." W.P. (C) No. 382 of 2013 Page 98

46. Therefore, any marriage of a child, i.e. a female aged below 18 years and a male below 21 years is void ab initio in the State of Karnataka. This is how the law should have been throughout the country. Where the marriage is void, there cannot be a husband or a wife and I have no doubt that protection of Exception 2 to Section 375 IPC cannot be availed of by those persons, who claim to be "husband" of "child brides" pursuant to a marriage which is illegal and void.

47. This leads to an anomalous situation. In Karnataka, if a husband has sexual intercourse with his "wife" aged below 18 years, since such marriage would be void ab initio, the wife cannot be treated to be a legal wife and, therefore, the husband cannot get the benefit of Exception 2 to Section 375 IPC whereas in rest of the country he would be entitled to the benefit of such exception and be immune from prosecution.

THE DEFENCE OF SOCIAL REALITY

48. The main defence raised on behalf of the Union of India is that though the practice of child marriage may be reprehensible, though it may have been made illegal, the harsh reality is that 20% to 30% of female children below the age of 18 years are got married in total violation of the PCMA. According to the Union of India, keeping in view this stark reality and also keeping in view the sanctity which is attached to a union like marriage, the Parliament, in its wisdom, thought W.P. (C) No. 382 of 2013 Page 99 it fit to retain the age of fifteen in Exception 2 to Section 375 IPC. It has also been urged that when Parliament enacts any law which falls within its jurisdiction, then this Court should not normally interfere with that Act. When any law is passed, the Court must presume that the Parliament has gone into all aspects of the matter. Though it was faintly urged before us by

learned counsel for the petitioner that the Parliament did not go into certain aspects, this Court is clearly of the view that such ignorance cannot be imputed to Parliament. In our constitutional framework, where there is division of powers, each repository of power must respect the other and this Court must extend to the Parliament the respect it deserves. One cannot and should not impute ignorance to the legislature.

49. The stand of the Union of India may be summarised 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.
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> (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
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> 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 W.P. (C) No. 382 of 2013 Page 100 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."

50. Certain other facts may be noted which, though not strictly necessary for deciding the legal issues, are necessary to decide the background in which amendment to Section 375 IPC and other criminal laws were carried out. These facts clearly show that Parliament knowingly took a decision not to criminalize sexual activity between husband and wife. In the 84th Report of the Law Commission, it was recommended that the age of consent under clause Sixthly of Section 375 IPC, should be increased to 18 years and Exception 2 should be deleted. In the 172nd Report of the Law Commission, it was recommended that the age of consent under clause Sixthly should be retained at

16 years, but the Law Commission specifically opined that there should be no distinction on account of marriage of the girl child and the age in Exception 2 be raised from 15 to 16 years. The Justice Verma Committee did not make any recommendation to change the age of consent under clause Sixthly. However Parliament, while amending the IPC in the year 2014, in the wake of the "Nirbhaya" incident, decided to increase the W.P. (C) No. 382 of 2013 Page 101 age of consent to 18 years under clause Sixthly, but did not make any change in Exception 2 of Section 375 IPC.

51. Interestingly, though the Verma Committee did not recommend that the age of consent should be increased under clause Sixthly from 16 to 18 years, but it did recommend that Exception 2 should be completely deleted. The Parliament took note of the Verma Committee report. It also took note of the recommendations of the Law Commission and a Standing Committee was constituted and Parliament enacted this law pursuant to the recommendations of the Standing Committee. It would also be pertinent to mention that one Member of Parliament, Mr. Saugata Roy moved a Private Member's Bill to fix the age at 18 years in Exception 2 of Section 375 IPC, but that amendment was not carried. Interestingly, the amendment to Section 375 IPC and other sections relating to offences against women and the POCSO were incorporated by one Amending Act i.e., The Criminal Law (Amendment) Act, 2013. After the "Nirbhaya" case, the Juvenile Justice (Care and Protection of Children) Act, 2015 was also amended in 2016 and a child in conflict with law over the age of 16 years, if charged with a heinous offence, can be tried in a court of law if the Juvenile Justice Board feels that he was mature enough to commit a crime.

W.P. (C) No. 382 of 2013 Page 102
POWER OF THE COURT TO INTERFERE

52. It is a well settled principle of law that when the constitutional validity of the law enacted by the legislature is under challenge and there is no challenge to the legislative competence, the Court will always raise a presumption of the constitutionality of the legislation. The courts are reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates the constitutional provisions or the fundamental rights of the citizens. The Courts must show due deference to the legislative process.

53. There can be no dispute with the proposition that Courts must draw a presumption of constitutionality in favour of laws enacted by the legislature. In Sub-Divisional Magistrate v. Ram Kali46, this Court observed as follows:

> ".....The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

54. Thereafter, in Pathumma & Ors. v. State of Kerala & Ors.47, this Court held that the Court would interfere only when the statute clearly violates the rights of the citizens provided under Part III of the Constitution or where the Act is beyond 46 (1968) 1 SCR 205 47 (1978) 2 SCC 1 W.P. (C) No. 382 of 2013 Page 103 the legislative competence or such similar grounds. The relevant observations are

as follows:

> "6. It is obvious that the Legislature is in the best position to understand and appreciate the needs of the people as enjoined by the Constitution to bring about social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of the lot of poor people. The Court will, therefore, interfere in this process only when the statute is clearly violative of the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds. It is for this reason that the Courts have recognised that there is always a presumption in favour of the constitutionality of a statute and the onus to prove its invalidity lies on the party which assails the same..."
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> 55. In Government of A.P. v. P. Laxmi Devi48, this Court held thus:
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> "66. As observed by the Privy Council in Shell Co. of Australia v. Federal Commr. of Taxation [1931 AC 275:1930 All ER Rep 671 (PC)] (All ER p. 680 G-H) "...unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will..."
>
> 67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar [AIR 1962 SC 955]. Also, if it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497....."
>
> 56. In Subramanian Swamy v. Director, CBI49, a Constitution Bench of this Court laid down the following principle:

48 (2008) 4 SCC 720 49 (2014) 8 SCC 682 W.P. (C) No. 382 of 2013 Page 104 "Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or

by way of conferment of authority to pass administrative orders – if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

57. I am conscious of the self imposed limitations laid down by this Court while deciding the issue whether a law is constitutional or not. However, if the law is discriminatory, arbitrary or violative of the fundamental rights or is beyond the legislative competence of the legislature then the Court is duty bound to invalidate such a law.

58. Justice H.R. Khanna in the case of State of Punjab v. Khan Chand 50 held that when Courts strike down laws they are only doing their duty and no element 50 (1974) 1 SCC 549 W.P. (C) No. 382 of 2013 Page 105 of judicial arrogance should be attributed to the Courts when they do their duty under the Constitution and determine whether the law made by the legislature is in conformity with the provisions of the Constitution or not. The relevant observations are as follows:

> "12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the Courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity."

> 59. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law

or the Court may read down the law in such a manner that the W.P. (C) No. 382 of 2013 Page 106 law when read down does not violate the Constitution. While the Courts must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.

60. It is not the job of the Court to decide whether a law is good or bad. Policy matters fall within the realm of legislature and not of the Courts. The Court, however, is empowered and has the jurisdiction to decide whether a law is unconstitutional or not.

61. "The law is an ass" said Mr. Bumble51. That may be so. The law, however, cannot be arbitrary or discriminatory. Merely because a law is asinine, it cannot be set aside. However, if the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to make it in consonance with the Constitution of India.

51 Oliver Twist: Author Charles Dickens W.P. (C) No. 382 of 2013 Page 107 WHETHER EXCEPTION 2 TO SECTION 375 IPC IS ARBITRARY?

62. Before dealing with this issue, it would be necessary to point out that earlier there was divergence of opinion as to whether a law could be struck down only on the ground that it was arbitrary. In Indira Nehru Gandhi v. Raj Narain52 the Court struck down clauses 4 and 5 of Article 329A of the Constitution on the ground of arbitrariness. Reliance was placed on the celebrated judgment of this Court passed in the case of Keshavananda Bharati v. State of Kerala53. In Para 681 of Raj Narain (supra), Chandrachud J., held as follows:

"681. It follows that clauses (4) and (5) of Article 329A are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of 'law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1885 under the title, "Introduction to the Study of the Law of the Constitution". But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the

courts……." 52 1975 (Supp.) SCC 1 53 (1973) 4 SCC 225.

W.P. (C) No. 382 of 2013 Page 108

63. The aforesaid case was one of the first cases in which a law was set aside on the ground of being arbitrary. In E.P. Royappa v. State of Tamil Nadu the doctrine of arbitrariness was further expanded. Bhagwati, J., eruditely explained the principle in the following terms.

"85……From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

64. The doctrine developed in Royappa's case (supra) was further advanced in the case of Maneka Gandhi v. Union of India55. In this case, the test of reasonableness was introduced and it was held that a law which is not "right, just and fair" is arbitrary. The following observations are apposite:-

"7……The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness 54 (1974) 4 SCC 3 55 (1978) 1 SCC 248 W.P. (C) No. 382 of 2013 Page 109 pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

65. This principle was followed in the cases of A.L. Kalra v. Project and Equipment Corpn.56, Babita Prasad v. State of Bihar57, Ajay Hasia v. Khalid Mujib Sehravardi58 and Dr. K.R. Lakshmanan v. State of Tamil Nadu59. In the case of Ajay Hasia (supra), a Constitution Bench of this Court held as follows:

"16……Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the

> concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

66. In State of A.P. v. McDowell & Co.60, a three-Judge Bench of this Court struck a discordant note and rejected the plea of the Amending Act being arbitrary. The Court held that an enactment could be struck down if it is being challenged as violative of Article 14 only if it is found that it is violative of equality clause, equal protection clause or violative of fundamental rights. The Court went on to hold 56 (1984) 3 SCC 316, 57 1993 Supp (3) SCC 268 58 (1981) 1 SCC 722 59 (1996) 2 SCC 226 60 (1996) 3 SCC 709 W.P. (C) No. 382 of 2013 Page 110 that an enactment cannot be stuck down only on the ground that the Court thinks that it is unjustified. This judgment need not detain us for long because in Shayara Bano v. Union of India & Ors.61 popularly known as the "Triple Talaq case", this Court held that this judgment did not take note of binding judgments of this Court passed by a Constitution Bench, in the case of Ajay Hasia (supra) and a three-Judge Bench in the case of Dr.K.R. Lakshmanan (supra). After discussing the entire law on the subject, Nariman, J., in his judgment held as follows:

> "It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary".
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> "55.....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." Therefore, there can be no dispute that a law can be struck down if the Court find it is arbitrary and falls foul of Article 14 and other fundamental rights.

61 WP(C) No.118/2016 and connected matters [(2017) Vol. 8 SCALE 178] W.P. (C) No. 382 of 2013 Page 111

67. In this case, we are concerned mainly with Article 14 and 21 of the Constitution of India. The legislative history given above clearly indicates that a child has universally been defined as a person below 18 years of age in all the enactments. This has been done for the reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of

his/her actions. Not only is a person below the age of 18 years treated to be a child, but is also not even entitled to deal with his property, enter into a contract or even vote.

68. The fact that child marriage is an abhorrent practice and is violative of human rights of the child is not seriously disputed by the Union of India. The only justification given is that since a large number of child marriages are taking place, it would not be proper to criminalize the consummation of such child marriages. It is urged that, keeping in view age old traditions and evolving social norms, the practice of child marriage cannot be wished away and, therefore, legislature in its wisdom has thought it fit not to criminalize the consummation of such child marriages.

69. I am not impressed with the arguments raised by the Union of India. Merely because something is going on for a long time is no ground to legitimise and legalise an activity which is per se illegal and a criminal offence. No doubt, it is totally within the realm of Parliament to decide what should be the age of consent W.P. (C) No. 382 of 2013 Page 112 under clause Sixthly of Section 375 IPC. It is also within the domain of the Parliament to decide what should be the minimum age of marriage. The Parliament has decided in both the enactments that a girl below 18 years is not capable of giving consent to have sex and legally she cannot marry. Parliament has also, in no uncertain terms, prohibited child marriage and come to the conclusion that child marriage is an activity which must come to an end. If that be so, can the practice of child marriage which is admittedly “an evil”, and is also a criminal offence be set up as an exception in a case of a girl child, who is subjected to sexual intercourse by her so called husband. Shockingly, even if this sexual intercourse is forcible and without the consent of the girl child, then also the husband is not liable for any offence. This law is definitely not right, just and fair and is, therefore, arbitrary.

70. There can be no dispute that every citizen of this country has the right to get good healthcare. Every citizen can expect that the State shall make best endeavours for ensuring that the health of the citizen is not adversely affected. By now it is well settled by a catena of judgments of this Court that the “right to life” envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the raison d’etre of a good life. Without good health W.P. (C) No. 382 of 2013 Page 113 there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.

71. It is true that at times the State, because of paucity of funds, or other reasons beyond its control, cannot live up to the expectations of the people. At the same time, it is not expected that the State should frame a law, which adversely affects the health of a citizen, that too a minor girl child. The State, under Article 15 of the Constitution, is in fact, empowered to make laws favouring women. Reservation for women is envisaged under Article 15 of the Constitution. In W.P. (C) No. 382 of 2013 Page 114 Vishakha v. State of Rajasthan62, this Court held that sexual harassment of working women amounts to violation of the rights guaranteed by Articles 14, 15 and 23 of the Constitution.

72. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16 year old girl, when forcibly subjected to sexual intercourse by her “husband”, undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in child birth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Article 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Article 14, 15 and 21 of the Constitution of India.

73. Approaching this aspect from another angle. As is evident from various reports filed in this case, child marriages are not restricted to girls aged above 15 years. Even as per the National Plan of Action for Children, 2016 prepared by the Ministry of Women and Child Development, Government of India, 30.3% 62 (1997) 6 SCC 241 W.P. (C) No. 382 of 2013 Page 115 marriages i.e. almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years. A girl may be married when she is 3-4 years or may be 10-11 years old. She may be sent to her matrimonial home on attaining the age of puberty, which may be well before she attains the age of 15 years. In such an eventuality, what is the reason for fixing the magic figure of 15 years. This figure had relevance when under the criminal law and the marriage laws the age was similar. In the year 1940, the age of consent was 16 years, the age of marriage was 15 years and the age under the exception was also 15 years; in 1975, the age of consent was 16 years, the age of marriage was 18 years, but the age under the exception remained 15 years. That may have been there because there was no change in the age of consent under Clause Sixthly. Now when the age of consent is changed to 18 years, the minimum age of marriage is also 18 years and, therefore, fixing a lower age under Exception 2 is totally irrational. It strikes against the concept of equality. It violates the right of fair treatment of the girl child, who is unable to look after herself. The magic figure of 15 years is not based on any scientific evaluation, but is based on the mere fact that it has been existing for a long time. The age of 15 years in Exception 2 was fixed in the year 1940 when the minimum age for marriage was also 15 and the age of consent under clause Sixthly was 16. In the present context when the age for marriage has been fixed at 18 years and when the age of consent W.P. (C) No. 382 of 2013 Page 116 is also fixed at 18 years, keeping the age under Exception 2 at 15 years, cannot be said to be right, just and fair. In fact, it is arbitrary and oppressive to the girl child.

74. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, the Parliament increased the minimum age for marriage. The Parliament

also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that the Exception 2, in so far as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 IPC DISCRIMINATORY?

75. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC in so far as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, W.P. (C) No. 382 of 2013 Page 117 who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say 'yes' or 'no' to marriage? Can she be deprived of her right to say 'yes' or 'no' to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding "NO". While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is "evil" but since it is going on for a long time, such "criminal" acts should be decriminalised.

76. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show W.P. (C) No. 382 of 2013 Page 118 that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be

achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons W.P. (C) No. 382 of 2013 Page 119 including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

77. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for offences under Sections 323, 324, 325 IPC etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354A, 354B, 354C, 354D of the IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with W.P. (C) No. 382 of 2013 Page 120 intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the “victim wife” is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

78. The discrimination is absolutely patent and, therefore, in my view, Exception 2, in so far as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

LAW IN CONFLICT WITH POCSO

79. Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It W.P. (C) No. 382 of 2013 Page 121 would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other

sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove.

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80. Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own “wife” not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

W.P. (C) No. 382 of 2013 Page 123 IS THE COURT CREATING A NEW OFFENCE?

81. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the Courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Section 3 and 5 of POCSO. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and POCSO.

82. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

83. The aforesaid principle, commonly known as Hale's principle, was recorded in the History of the Pleas of the Crown 63 and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his 63 (1736), Vol. 1, Ch. 58, P. 629 W.P. (C) No. 382 of 2013 Page 124 wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

84. The aforesaid principle was followed in England for more than two centuries. For the first time in Reg v. Clarence64, some doubts were raised by Justice Wills with regard to this proposition. In Rex v. Clarke65, Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held as follows:

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

85. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive. THE PRIVACY DEBATE

86. Ms. Jayna Kothari, learned counsel for the Intervener, had raised the issue of privacy and made reference to the judgment of this Court in the case of Justice 64 (1888) 22 Q.B.D. 23 65 (1949) 2 All E.R. 448 W.P. (C) No. 382 of 2013 Page 125 K.S. Puttaswamy (Retd.) & Anr. v. Union of India and Ors.66 to urge that the right of privacy of the girl child is also violated by Exception 2 to Section 375 IPC. I have purposely not gone into this aspect of the matter because anything said or urged in this behalf would affect any case being argued on "marital rape" even in relation to "women over 18 years of age". In this case, the issue raised is only with regard to the girl child and, therefore, I do not think it proper to deal with this issue which may have wider ramifications especially when the case of girl child can be decided without dealing with the issue of privacy. RELIEF

87. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the

Constitution of India.

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:–

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

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(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> "Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".
>
> It is, however, made clear that this judgment will have prospective effect.
>
> 89. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.
>
> 90. At the cost of repetition, it is reiterated that nothing said in this judgement shall be taken to be an observation one way or the other with regard to the issue of "marital rape".
>
> 91. Extremely valuable assistance was rendered to this Court by Mr. Gaurav Agarwal, learned counsel appearing for the petitioner and Ms. Jayna Kothari, learned counsel appearing for the intervener and I place on record my appreciation and gratitude for the same.

.....J. (DEEPAK GUPTA) New Delhi October 11, 2017 W.P. (C) No. 382 of 2013 Page 127