

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

In the matter of:

INDEPENDENT THOUGHT

Petitioner

Versus

UNION OF INDIA

Respondent

WRITTEN NOTE ON BEHALF OF THE UNION OF INDIA, BY SENIOR
ADVOCATE, RANA MUKHERJEE

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New Delhi, the 6th day of September, 2017

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PART-A

ISSUE

In the present case, the primary issue which falls for determination of this Hon'ble Court is, whether the *Exception 2* to Section 375 of the Indian Penal Code (IPC) (which was added vide Criminal Law (Amendment) Act of 2013) which provides a blanket protection to a man from being charged with rape of his wife who is 'not under 15 years of age' (who is, in other words, between the age of 15 - 17 years) in respect of sexual intercourse or sexual acts done within the confines of his marital relationship with her, is arbitrary and unreasonable in its separate classification of a "married girl" based on age and thereby falls foul of Article 14, 15 and 21 of the Constitution of India.

The Petitioner has raised this issue particularly in view of the fact that in all other statutes pertaining to sexual offences/ offences against women, the age of "*free consent*" is the age of majority i.e. 18 years and a "*child*" (in respect of a female) is described as one below 18 years of age.

Therefore, it is their contention that the Legislature in amending Section 375, IPC, and by carving out an exception viz-a-viz "married girl between 15 - 17 years" has provided no protection in the form of a legal remedy in the event married girls in the said age-group become victims of sexual assault and/or rape within the confines of marriage along with a punishment to act as a deterrent.

PART-B

The following is a Comparative Chart on the Statutes which seek to protect a 'child' / a woman *inter alia* from sexual offences/offences and other rights, where their "*age*" is a determinative factor:

Statute	Preamble & Definition of Child	Age of Majority/Consent
Prohibition of Child Marriage Act, 2006	<p>Preamble: An Act to provide for the prohibition of solemnisation of child marriages and for matters connected therewith or incidental thereto.</p> <p>Section 2(a) - "Child": "Child means a person who, ...if a female, has not completed eighteen years of age".</p> <p>Section 2(f) - Minor: Minor means a person who, under the provisions of the Majority Act, 1875 is to be deemed not to have attained his majority.</p>	18 years
The Hindu Marriage Act, 1955	<p>Preamble: An Act to amend and codify the law relating to marriage among Hindus.</p> <p>Section 5 - Conditions for a Hindu Marriage: 5(ii) the bridegroom has completed the age of twenty-one years and <u>the bride, the age of eighteen years, at the time of marriage.</u></p>	18 years
The Protection of Children from Sexual Offences Act, 2012	<p>Preamble: An Act to protect children from offences of</p>	18 years

	<p>sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.</p> <p>Section 2(1)(d) - Child: Child means any person below the age of eighteen years.</p>	
<p>The Juvenile Justice (Care and Protection of Children) Act, 2015</p>	<p>Preamble: An Act to consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, hereunder and for matters connected therewith or incidental thereto.</p>	<p>18 years*</p>

	<p>Section 2(12) - Child: "Child means a person who has not completed eighteen years of age."</p>	
<p>The Protection of Women from Domestic Violence Act, 2005</p>	<p>Preamble: An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.</p> <p>Section 2(a) - Aggrieved person: Aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.</p> <p>Section 2(b) - Child: Child means any person below the age of eighteen years and includes any adopted, step or foster child.</p>	18 years
<p>The Muslim Personal Law (Shariat) Application Act, 1937</p>	<p>Preamble: An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims</p>	16/18 years

	<p>Section 5 - Grounds for decree for dissolution of marriage:</p> <p>"(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years."</p>	
The Indian Penal Code, 1860 (As amended in 2013)	<p>Section 375 - Rape:</p> <p><i>Sixthly</i> - With or without her consent, when she is under eighteen years of age;</p> <p><i>Explanation 2</i> - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;</p> <p><i>Exception 2</i> - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape</p>	<p>18 years - for an unmarried girl;</p> <p>And</p> <p>15 years - for a married girl</p>
Guardianship & Wards Act, 1890	<p>Preamble:</p> <p>An Act to consolidate and amend the law relating to Guardian and Wards.</p>	18 years

	<p>Section 4(1) - Minor: Minor means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority.</p>	
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PART-C

LAW COMMISSION REPORTS & OTHER DOCUMENTS

1. In the 84th Law Commission Report (dated 25th April 1980) (Annexed @ Page 24 to 43 of ¹/₄ P PB) on "Rape and Allied Laws", in Chapter XI on Rape of Girls Below Minimum Age containing its discussion on 'Increase in minimum age', observed as follows:

"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."

The Committee considered the following chart (@ Page 38 of ¹/₄ P PB) for comparison and analysis:

Year	Age of consent under Section 375, fifthly of IPC	Age mentioned in the Exception to section 375, IPC	Minimum age of marriage under the Child Marriage Restraint Act, 1929
1860	10 years	10 years	-
1891	12 years	12 years	-
1925	14 years	13 years	-
1929	14 years	13 years	14 years
1940	16 years	15 years	15 years
1978	16 years	15 years	18 years

2. In the General Assembly Declaration on the Elimination of Violence against Women, 1993, Article 2 contained therein recognized "**marital rape**" to be an offence against women.

Article 2 reads as under:

"Article 2: Violence against women shall be understood to encompass, but not be limited to, the following:

*(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, **marital rape**, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

3. In the 172nd Law Commission Report (dated 25th March 2000) (Annexed @ Page 44 to 64 of WP PB) on "**Review of Rape Laws**", the Committee while considering the suggestion of NGO Sakshi to delete the said Exception to Section 375 of IPC concluded by saying that such an amendment / deletion would amount to excessive interference with the marital relationship (Page 58).

Paragraph 3.1.2.1. @ Page 58 reads as under:

"3.1.2.1. Representatives of Sakshi wanted us to recommend the deletion of the Exception, with which we are unable to agree. Their reasoning runs thus: 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 recognised by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years. We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship."

4. In the 13th Report OF Parliamentary Standing Committee (dated 29th November 2005) (Annexed @ Page 524 to 544 of Vol. III) on the *Prevention of Child Marriage Bill, 2004*, *inter alia* the following recommendations were made by the Committee:

"(i) The Committee has observed that there are different definitions of "Child" in different statutes which may in comparison with the definition of children in the proposed legislation, cause anomaly and confusion as to which definition is more appropriate. Citing an example of the Indian Penal Code which renders a married girl child of 15 years mature enough to give her consent for sexual intercourse, the Committee has found it absurd and contradictory that while a married girl child as per the Indian Penal Code is quite mature while on the other hand, a girl married at an age of 15 years will still be a child as per the proposed legislation. The Committee has therefore recommended for amending the Indian Penal code to remove any anomaly and bring the two legislations in parity with each other.

(iii) The Committee has found that rendering a child marriage voidable at the option of any contracting party would cause further complications considering the social pressures and mindset of the people belonging to lower strata of society who may have inhibitions to be subjected to court's proceedings. The Committee has therefore recommended that a child marriage should be rendered void *ab initio*."

@ Page 543, Vol. III

5. In the 167th Report of the Parliamentary Standing Committee of Rajya Sabha (Annexed @ Page 475 to 547 of Vol. II), the following discussions/observations were made:

"2.6.9 The Committee, thereafter, took up Section 375 of IPC, which defines 'sexual assault'. The Home Secretary pointed out that the amendment widens the definition of 'sexual assault', which is comprehensive and, in his opinion, there is agreement of almost all parties on the issue. He clarified that, by and large, the provision is the same as the previous provisions. The change has been made in the first part. Another change has been made in the age of consent which has been raised to 18 years.

2.6.10 A Member of the Committee felt that even though the age of wife has been increased from 15 years to 16 years, it is still below the

stipulated age of 18 years for the girl to marry under the Prohibition of Child Marriage Act, before which the marriage is considered to be a child marriage and can be declared void at the instance of any of the couple. Even in the case of Prohibition of Child Marriage Act, if the groom is below 21 years of age and the bride is below 18 years, the marriage is voidable at the option of either of these two who were children at that time. He viewed 21 that there is also a need to have consistency in law and wanted to know as to why it is 16 years and not 18 years.

2.6.11 The Home Secretary conceded that the provision indicates the practical reality. He mentioned that the marriage of a girl below 18 years of age is voidable and not void ab initio. There are numerous marriages where the girl has been below 18 years of age. Therefore, unless there is a provision all those marriage would become illegal and punishable

Page 394-395, Vol. II

5.9. Section 375 of IPC

5.9.1. While discussing about Section 375, some Members felt that the word 'rape' should also be kept within the scope of sexual assault. The Home Secretary clarified that there is a change of terminology and the offence of 'rape' has been made wider. Some Members also suggested that somewhere there should be some room for wife to take up the issue of marital rape. It was also felt that no woman takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent forever. However, several Members felt that the marital rape has the potential of destroying the institution of marriage. The Committee felt that if a woman is aggrieved by the acts of her husband, there are other means of approaching the court. In India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice. Some Members also suggested that the age mentioned in the exception to the Section may be raised to 18 years from 16 years. The exception provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. The Home Secretary, 48 responding to this suggestion, stated that by doing so by one stroke, the marriages in thousands in different States would be outlawed. One Member again suggested that for the words 'with or without the other person's

consent, the words 'with or without the complainant's consent' may be used. The Committee, however, felt that by using complainant, a proper message will not go and existing formulation may continue.

@ Page 421-422

5.17 Clause 5 (Sections 375, 376, 376A, 376B, 376C 376D and 376E of IPC)

5.17.1 This clause seeks to substitute Sections 375, 376, 376A and 376B by Sections 375, 376, 376A, 376B, 376C and 376D of the Indian Penal Code replacing the offence "rape" by "sexual assault" to make the offence gender neutral and also to widen the scope of the offence. The age for consent has been raised from 16 years to 18 years in sexual assault. It was also proposed in the Bill to raise age of wife from fifteen to sixteen years in the exception for sexual assault. The Committee took note that the Ordinance made further amendments to the provisions as contained in the Bill and also brought in some new Sections. The new Sections in Ordinance provide for punishment for causing death or resulting in persistent vegetative state of the victim, punishment for sexual assault by gang, and punishment of deaths for repeat offenders.

Page 431-432, Vol. II

6. In the 15th Lok Sabha Parliamentary Debate dated 19.03.2013. (Annexed @ Page 488 to 503 of Vol. II), for consideration of Criminal Law Amendment Bill, 2013, Professor Saugata Roy (@ Page 499) put forth amendment 7 & 8 to increase the age to 18 years.

The said amendment was negated.

PART-D

RELEVANT PROVISIONS OF STATUTES

Prohibition of Child Marriage Act, 2006

Section 2. Definitions.

- (a) "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;

Section 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 along with 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.

(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.

Section 6. Legitimacy of children born of child marriages.

Notwithstanding that a child marriage has been annulled by a decree of nullity under section 3, every child be gotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes.

The Protection of Children from Sexual Offences Act, 2012

Statement of Objects and Reasons

Preamble:

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of

Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Section 3 - Penetrative sexual assault

Section 6 - Punishment for aggravated penetrative sexual assault

Section 7 - Sexual assault

Section 8 - Punishment for sexual assault

Section 9 - Aggravated sexual assault

Section 11 - Sexual harassment

Section 12 - Punishment for sexual harassment

Section 42. Alternate punishment:

Where an act or omission constitutes an offence punishable under this Act and also under section 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree

Section 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.

The Hindu Marriage Act, 1955

Section 5. Condition for a Hindu Marriage. -

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

...(ii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;

Section 12: Voidable Marriages.

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :-

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

Section 13: Divorce.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Section 16. Legitimacy of children of void and voidable marriages.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

Section 18. Punishment for contravention of certain other conditions for a Hindu marriage.

Every person who procures a marriage of himself or herself or to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), and (v) of Section 5 shall be punishable-

(a) in the case of a contravention of the condition specified in clause (iii) of Section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both;

Indian Penal Code, 1890As per Ordinance of 2013**Section 375 - Rape**

Sixthly--With or without her consent, when she is under eighteen years of age.

Exception - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.

As per Criminal Law Amendment Bill 2013**Section 375 - Rape**

Sixthly--With or without her consent, when she is under sixteen years of age.

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.

Indian Penal Code, 1890*(As amended by Criminal Amendment Act of 2013 w.e.f. 3-2-2013)*

Section 354A - Sexual harassment and punishment for sexual harassment.

Section 354B - Assault or use of criminal force to woman with intent to disrobe.

Section 370A - Exploitation of a trafficked person

Section 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.

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.'

PART-E

CASE LAWS

1. Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41 @ Para 11 (Fazl Ali, J.)
2. Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958 SC 538 @ Para 11
3. V.C. Shukla v. State (Delhi Administration), (1980) Supp SCC 249, Para 11 @ Page 259
4. Government of AP v. P. Laxmi Devi, (2008) 4 SCC 720 (@ Page 747):

"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 (7-11))

"...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 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."

5. Sub-Divisional Magistrate, Delhi v. Ram Kali, (1961) 1 SCR 205:

"5...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."

6. Pathumma & Ors. v. State of Kerala & Ors., (1978) 2 SCC 1:

"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..."

7. In **Subramaniam Swamy v. Director, CBI**, (2014) 8 SCC 682, in Para 49 @ Pgs. 721 & 722 of the Report, observed as under:

"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 386 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."

8. In **Ms. Eera through Dr. Manjula Krippendorf Vs. State (Govt. of NCT of Delhi) & Anr.**, (2017) 8 SCALE 112, this Hon'ble Court while dealing with the issue as to whether the definition of the word 'child' in Section 2(d) of POCSO Act, can be construed compositely to include biological and mental

age, concluded that the Parliament has felt it appropriate that the definition of the term "age" or biological age would be the safest yardstick and has not included mental age and it is within the domain of legislative action.

The Court observed as follows:

"62. I have referred to the aforesaid authorities to highlight that legislative intention and the purpose of the legislation regard being had to the fact that context has to be appositely appreciated. It is the foremost duty of the Court while construing a provision to ascertain the intention of the legislature, for it is an accepted principle that the legislature expresses itself with use of correct words and in the absence of any ambiguity or the resultant consequence does not lead to any absurdity, there is no room to look for any other aid in the name of creativity.

There is no quarrel over the proposition that the method of purposive construction has been adopted⁶⁴ keeping in view the text and the context of the legislation, the mischief it intends to obliterate and the fundamental intention of the legislature when it comes to social welfare legislations. If the purpose is defeated, absurd result is arrived at.

The Court need not be miserly and should have the broad attitude to take recourse to in supplying a word wherever necessary. Authorities referred to hereinabove encompass various legislations wherein the legislature intended to cover various fields and address the issues. While interpreting a social welfare or beneficent legislation one has to be guided by the 'colour', 'content' and the 'context of statutes' and if it involves human rights, the conceptions of Procrustean justice and Lilliputian hollowness approach should be abandoned.

The Judge has to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event, he becomes a real creative constructionist Judge. I have perceived the approach in Hindustan Lever Ltd. (supra) and Deepak Mahajan (supra), Pratap Singh (supra) and many⁶⁵ others. I have also analysed where the Court has declined to follow the said approach as in R.M.D. Chamarbaugwalla (supra) and other decisions. The Court has evolved the principle that the legislative intention must be gatherable from the text, content and context of the statute and the purposive approach should help and enhance the functional principle of the enactment.

That apart, if an interpretation is likely to cause inconvenience, it should be avoided, and further personal notion or belief of the Judge

as regards the intention of the makers of the statute should not be thought of. And, needless to say, for adopting the purposive approach there must exist the necessity. The Judge, assuming the role of creatively constructionist personality, should not wear any hat of any colour to suit his thought and idea and drive his thinking process to wrestle with words stretching beyond a permissible or acceptable limit.

That has the potentiality to cause violence to the language used by the legislature. Quite apart from, the Court can take aid of causus omissus, only in a case of clear necessity and further it should be discerned from the four corner of the statute. If the meaning is intelligible, the said principle has no entry. It cannot be a ready tool in the hands of a Judge to introduce as and what he desires."

9. Significantly, a similar challenge to the Exception 2 to Section 375, IPC as enacted in 2013, a Division Bench of the High Court of Kerala in *Dr. Vincent Panikulangara V. Union Of India* (reported in (2015) 4 KLT 754) (Annexed to this Note) upheld the said exception while holding as under:

"4...But, while coming to a penal provision especially regarding an offence which has very grave penal consequences as well as repercussions in the society, the legislature had consciously excluded child marriage from the penal consequences of rape, if the wife is above the age of 15. We are of the view that the restrictions imposed under the 2006 Act or the statutes in this regard which legalises the marriage between the male and female, only if the male is 21 years and female is 18 years of age, cannot be related to an offence of rape. In other words, the restrictions imposed by the statute for a legal marriage cannot be equated with a penal provision under the I.P.C. The drafters of Indian Penal Code were conscious about the customary practices, the religious rituals and the ground reality in such a vast country where people live in diverse situations having different cultural and social background and had consciously created an exception to the general rule in regard to rape. That apart, 2006 Act has also provided appropriate penal provisions for violating the said provisions. The wisdom of Legislature to enact such statutory exceptions, therefore, cannot be termed

as arbitrary. Such exceptions, in the light of the legislative competence of the parliament, cannot be considered to be in violation of Articles 14, 15 or 21 of the Constitution of India."

PART-F

NOTES FROM COMMENTARIES

G.P. Singh on Statutory Interpretation, 14th Edition.

I. Intention of Legislature @ Page 17 to 21 *inter alia* comments as under:

"According to Blackstone the most fair and rational method for interpreting a statute is by exploiting the intention of the Legislature through the most natural and probable signs which are 'either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law'. (Pg.17)

The Courts are warned that they are not entitled to usurp legislative function under the disguise of interpretation and that they must avoid the danger of an a priori determination of the meaning of provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted."

II. Regard to Subject and Object, Pg. 139 @ Pg. 140

In the context of purposive construction SINHA, J. recommends: "To interpret a statute in a reasonable manner the court must place itself in the chair of a reasonable legislator / author. So done the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner as to see that the object of the Act is fulfilled." He then quotes a passage from Barak from his work on Purposive Construction which refers to two elements of objectivity in the process of construction as introduced by HART and SACHS: "first the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfil their constitutional duties in good faith. This

foundation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."

Summation:

In view of the inescapable factum of child marriages despite the 2006 enactment being prevalent in the Indian society by and large though diminishing, the Government in its wisdom sought to strike a balance between the necessity to impose the rigours of the 2006 Act with its full force while at the same time recognising that child marriages in any event below the age of fifteen would be void and between the ages of 15 to 18 voidable and therefore sought to, as can be deciphered from the various Law Commission Reports and Parliamentary Debates that such marriages between the ages of 15 - 18 though deprecated would still not fall foul of Section 375 and 376 of the Indian Penal Code as a method of restrictive social welfare.

In the circumstances, the prayers in the present writ petition as sought for may not be granted.

Prayed accordingly.

Submissions of The Union of India,

Through Mr. Rana Mukherjee, Senior Advocate.