

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**ANTICIPATORY BAIL APPLICATION NO.118 OF 2022
WITH
CRIMINAL APPLICATION NO.970 OF 2022**

Ramnath S/o Ashok Shinde

...APPLICANT

VERSUS

1) The State of Maharashtra,

2) X.Y.Z.

...RESPONDENTS

...
Mr.Narayan B. Narwade Advocate for Applicant.
Mrs.Vaishali Patil-Jadhav, A.P.P. for Respondent No.1 State.
Mr.Kunal A. Kale Advocate for Respondent No.2.
Ms.Manjushri V. Narwade Advocate for applicant in Criminal
Application No.970 of 2022 for assist to APP.
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CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 15th MARCH 2022

DATE OF PRONOUNCING ORDER : 19th APRIL 2022

ORDER :

1. Criminal Application No.970 of 2022 moved for assist to
APP stands allowed and disposed of.

2. Applicant is apprehending his arrest in connection with Crime No.370 of 2021 registered with Sonai Police Station, Taluka-Newasa, District-Ahmednagar, for the offence punishable under Sections 3, 4, 5, 6, 9, 10, 11 of the Child Marriage Restraint Act and under Sections 376(N), 323, 504, 506 of the Indian Penal Code and under Sections 4, 5 (L), 6, 8 of the Protection of Children from Sexual Offences Act (for short "POCSO Act").

3. Heard learned Advocate Mr. N.B. Narwade for the applicant, learned APP Mrs. Vaishali Patil - Jadhav for the respondent No.1 – State well assisted by learned Advocate Ms. Manjushri Narwade for the informant, and learned Advocate Mr. Kunal Kale for respondent No.2.

4. It has been vehemently submitted on behalf of the applicant that the perusal of the First Information Report (for short "FIR") would show that it has been filed due to constraints. The relationship in between the informant and the present applicant is that of wife and husband. At the time of marriage, there was no resistance by the informant nor she says that she had personally disclosed her age. In fact, what impression was

given to the applicant by her mother and other relatives was that she was major. The marriage was performed on 3rd July 2021. After few days the applicant – husband and his parents found certain abnormal activities of the victim – respondent No.2. She used to talk irrelevantly and used to behave in such a way that she was not able to understand anything. The applicant had taken her to hospital on 24th July 2021, where it was suggested that she should be admitted. At that time her parents told that she should be given treatment from the earlier doctor i.e. Doctor Unde Hospital, Shrirampur. The applicant then came to know that she was taking treatment from a psychiatrist. Rather the applicant himself has been cheated by the victim and her parents. Neither the victim nor her parents had disclosed that the victim was minor. Even before the Superintendent of Police, her parents had told that the age of the girl was 18 years. The applicant is educated person and believed in the statement of the victim and her parents. Offence under Section 376(n) of the Indian Penal Code is technically not attracted because applicant is the husband of the victim. The applicant had issued legal notice to the victim on 1st October 2021, giving intimation that she should meet the Advocate of the applicant so that process of cancellation of marriage would be started and after receiving

that notice the FIR has been lodged with the concocted story that she was minor when the marriage was performed. The custodial interrogation of the applicant is not required. The applicant has produced copies of the papers of treatment given to the victim. Her photographs, alleged to be doing abnormal activities, and copy of the notice are also placed on record. The applicant is ready to abide by the terms of the bail.

5. Learned Advocate for the applicant has relied on the decision in ***Independent Thought vs. Union of India, AIR 2018 SC (Criminal)) 229***, wherein the Hon'ble Supreme Court held that, the exception 2 to Section 375 of the Indian Penal Code insofar as it relates to girl child below 18 years is liable to be struck down and it should be read as follows:-

"Sexual intercourse or sexual acts by man with his own wife, wife not being 18 years, is not rape."

6. Learned counsel for the applicant is relying upon Paragraph Nos. 29, 30, 31, 46 to 48, 63, 64, 70, 71, 74, 78, 79 and 97 of the Judgment of the Apex Court ***Independent Thought vs. Union of India*** (supra). He further submits that though this decision is there, yet when the custodial interrogation of the

applicant – husband is not required, he be released on anticipatory bail.

7. Learned APP has submitted that the applicant is not denying the fact that his wife i.e. victim girl was aged 17 years when the FIR was given and prior to that , i.e. for about four months she was married to the applicant. The consent of the minor is no consent at all and if the loopholes or technical defences are allowed to be raised, then it would help those persons who commit the offence and still want the protection of the law. Learned APP has pointed out that reports are appearing in the newspapers that in the Covid situation there is increase in child marriages and in fact it is a social problem and it cannot be tackled unless there are rigours of law as well as social awareness. Learned APP is also relying upon the same decision in ***Independent Thought vs. Union of India*** (supra) wherein it has been held :-

“Sexual intercourse with girl below 18 years of age is rape regardless of whether she is married or not. Exception creates unnecessary and artificial distinction between married girl child and unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. Artificial distinction is arbitrary and discriminatory and is definitely not in best interest of girl child. Artificial distinction is contrary to philosophy and ethos of Article 15(3) of Constitution as well as contrary

to Article 21 of Constitution and out commitments in international conventions. It is also contrary to philosophy behind some statutes, bodily integrity of girl child and her reproductive choice. What is equally dreadful, artificial distinction turns blind eye to trafficking of girl child and surely each one of us must discourage trafficking which is such horrible social evil. Existence of Article 21 of Constitution gives fundamental right to girl child to live life of dignity. Documentary material placed before Supreme Court clearly suggests that early marriage takes away self esteem and confidence of girl child and subjects her, in sense, to sexual abuse. Under no circumstances can it be said that such girl child lives life of dignity. Right of girl child to maintain her bodily integrity is effectively destroyed by traditional practice sanctified by IPC. Her husband, for purposes of Section 375 of IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such 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 provisions of IPC. It appears therefore that different and irrational standards have been laid down for treatment of girl child by her husband and it is necessary to harmonize provisions of various statutes and also harmonize different provisions of IPC interse."

" Exception 2 to Section 375 IPC insofar 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 Articles 14, 15 and 21 of the Constitution of India;
- (ii) it is discriminatory and violative of Article 14 of the Constitution of India and;
- (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 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.”

8. The learned APP further submits that in ***Independent Thought vs. Union of India*** (supra) the Hon’ble Supreme Court has considered all the aspects involved and in order to bring POCSO Act in consonance with Exception 2 to Section 375 of the Indian Penal Code (for short “IPC”), had taken pragmatic option available. The impact on the society of the child marriages was also considered and therefore, in fact the case is against the interest of the applicant. Rather when offence is clearly made out, the applicant does not deserve to be released on bail.

9. Learned Advocate appearing for respondent No.2 – victim girl has strong objection for grant of anticipatory bail to the applicant. It has been stated that the victim was minor when her marriage was performed. Even her parents are accused persons but at present she is residing with them. No advantage can be given to the applicant on the count that he is the husband of the

victim. The victim has denied that she behaved abnormally while cohabiting with the applicant.

10. It is to be noted that in this case the FIR has been lodged by Ajrun Sitaram Gadge, who is serving as Village Development Officer. In fact it is the outcome of the inquiry made by Child Welfare Committee and directions given by the Child Welfare Committee to lodge the report under the Child Marriage Restraint Act and therefore, when the FIR was lodged, it was in respect of offences under sections of Child Marriage Restraint Act only. However, after the statement of the victim was recorded, further sections have been added i.e. 376(n), 323, 504, 506 of the IPC and Sections 4, 5 (L), 6 and 8 of the POCSO Act. The informant has filed separate application bearing Criminal Application No.970 of 2022 for assisting the APP and accordingly by taking objection for grant of anticipatory bail, the learned Advocate representing informant has assisted the learned APP.

11. At the outset, it can be seen that there is no dispute that the marriage of the victim was performed with the applicant on 3rd July 2021. So far as the age of the victim is concerned, it is submitted on behalf of the applicant that it was represented to the applicant by the relatives of the victim that she was major at

the time of settlement of marriage. However, it is to be noted that statement of counsellor of Child Protection Department has been recorded, who states that on 25th November 2021 two ladies and one male person came to her and had disclosed their name as of victim and her parents. The victim gave application to child-line stating that the parents and the father-in-law, mother-in-law and other persons had forced her to perform marriage with the applicant though she was minor. Upon the said complaint application, it was forwarded to Village Development Officer, who is also the competent authority under the Child Marriage Restraint Act, who has lodged the report. In that application, she has given her age as 17 years 3 months and 27 days. The Department of Women and Child Development gave further directions that further steps to be taken and therefore, the matter was referred to Child Welfare Committee and after inquiry, the Child Welfare Committee considered as to whether the victim is in need of care and protection and taking into consideration the age of the child, the Committee had considered the victim as "child" within the definition of the Juvenile Justice (Care and Protection of Children) Act. The school leaving certificate, Adhar Card of the girl was considered. Under such circumstance, we can say that there is *prima facie* evidence to

show that the victim is a “child” within the definition of Child Marriage Restraint Act as well as the Juvenile Justice (Care and Protection of Children) Act. No other documentary evidence has been placed by the applicant to show that because of those documents he carried the impression that the girl is major. He is simply saying that since the representation was given to him that the girl is major he believed the said statement. It is for him to establish the same through oral evidence. Now, when the *prima facie* evidence appears to be showing that the victim was minor when her marriage was performed with the applicant, then whether the applicant can seek any kind of exemption on the count that he is the husband of the victim, is a question.

12. It is to be noted that Exception 2 to Section 375 of the IPC reads thus:

“ 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.”

13. However, the matter was placed before the Hon’ble Apex Court in ***Independent Thought vs. Union of India*** (supra) for the interpretation of the said Clause as well as by pointing out the conflict or incongruity between the provisions of IPC and

POCSO Act. It was observed that, rape of married girl child (between 15 to 18 years of age) is not rape under IPC and therefore not offence in view of Exception 2 to Section 375 thereof, but it is offence of aggravated penetrative sexual assault under Section 5(n) of POCSO Act and punishable under 6 of that Act. This conflict or incongruity needs to be resolved in best interest of girl child and provisions of various complementary statutes need to be harmonized and read purposively to present an articulate whole and therefore, taking into consideration the object with which various Acts were enacted, the report of Law Commission of India, National Policy and National Plan, the Protection of Human Rights Act etc. were considered. Section 42-A of the POCSO Act inserted in POCSO Act by amendment dated 3rd February 2013 was also considered and the further consideration was for the definitions in Juvenile Justice (Care and Protection of Children) Act, 2015. The brief summary of the existing legislations has been considered in Para 52 of the Judgment, which reads thus:

"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 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."

. The various pronouncements of the Apex Court were also considered and then it has been observed:-

" 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 172nd 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."

14. Thereafter, the Hon'ble Apex Court went on to interpret how the harmony can be brought into the provisions of the IPC inter-se and also with the various Statutes. Further, the Hon'ble Apex Court observed that there were five options before the Court, which have been enumerated in Para 105 of the Judgment, which runs thus:-

" (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 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."

. By separate Judgment, but concurring, Hon'ble Justice Deepak Gupta also observed that:

" 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 years 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 Articles 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 Articles 14, 15 and 21 of the Constitution of India."

15. The major inconsistency between POCSO Act and IPC was also considered by the Hon'ble Apex Court and therefore, the

said Exception to Section 375 of the IPC was rather modified and instead of age 15 it was replaced by the word "18". It will have to be said that since the law has been laid down by the Hon'ble Apex Court under Article 32 of the Constitution of India, it is the law and it will have to be interpreted in the same way which has been put in ***Independent Thought vs. Union of India*** (supra).

16. The present applicant, therefore, cannot take up such defence that since he was married to the informant and she had not resisted or whatever sexual intercourse between them was with consent or voluntary. Child marriages are hazardous to the social fabric of this Country. Child marriages will have to be stopped and no person can be allowed to take advantage of any such situation. At the time of settlement of marriage, definitely, certain inquiries are required to be made and it is not restricted to the behaviour of the girl or the financial condition of her parents but also other things are also required to be considered, especially, the age. The applicant is harping upon the point of his notice dated 1st October 2021 and also the treatment papers. All those defences are required to be proved by him at the time of trial. He cannot be allowed to say that because of the said abnormal behavior he will not get rid off the relationship. Ultimately, the competent Court, if the applicant approaches, will

have to decide that point. The fact, however, remains that the victim was minor when the marriage took place. Whether only to believe the representations made regarding the age, is a point to be decided and when there was scope for making inquiry, going through the documents before settlement of marriage, yet to believe in the representations only, are all the points of defences which cannot be considered at this stage. We are required to consider the *prima facie* facts. The persons cannot be allowed to go away by putting a defence that they had taken the precaution and in fact what was represented, was different at the time of settlement of marriage. Those efforts or the inquiry that was made, should be visible and *bona fide*. When the offence alleged against the applicant also involves the social problem, this Court is not inclined to use the extraordinary discretionary relief under Section 438 of the Code of Criminal Procedure in favour of the applicant.

17. Accordingly, the Application stands rejected.

[SMT. VIBHA KANKANWADI , J.]