

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

ANTICIPATORY BAIL APPLICATION NO.203 OF 2022

Trimbak S/o Arun Borude

...APPLICANT

VERSUS

- 1) The State of Maharashtra,
- 2) XYZ

...RESPONDENTS

...
Mr.Rahul R. Karpe Advocate for Applicant.
Mr.A.M. Phule, A.P.P. for Respondent No.1 – State.
Mr.S.S. Gangakhedkar Advocate h/f. Mr. S.D. Munde
Advocate for Respondent No.2.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 17th MARCH 2022

DATE OF PRONOUNCING ORDER : 12th APRIL 2022

ORDER :

1. Applicant is apprehending his arrest in connection with Crime No.1 of 2022 registered with Shrigonda Police Station, District-Ahmednagar for the offence punishable under Sections 376 of the Indian Penal Code read with Sections 9, 10, 11 of

Prohibition of Child Marriage Act and Sections 3 and 4 of the Protection of Children from the Sexual Offences Act (for short "POCSO Act").

2. Heard learned Advocate Mr. Karpe for the applicant, learned APP Mr. Phule for the respondent No.1 – State and learned Advocate Mr. Gangakhedkar holding for learned Advocate Mr. Munde for respondent No.2 – informant.

3. 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 constrains. 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 24th December 2020. She was properly cohabited with the husband and she does not say that she was ill-treated in any manner. Thereafter, she became pregnant and she was getting all the initial treatments at Nawale Hospital, Shrigonda. The expenses were born by the applicant. She suffered cough and cold as well as

fever on 22nd December 2021 and therefore, again she was taken to Nawale Hospital, where after checking it was diagnosed that she was Covid Positive at that time. She was then sent to Civil Hospital, Ahmednagar. She was pregnant of nine months and since there was no facility in the Civil Hospital, Ahmednagar, she was referred to Sasoon Hospital, Pune. She was admitted by her mother and father-in-law to the hospital. After treatment, she came out of the Covid-19 and she delivered a baby boy at 12.00 midnight on 23rd December 2021. When it was told to the hospital authorities that she was 17 years of age, at that time then the fact was informed to the Police and then it is stated that though the mother, paternal uncle, father of the informant were having knowledge that she is minor, yet her marriage was performed with the applicant. Learned Advocate for the applicant submits that even in her FIR she has not stated that she has any complaint to make against the husband. It cannot be said that sexual intercourse between them was against the wish of the girl. In fact there are good relations between them and being wife she had extended no objection for grant of anticipatory bail when the matter was before the learned Special Judge, Shrigonda. The custodial interrogation of the applicant is

absolutely not necessary. Applicant is ready to abide by the terms of the bail.

4. 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.”

5. Learned counsel for the applicant submits that though this decision is there, yet when the custodial interrogation is not required, the applicant be released on anticipatory bail.

6. Learned APP has submitted that the applicant is not denying the fact that his wife i.e. informant is aged 17 years when the FIR was given and prior to that , i.e. for about 1 and ½ year 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."

7. 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.

8. Learned Advocate Mr. Gangakhedkar holding for learned Advocate Mr. S.D. Munde for respondent No.2 i.e. informant rather appear to be in dilemma as to what stand should be taken. We can understand that the informant – respondent No.2 has given birth to a child and now her relations with the applicant are jeopardized because of the filing of the FIR. At the end, the learned Advocate for the informant submits that the informant has no objection if the applicant is released on anticipatory bail.

9. At the outset it can be seen that there is no dispute as regards the marriage between the informant and the present applicant on 24th December 2020. It is also not in dispute that that the informant got pregnant from the applicant and she has delivered a child on 23rd December 2021. The informant has given her age, at the time of lodging FIR, as 17 years. No other documentary evidence has been produced by the applicant to

show that because of those documents he carried the impression that the girl is major. According to the informant, at the time of settlement of marriage, her paternal uncle, mother-in-law, father-in-law and brother-in-law were present. Except brother-in-law, all the persons referred above are accused persons in this case. The applicant appears to be aged 27 years at that time and as aforesaid, if the calculations are made, the informant would be aged around 16 years at the time of marriage. The applicant now wants to take advantage of the fact that the FIR does not give the actual date of birth of the informant and therefore there is no support to her statement that she is aged 17 years. He also then states that at the time of marriage, it was posed to him that she was 18 years of age. It is to be noted that if that fact would have been there, there was no reason for the informant to disclose now that she is 17 years of age. At one place the applicant is saying that his relations with the informant are good and he is still considering her as his wife. The question would be then, what prompted the informant to lodge the report.

10. Another fact that appears to be is that even the father of the present applicant was present when the informant was admitted to the hospital for delivery and prior to that for the treatment for Covid-19. The applicant has not produced a single

prescription of the doctor or any such document which would show that he had taken the informant to the hospital and at that time it was disclosed that she is major. The case is still under investigation and therefore the Investigating Officer would make investigation as regards, what was the age of the informant at the time of marriage. That would be to corroborate her FIR and therefore, the applicant cannot take advantage of not mentioning of the birth date of the informant in the FIR. The FIR is not an encyclopedia and when the case is still under investigation, the necessary evidence would be collected.

11. It is to be noted that Exception 2 to Section 375 of the IPC is 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.”

12. 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.”

13. 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."

14. 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 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.]

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