

INDEPENDENT THOUGHTS v. UNION OF INDIA- Jyotsana Singh & Rushank Shah¹**Abstract**

In this case, Independent Thought v. Union of India, the petitioner was 'Independent Thought', a registered firm advocating for children's rights, and respondents were the Union of India and the National Commission for Women. Section 375 of IPC defines rape as any act that involves sexual penetration of the penis or any other object in a woman's vagina without her equivocal consent. It also has a separate provision that treats consensual sex age at 18. Exception 2 of Section 375 states that a husband can have non-consensual sex with his wife, given that she was not under 15 years of age. The issue which was raised before the court was to decide on the legality and constitutionality of Exception 2 to Section 375 IPC. The division bench of the Supreme Court has issued to resolve the case in favour of the petitioner, reading Exception 2 to Section 375 IPC and clarifying that nothing in the Judgment is taken into account on the issue of "marital rape".

Facts:

In 2013, the Criminal Law Amendment Act increased the age of consent for sexual intercourse from 16 to 18 years as mentioned in Section 375 of the Indian penal Code, but there was an exception clause to that Section that is, In Exception 2, a husband can have non-consensual sex with his wife (i.e., under 18 years of age) if she is over 15 years old. In 2012, the POCSO Act was passed, which also set the minimum age for consensual sex at 18 years and above. Exception 2 contradicted Section 3 of the POCSO Act, which criminalises sexual assault extending up to sexual penetration. On 11.08.2013 the petitioner filed a complaint in public interest litigation under Article 32 and Article 226 of the Indian Constitution opposing the legality and constitutionality of exception 2 stating that it was discriminatory against the minor girl. In February 2014, the Home Ministry under the United Progressive Alliance (UPA) submitted a counter-affidavit, which was later also adopted

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by the National Democratic Alliance government to support Exception 2 under Section 375, the Indian Penal Code.

Issues:

The issue before us is one with a slightly narrow scope but of magnanimous public importance:

1. Whether Exception 2 to Section 375 IPC violates Article 21 of the Constitution by keeping a lower age of consent for married girls?
2. Whether Exception 2 to Section 375 IPC violates Article 14 of the Constitution by discriminating between married and unmarried minor girls in the context of sexual violence?
3. Whether an exception in the IPC can be made to the age of consent universally fixed by the Parliament at 18 years for girls in all other statutes?

Judgement:

In delivering the verdict, the judges considered the following:

- The 2003 National Children's Charter recognises that child marriage is a crime against girls. Following the latter, the 2013 National Policy for Children was communicated, defining children as anyone under the age of 18 years. It also affirms that every child has universal and indivisible rights, including the right to life, survival, development, education, protection and participation.
- The Protection of Children against Sexual Offences Act, 2012 mandates that the law make the best interests of the child the highest priority. Sexual offences against children are heinous crimes that must be combated effectively. Husbands who have sexually abused the 'wife' under the age of 18 years, have actually committed serious penetrative sexual assault within the meaning of Section 5 (n) of the POSCO Act and are liable to be punished under Section 6 with a rigorous prison sentence of no less than ten years, which can be extended to life imprisonment, and a fine. • Article 34 of the Convention on the Rights of the Child (CRC) obliges all member countries to take all appropriate national, bilateral and multilateral measures to prevent a child from being coerced into illegal sexual acts.
- According to the Juvenile Justice Act (Welfare and Protection of Children), 2015, every girl being married under the age of 18 is a girl in need of care and protection and must therefore appear before a committee for child welfare.

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- Women's rights to privacy, dignity, physical integrity and the right to reproductive decisions must be respected (Suchita Srivastava vs. Chandigarh Administration, Maharashtra State vs. Madhukar Narayan Mardikar, Devika Biswas vs. Union of India)
- Rape is serious crime that defiles a girl's physical integrity, causes trauma, and desecrates her right to reproductive choice that requires serious thought and consideration (Karnataka state v. Krishnappa(2000 CriLJ 1793), Bodhisattwa Gautam v. Subhra Chakraborty(1996 AIR 922, 1996 SCC (1) 490),State of Punjab v. Gurmit singh(1996 AIR 1393, 1996 SCC (2) 384))
- Karnataka State has best resolved the conflict between the IPC and the POSCO Act by adding subsection (1A) to Section 3 of the PCMA, stating that all child marriages thereafter are null and void and the husband of the girl child in these matters will be in violation of the same.

The two judges gave a simultaneous but separate judgment stating that,Exception 2 to Sec 375 IPC, in so far as it affects a girl under the age of 18, should be declared null and void for the following reasons: It is arbitrary and violates the rights of the girl and is not fair or reasonable and therefore violates Articles 14, 15 and 21 the Constitution of India; it contradicts POSCO's regulations, which must take precedence. 2 to Sec 375 reads: "Sexual intercourse or sexual acts of a man with his own wife, the wife not being under 18 years old, is not rape" However, it was made clear that the judgment also clarifies that only Sec198 Paragraph 6 of the law can be applied to cases of marital rape if the wife is a minor.

Analysis

Independent Thought vs. Union of India is a landmark judgment because of the martial rape related wide scoped advisories that were outlined for the Government of India. This case mainly focuses upon the issue of marital rape in the case of child marriages where the girl is between 15 and 18 years of age. It should be noted that the case does not express its opinion on marital rape in general but only in the purview of the afore-mentioned issue.

Referring to exception 2 of Section 375 of the Indian Penal Code (hereafter referred to as Indian Penal Code), stating,

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape", the court at first observed that sexual intercourse between a husband and his wife isn't in violation of the law, provided that the girl is above 15 years of age However, at the

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same time the Court also opined that it would indeed be classified as ‘rape’, regardless of the marital status of the girl. It found the exception 2 in Section 375 as “an unnecessary and artificial distinction” between a married and an unmarried girl, not to mention as “lacking any rational nexus to any unclear objective sought to be achieved”.

The Court has pointed out the fallacies in the framework of exception 2 of Section 375, IPC in correlation with other laws. It pointed out the anti-sociality of the law through the advent of other laws as well as the documentaries presented by the Petitioner and also the five options that were laid in front of the Court; i) to remain the fallacy as it is ii) to strike down the complete exception 2 from Section 375, IPC, iii) to reduce the age of sexual consent from 18 to 15 years, iv) to make adjustments to the POCSO Act so as to concur perfectly with the said Section, v) to make turns to Section 375, IPC so as to bring it under concurrence with the POCSO Act.

The Court disregarded the first option citing the anti-sociality of the clause itself, making the option unviable in itself. As for the second option, it stated that striking out the exception itself would mark lacuna in the law, which could lead to societal deterioration. The response for the third option was quite similar to the second one. Reducing the age of sexual would not be a logical step and is a matter for the legislation to decide. The fourth option would have been accepted if it hadn't been too cumbersome. Changing a whole Act to bring it under harmony with one single sub-clause of a Section would require a great deal of changes to be made to the Constitution which is not a simple task. This left the fifth option as logical, owing to which, the Court decided that the issue could be resolved by simply changing the wordings of the exception 2 of Section 375 to be 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.”

Conclusion:

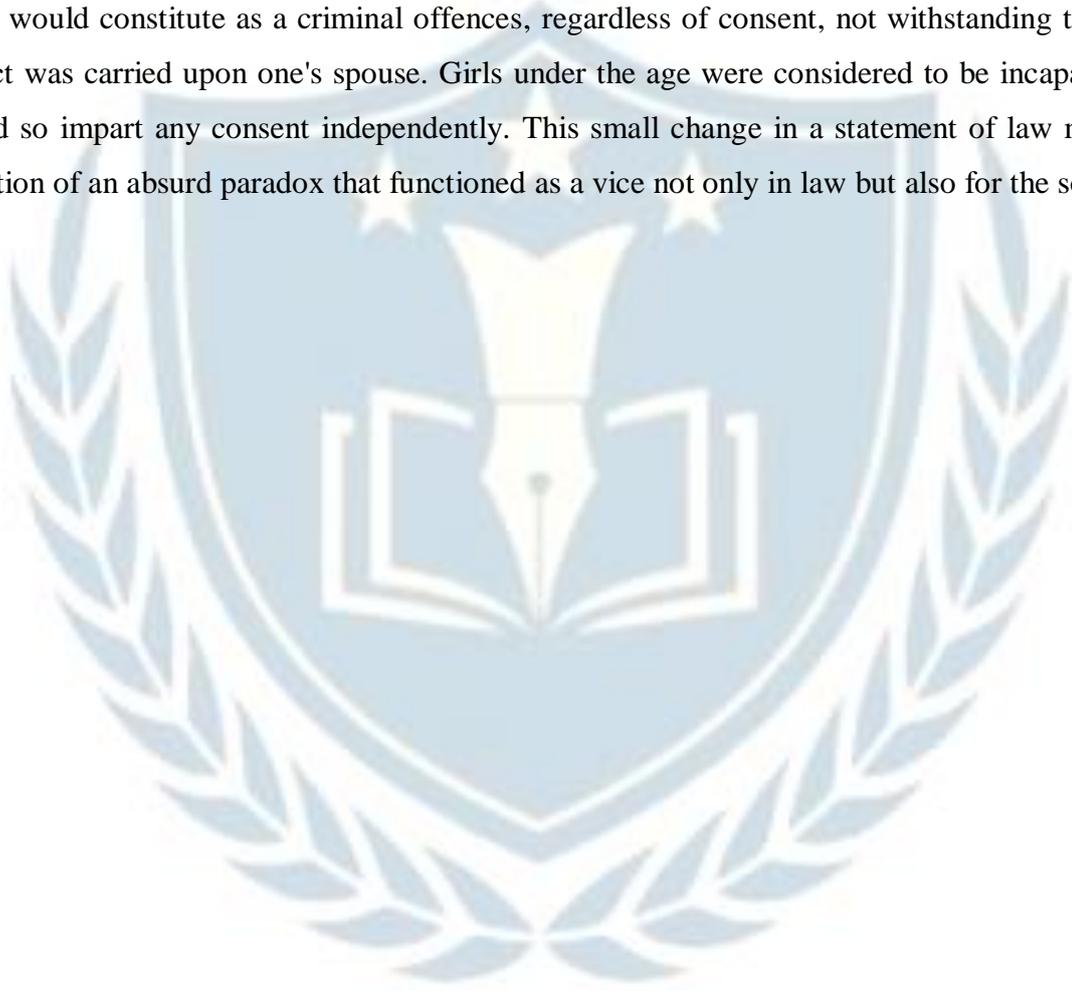
This case marks a milestone in correcting a fallacy while making a contribution to the social strata in ensuring that girls below the age of 18 stay legally protected. This case was a writ petition filed in the Supreme Court of India by a foundation named as ‘Independent Thoughts’ that works for the rights of children. The writ was filed regarding the issue of marital rape questioning the legality child marriages and marital rapes in such marriages. This case had inclinations of many different Acts which would have got affected because of just one sub-clause of a Section. Section 375 exception 2 stated that, “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”. However, this statement was fallacious on many

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aspects of different laws such the POCSO Act, Juvenile Justice Act, Protection of Human rights act, Hindu Marriage Act, etc. All of these acts accepted that any sexual act committed with any minor girl under the age of 18 years, would be considered as an offences, regardless of her consent. But the Exception 2 to Section 375 of the IPC acted as a fallacy to all these laws because of the age difference stated in it. The Court rightly decided to make a small edit to the Exception to make the age of legal marriage for girls the same throughout the laws laid down under the laws of India.

It chose to replace the word 'fifteen' with 'eighteen' thus inciting the fact that any sexual act with any minor girl would constitute as a criminal offences, regardless of consent, notwithstanding the fact that the act was carried upon one's spouse. Girls under the age were considered to be incapable of reason and so impart any consent independently. This small change in a statement of law marked the correction of an absurd paradox that functioned as a vice not only in law but also for the society.



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