

IN THE HIGH COURT OF ORISSA, CUTTACK.

(ORIGINAL JURISDICTION CASE)

WP (C) PIL. No.16659 /2019

Code No.....

In the matter of : An application under Article 226 of the
Constitution of India.

AND

In the matter of : An application seeking intervention of this
Hon'ble Court for Odisha State Amendment of
Child Marriage Prohibition Act, 2006 to make
all marriages below marriageable age void.

AND

In the matter of : Dr. Bikash Das, President, CLAP (Committee for Legal
Aid to Poor), aged about 49 years, S/o Late Shyama
Sundar Das, Plot No. E-367, Sector-6, Markat Nagar,
Ps- Bidanasi, Cuttack.

-----Petitioner.

Vrs

1. State of Odisha represented through its Chief Secretary, At- Lok Seva Bhawan Building, Po- Bhubaneswar, Dist- Khurda.
2. State of Odisha represented through its Principal Secretary, Dept. of Law, At- Lok Seva Bhawan Building, Po- Bhubaneswar, Dist- Khurda.
3. Commissioner-Cum-Secretary, Department of Women and Child Development, At- Lok Seva Bhawan Building, Po- Bhubaneswar, Dist- Khurda.

-----Opposite Parties.

The matter out of which this writ petition arises was never before this Hon'ble Court, in any manner whatsoever, at the instance of the petitioners.

To,

The Hon'ble K.S. Jhaveri M.Sc., LL.B, The Hon'ble Chief Justice of Orissa High Court & His Lordship's Companion Justices of the said Hon'ble Court.

The humble petition of the

Petitioner as named above;

Most Respectfully Sheweth:

1. That the public interest petition is filed based on report submitted by the former Judge of Supreme Court of India Justice Shivraj V. Patil to the Karnataka Government and also the judgment of the High Court of Karnataka in the matter of making all child marriages void. A copy of report of Justice Shivraj V. Patil is attached in the shape of Annexure-1 and also a copy of the order of the High Court of Karnataka in the case no Writ Petition No. 11154/2016 (PIL) –M/s Muthamma Devaya And Budeappa V/s Union of India in the shape of Annexure-2.
2. That, the major issues of concern highlighted by Justice Shivraj V. Patil and Karnataka High Court aligns with the situation prevailing in the State of Odisha with regard to the issue of Child Marriage.
3. That, the petitioner has filed this present petition in the form of a PIL seeking State Amendment of Section 3 of Child Marriage Prohibition Act, 2006 to make all marriages below permissible marriage age void ab initio.
4. That, the petitioner is the President of a Public Interest Law Organization CLAP, which is the oldest Public Interest Law

Organisation in India. He is also a well known Child Right Activist involved in bringing many child right issues to the forefront and helping them in getting justice. Through this petition the petitioner tries to procure a direction to the government for State Amendment of Section 3 of Child Marriage Prohibition Act, 2006 to prevent child marriages and misuse of the Act over confusing concepts like void and voidable provision which are provided by this Act.

5. That, the petitioner is a citizen of India and permanently residing within the territorial jurisdiction of this Hon'ble Court and the cause of action of this writ petition also arises within the territorial jurisdiction of this Hon'ble Court.
6. That, the petitioner is filing this present petition on his own and not at the instance of someone else. The petitioner is not filing this petition for his personal gain but to prevent child marriages in the State by bringing out an amendment in the law. The litigation cost, including the advocate's fee and the travelling expenses of the lawyer, if any, is borne by the petitioner.
7. That, it is respectfully submitted that in spite of the Child Marriage Prohibition law, child marriages are rampant in the State. The

marriages are rampant because the third important aspect of the PCMA, which is prosecution of offenders, is that fruitful as a result of the confusion over concepts like void and voidable provisions in the law, thus whenever any child marriage takes place; the perpetrators are escaping from the liabilities taking advantage of this defect in the Child marriage law. When the law provides for complete prohibition of child marriage, such a defect in the law stands as an impediment to the proper implementation of the law. So children are given in marriage at their tender age without knowing the future consequences of child marriage and in this way their childhood is ruined and destroyed. This specific lacuna has been proved to be enough to fracture the agenda of this specific statute which is curbing and simultaneously eliminating child marriage from the country.

8. That, it is respectfully submitted that considering the defect in the law, the Government of Karnataka has made State Amendment of Child Marriage Prohibition Act, 2006 making all the marriages which are below the permissible age of marriage i.e. eighteen years in case of girls and twenty one years in case of boys void ab initio

in the year 2017. The decision of the Karnataka Government to amend the law came in the wake of a case of M/s Muthamma Devaya and Budeappa V/s Union of India filed In the High Court of Karnataka wherein the Hon'ble High Court Judges visualized the fatal consequences of the phenomenon of child marriage which is evident in the whole of the Indian Sub-Continent. Subsequently in accordance with the terms and conditions passed by the Karnataka High Court, the Karnataka Government appointed the justice Shivraj V. Patil Committee in order to evaluate the Central Law and to develop certain guiding principles which will be helpful to curtail child marriage from the very beginning in the State of Karnataka.

The Report of Justice Shivraj V. Patil Committee is annexed herewith as Annexure-1 and a copy of the order of the High Court of Karnataka in the case no Writ Petition No. 11154/2016 (PIL) –M/s Muthamma Devaya And Budeappa V/s Union of India in the shape of Annexure-2.

9. That Child marriage is one of the harmful traditional practices that violate child rights. A child who is the victim of child marriage gets deprived of all rights. Child marriage challenges the right to health,

education, protection and development of a child. Due to marrying at a very tender age the childhood of the children are getting ruined, they are getting exposed to different kinds of diseases like anemia, insomnia, etc. Furthermore, with regard to a girl child they are prone to become mothers at a very tender age when they themselves are not in a stage to recognize and exercise their sexual and reproductive rights and endure the pressure of the in-laws as well as the responsibilities of begetting a child.

10. That there will be an implied consent for sexual intercourse after marriage and in the case of a young girl given in marriage she has not attained the maturity to exercise her consent for sexual intercourse, use of contraceptives or reproductive choice. Thus child marriage is a clear violation of the right to reproductive and sexual health under the right to health guaranteed to all citizens.

This specific piece of legislation is in contravention with a number of other statutes that are designed to protect the right of a child in the country. The first statute is **Protection of Children from Sexual Offences Act 2012**. This Act makes it punishable for a person who commits penetrative sexual assault on a child who is

below 18 years of age and in Sec- 5 Clause n aggravated penetrative sexual assault by any relative of the child through blood or adoption or marriage is punishable under the next section. Thus it is evident this PCMA and POCSOA are in contravention because sexual intercourse with a child is an offence under POCSOA but the same does not attract any penal provision and is valid till the girl child comes up for an annulment. Similarly the J.J. Act under Sec-2 Sub sec 14 (xii) has given a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years is recognized as a child in need of care and protection. But it is unfortunate that if such girl child is married before the age of 18 none of the statutes including Prohibition of Child Marriage Act, 2006 which was enacted only with the object of eradicating child marriage that are made for protection of the child can come to her rescue and the onus lies on the girl child who has already been given in marriage to come forward to dissolve her own marriage. It is unfortunate that the child marriage prohibition officers appointed under the PCMA are only empowered to stop a child marriage from taking place but in such circumstances where the marriage is over

the power of such officers is null. This makes the motto of this very Act shallow.

11. That it is respectfully submitted that apart from the debate of void and voidable provision of the PCMA, the provisions of I.P.C. that had made an artificial distinction in the age of the minor and under Exception 2 of Sec- 375 was instructed to be struck down by the Supreme Court in the case of Independent Thought V/s Union of India and Another in the year 2017. In this very case the Hon'ble Court was of the opinion that the exception which read that sexual intercourse by a man with his own wife where the wife is below 18 years of age does not constitute rape was held violative of Art 14, 15 and 21 of the Constitution of India and has specifically said that the section when relates to a girl child below 18 years of age must be struck down as it is arbitrary, violative of rights of the girl child, unfair and is in clear inconsistency with the provisions of POCSOA, which must prevail. Such positive changes in law along with statutes for protecting the right of a child currently are in conflict with the provisions of Prohibition of Child Marriage Act 2006 and calls for its amendment.

12. That According to National Family Health Survey-4 (2015-16), 21.3 percent of women aged 20-24 (21.7 percent in rural areas and 19.5 percent in urban areas) were married by age 18 in Odisha. The Men aged 25-29 years, who married before 21 years constitutes 11 percent (urban: 8.1 percent & rural: 11.7 percent). Legislations have been enacted and Rules have been framed to prohibit child marriage but are still not adequate, need amendments and improvements. In a landmark judgment the Supreme Court of India on 11th Oct, 2017 has recommended other states to amend the Prohibition of Child Marriage Act, 2006 to make all child marriage VOID, following the route taken by Karnataka state. The judgment goes as follows:

“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?” The apex court has also said that 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 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”.

13. That it is pertinent to mention here that based on the recommendations given by the Justice Shivraj V. Patil Committee, the State of Karnataka made an amendment to Sec-3 of Prohibition of Child Marriage, Act 2006 through Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 which says that any marriage of

a child, i.e. a female aged below eighteen years and male below twenty one years is void ab initio. A copy of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 in the State of Karnataka is attached herewith as **Annexure-3.**

14. That, the petitioner seeks to invoke this Hon'ble court's extraordinary jurisdiction under article 226 of the Constitution of India on the following grounds amongst others:

GROUND

- A. For that it is mentioned that the petitioner has given representation to the government of Odisha for bringing an amendment to this law by making all the marriages which are below the permissible age of marriage i.e. eighteen years in case of girls and twenty one years in case of boys void ab initio. The copy of the representation is annexed herewith as **Annexure-3.**

15. That in view of the above facts and circumstance the petitioner seeks the Hon'ble Court's intervention for a direction to the State Government for an Amendment of Section 3 of Child Marriage Prohibition Act, 2006 to make all marriages below permissible marriage age void ab initio in line with the State of Karnataka since

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.

16. That, finding no other alternative and efficacious remedy, the petitioner invokes your Lordship's extra ordinary jurisdiction under Articles 226 of the Constitution of India.

PRAYER

It is therefore, prayed that this Hon'ble Court may graciously be pleased to admit this PIL Writ Petition and issue a writ in the nature of writ of mandamus directing the opposite parties:

1. To bring a State Amendment to the Prohibition of Child Marriage Act, 2006 by making all the marriages which are below the permissible age of marriage i.e. eighteen years in case of girls and twenty one years in case of boys void ab initio.
2. To make registration mandatory for all marriages taking place in the State to keep a check on the incidence of child marriages.

Any other relief/relieves, order/orders, direction/directions as this Hon'ble court deems fit and proper.

And for this act of kindness, the petitioner as in duty bound ever pray.

Cuttack: **By the Petitioner through**

Dated: **Advocate**

A F F I D A V I T

I, Dr. Bikash Das, President, CLAP (Committee for Legal Aid to Poor), aged about 49 years, S/o Shri Shyam Sundar Das, Plot No-E-367, Sector-6, Markat Nagar, P.S. Bidanasi, Dist-Cuttack-753014, do hereby solemnly affirm and state as follows:

1. That, I am the petitioner in this case and competent to swear this affidavit.
3. That, the facts stated in this petition are true to the best of my knowledge based on records.

I d e n t i f l e d b y

Advocate

Deponent

C E R T I F I C A T E

Due to non availability of Cartridge Papers, thick blue papers are used.

Advocate

IN THE HIGH COURT OF ORISSA, CUTTACK

(ORIGINAL JURISDICTION CASE)

W.P. (C) PIL NO. _____ OF 2019

CODE NO. _____

Dr. Bikash Das Petitioner.

- Versus -

State of Odisha & others. Opp.parties.

I N D E X

Sl.Nos. Description of documents Pages

1. Writ application.

2. Annexure – 1 Series

(Copy of the justice Shivraj V. Patil Committee Report)

3. Annexure- 2

(Copy of Amendment Act of Karnataka)

4. Annexure- 3

(Copy of the Representation)

VAKALATANAMA

CUTTACK.

DATE. 2019.

ADVOCATE

FOR THE PETITIONER.