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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(CRL) 1231/2012

MEENA & ANR.

..... Petitioners

Through: Mr. F. Haq, Advocate and Mr. Momin
Fazal, Advocate with petitioners in
person.

versus

STATE & ANR.

..... Respondents

Through: Mr. Pawan Sharma, Standing Counsel
(Crl.) for State with Mr. Sahil Mongia,
Ms. Priyanka Kapoor and Ms. Richa
Sharma, Advocates.
Insp. Subash Malik, PS Sangam Vihar,
Delhi.
Mr. Arun Srivastava, Advocate for
respondent No.2.

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Date of Decision: 17th October, 2012

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (ORAL) :

1. Present writ petition has been filed under Article 226 of the Constitution of India read with Section 482 Cr.P.C. seeking police protection.
2. It is alleged in the present petition that petitioner No.1 has married petitioner No.2 on 18th August, 2012 in Ghaziabad, Uttar Pradesh against the

wishes of her parents. It is further stated that petitioners apprehend trouble from the family of petitioner No.1 and, therefore, request this Court to provide police protection.

3. The parents of petitioner No.1 pray for custody of petitioner No.1 on the ground that she is still a minor. They, however, undertake to this Court that they will not marry the petitioner No.1 to anyone else without her consent and till she attains the age of majority.

4. The State has filed a status report dated 20th September, 2012 in which it is stated as under:-

“On 18.08.2012, Sh. Jawahar Mandal S/o Sh. Buddhan Mandal R/o F-417, Janta Jeewan Camp, Tigri, New Delhi reported that his daughter named Meena aged about 14 years, Ht. 5’3” round face, wheatish Complexion, medium built had left for G.G.S.S. Kali Building, Daxinpuri on 17.08.2012 at about 7.30 AM, where she was studying in 10th class, but did not return. On this complaint of Sh. Jawahar Mandal present case FIR No. 330/12 Dt. 18.08.2012 u/s 363 IPC, P.S. Sangam Vihar was registered and investigation was handed over to ASI Rajinder Singh.

ASI Rajinder Singh completed all the proceedings laid in S.O. No. 252, and thereafter investigation was transferred to Insp. Subhash Malik, ATO/Sangam Vihar. During the course of investigation it was suspected by the complainant that one Rajan Kumar S/o Sh. Netrapal Singh R/o F-623 Janta Jeewan Camp, Tigri, Sangam Vihar, New Delhi had enticed the girl Meena. During the course of investigation IO collected the aged Birth Certificate of victim issued by MCD from the complainant Sh. Jawahar Mandal. According to the said Birth Certificate victim’s date of birth is 10.10.1996. Besides, IO collected the age proof of the victim from her school i.e. G.G.S.S. Kali Building, Daxinpuri bearing the same date of birth.

Meanwhile, the petitioner Ms. Meena D/o Sh. Jawahar Mandal has filed the present criminal writ before this Hon’ble court for issuing a writ in the nature of mandamus or certiorari to the respondents. The petitioner claims that she has married to Rajan

Kumar with her free will and consent without any coercion, duress from any quarter and also claims that her date of birth is 10.04.1993 as mentioned in the marriage certificate but has not produced any proof of her age in support of her claim during the investigation as such neither of the couple has joined the investigation and both are absconding from the address mentioned in the present petition and their present whereabouts could not be known to the police despite the sincere efforts.”

5. A Full Bench of this Court in ***Court On Its Own Motion (Lajja Devi) vs. State, W.P. (Crl.) No. 338/2008, Crl.M.C. No. 1001/2011 & Crl. M.A. No. 3737/2011, W.P. (Crl.) No. 821/2008 and Crl.M.A. No. 8765/2008*** and ***W.P. (Crl.) No. 566/2010*** decided on **27th July, 2012** has held as under:-

“12. Now, we proceed to reproduce the questions formulated by the Division Bench in its order dated 31.7.2008 in W.P. (Crl.) No.338/2008, which are as follows:

1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 year could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?

2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

3) If yes, can she be kept in the protective custody of the State?

4) Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?

5) Whether there may be other presumptions also which may arise?”

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32. *It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages. Thus by keeping a lower age of consent for marital intercourse, it seems that the legislature has legitimized the concept of child marriage. The Indian Majority Act, 1875 lays down eighteen years as the age of majority but the non obstante clause (notwithstanding anything contrary) excludes marriage, divorce, dower and adoption from the operation of the Act with the result that the age of majority of an individual in these matters is governed by the personal law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the personal law and customs of the religion. It is to be specifically noted that the other legislations like the Indian Penal Code and Indian Majority Act are pre independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post independent era. Another post independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages. The words 'when the woman was minor' used in section 6(1)(c) reflects the implied legislative acceptance of the child marriage. Criminal Procedure Code, 1973 also contains a provision which incorporates the legislative endorsement of Child Marriage. The Code makes it obligatory for the father of the minor married female child to provide maintenance to her in case her husband lacks sufficient means to maintain her.*

33. *The insertion of option of dissolution of marriage by a female under Section 13(2)(iv) to the Hindu Marriage Act through an amendment in 1976 indicates the silent acceptance of child marriages. The option of puberty provides a special ground for divorce for a girl who gets married before attaining fifteen years of age and who repudiates the marriage between 15- 18 years.*

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35. Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act 2006, certain loopholes still remain, the legislations are weak as they do not actually prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.

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40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No.1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void.

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46. In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the PCM Act, 2006 is that there should be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. There is another important aspect which is to be borne in mind. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking to exercise her option to get the marriage declared as void till she attains the age of 20 years. How she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Such marriages, if they are made legally enforceable will have deleterious effect and shall not prevent anyone from entering into such marriages. Consent of a girl or boy below the age of 16 years in most cases a figment of imagination is an anomaly and a mirage and, and will act as a cover up by those who are economically and/or socially powerful to pulverize the muted meek into submission. These are the considerations which are to be kept in mind while deciding as to whether custody is to be given to the husband or not. There would be many other factors which the Court will have to keep in mind, particularly in those cases where the girl, though minor, eloped with

the boy (whether below or above 21 years of age) and she does not want to go back to her parents. Question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband would not be allowed to consummate the marriage. Thus, we are of the opinion that there cannot be a straight forward answer to the second part of this question and depending upon the circumstances the Court will have to decide in an appropriate manner as to whom the custody of the said girl child is to be given.

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48. We often come across cases where girl and boy elope and get married in spite of the opposition from the family or parents. Very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep-seated social and cultural prejudices. However, both the boy and girl are in love and defy the society and their parents. In such cases, the courts face a dilemma and a predicament as to what to do. This question is not easy to answer. We feel that no straight jacket formula or answer can be given. It depends upon the facts and circumstances of each case. The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Section 3 of the PCM Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.

54. As per the facts noted in paras 3-6 above, Ms.Meera is the girl in question whose date of birth is 6.7.1995. When she married Charan Singh she was 13 years of age. She had made a statement under Section 164 of the Cr.P.C. before the learned MM, Rohini that she had gone with Charan Singh of her own free will. This petition was registered on the basis of letter written by her mother Smt. Lajja Devi. During the pendency of this petition, order dated 31.7.2008 was passed permitting her to go with her parents as she desired to live with them on assurance given by her parents that they would not marry her to anyone else. She is still 17 years of age. This marriage, as per our discussion above, is voidable. Since she has not attained majority and is residing with her parents, this arrangement would continue. When she becomes major it would be for her to exercise her right under the PCM Act if she so desires and future course of action would depend thereon.”

6. The petitioner No.1 on the date of alleged marriage that means 18th August, 2012 was only 15 years 10 months old i.e. below the age of majority and having the right under the Prohibition of Child Marriage Act, 2006 to repudiate the marriage at a subsequent date.

7. This Court has spoken to petitioner No.1 in Court. She states that she does not want to return to her parental home.

8. Keeping in view the aforesaid judgment, this Court is of the opinion that to keep alive the petitioner No.1's option of repudiating the marriage, petitioner No.1 should not be allowed to reside in the house of petitioner No.2. The undertaking given by the parents of petitioner No.1 not to marry her without her consent and till she attains the age of majority is accepted by this Court.

9. Consequently, this Court directs Inspector Subash, Investigating Officer to forthwith record the statement of petitioner No.1 and get her admitted to Nari Niketan till she attains the age of majority that means 18 years.

10. However, during her stay in the Nari Niketan, petitioner No.2 shall be entitled to meet the petitioner No.1 twice a week i.e. Wednesday and Saturday for two hours each.

11. This Court may mention that the aforesaid direction has been passed because if the petitioner No.1 delivers a baby, then her option to repudiate the marriage may be rendered illusory as in that circumstance it would stand overtaken by events.

12. In the meantime, the beat constable and the SHO of the area where petitioner No.2 resides shall ensure that no bodily harm or injury is caused to the petitioner No.2. The beat constable of the concerned area is also directed to meet the petitioner at his address and give his as well as concerned SHO's mobile number to the petitioner No.2. In the event of any emergency, petitioner No.2 would be entitled to get in touch with them.

13. It is further directed that in the event police wants to arrest petitioner No.2, he shall be given four weeks prior written notice.

14. With the aforesaid observations and directions, present petition stands disposed of.

Order dasti under signature of Court Master.

MANMOHAN, J

OCTOBER 17, 2012

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