

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

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**CRM-M-22389-2020
Date of decision: 24.09.2020**

Parminder Singh

.....Petitioner

Versus

State of Haryana and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present: Mr. Mohit Rathee, Advocate
for the petitioner.

Mr. Naveen Singh Panwar, DAG, Haryana
for respondent No.1-State.

Mr. Pardeep Solath, Advocate
for respondent No.2.

Respondent No.3 did not appear
despite service.

ARUN KUMAR TYAGI, J (ORAL)

(The case has been taken up for hearing through video conferencing.)

1. The petitioner has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.") for issuance of directions to respondent No.2 for releasing his wife detenue Simran Kaur from illegal custody of respondent No.2 and for quashing of order dated 15.07.2020 (Annexure P-5) passed by learned Judicial Magistrate 1st Class, Bilaspur whereby the wife of the petitioner namely Simran Kaur has been ordered to be kept in Bal Kunj, Chhachhrauli, District Yamuna Nagar against her wishes.

2. Briefly stated, the petition has been filed on the averments that the petitioner and detenue-Simran Kaur performed marriage on

28.05.2020 at Bhartiya Balmiki Dharam Samaj (Regd. No.1207) Branch, Ambala City. Respondent No.3-Mohinder Singh father of detainee Simran Kaur lodged FIR No.115 dated 26.05.2020 under Sections 363 and 366-A of the Indian Penal Code, 1860 (for short, "the IPC") at Police Station Chhachhrauli, District Yamuna Nagar. Mohinder Singh father of detainee Simran Kaur also filed habeas corpus petition bearing CRWP No.3358 of 2020 titled as 'Mahender Singh Vs. State of Haryana and others' which was disposed of vide order dated 05.06.2020 in view of status report that detainee Simran Kaur left her parental house of her own will and solemnized marriage with the present petitioner. The petitioner was granted interim anticipatory bail in the above said case by this Court vide order dated 30.06.2020. Detainee Simran Kaur had at the time of leaving her parental house her Aadhaar Card in which her date of birth was mentioned as 01.01.2001 and the petitioner married detainee Simran Kaur after verifying her age to be more than 18 years but father of detainee Simran Kaur is claiming her to be aged 16 years. Learned Judicial Magistrate 1st Class, Bilaspur sent detainee Simran Kaur to Bal Kunj, Chhachhrauli, Yamuna Nagar-respondent No.2. The petitioner filed application for release of his wife which was dismissed by learned Judicial Magistrate 1st Class, Bilaspur vide order dated 15.07.2020. Detention of detainee Simran Kaur in Bal Kunj against her wishes is illegal. The petitioner had earlier filed CRWP No.5369 of 2020 for release of detainee Simran Kaur which was dismissed by this Court as not maintainable vide order dated 28.07.2020 with liberty to avail alternative remedies in accordance with law.

3. The petition has been opposed by respondent No.1-State. However, no reply has been filed on behalf of respondent No.1-State.

4. The petition has been opposed by respondent No.2 in terms of reply filed by Mona Chauhan, In-charge Officer, Bal Kunj, Chhachhrauli, Yamuna Nagar. In the reply it has been submitted that the petitioner and Simran Kaur filed CRM-246-2020 before learned Sessions Judge, Ambala who after examining all the facts and police report found that date of birth of Simran Kaur is 01.03.2004 and due to Simran Kaur being minor her marriage was voidable and learned Sessions Judge, Ambala accordingly ordered Simran Kaur to be kept in Bal Kunj, Chhachhrauli, Yamuna Nagar till she attained majority. Simran Kaur is not in illegal custody of respondent No.2.

5. Notice was also issued to respondent No.3 but respondent No.3 did not appear despite service.

6. I have heard learned counsel for the petitioner, learned State counsel and learned counsel for respondent No.2 and gone through the relevant record.

7. Learned counsel for the petitioner has submitted that the petitioner had solemnized marriage with detenue Simran Kaur on 28.05.2020. As per her Aadhaar Card her date of birth is 01.01.2001 and she was major at the time of marriage. Detenue Simran Kaur is more than 18 years of age but her father has claimed her to be 16 years of age. The petitioner has been falsely implicated by father of detenue Simran Kaur in case FIR No.115 dated 26.05.2020 registered under Sections 363 and 366-A of the IPC at Police Station Chhachhrauli, District Yamuna Nagar alleging detenue Simran Kaur to be aged about

16 years. Even if, detainee Simran Kaur is considered to be minor she cannot be kept in Bal Kunj against her wishes. Therefore, directions may be issued for release of detainee Simran Kaur from illegal custody of respondent No.2. In support of his arguments, learned counsel for the petitioner has relied on judgment of Hon'ble Supreme Court in *Smt. Lila Gupta Vs. Laxmi Narain and others : AIR 1978 Supreme Court 1351* and judgment of this Court in *Balwinder Singh @ Binder Vs. State of Punjab : 2008 (3) RCR (Criminal) 1*.

8. On the other hand, learned State counsel and learned Counsel for respondent No.2 have submitted that the petitioner is being prosecuted under Sections 363 and 366-A of the IPC. The petitioner is also liable to be prosecuted and punished under Section 9 of the Prohibition of Child Marriage Act, 2006 (for short 'the PCM Act') for contracting child marriage. Consummation of his marriage and sexual intercourse or sexual act by the petitioner with detainee Simran Kaur his wife under 18 years of age will amount to rape under Section 375 of the IPC and will also attract the provisions of Section 5 of the Protection of Children from Sexual Offences, 2012 (for short 'the POCSO Act'). The petitioner is not entitled to custody of detainee Simran Kaur who being child in need of care and protection has to be kept in Child Care Institution and her custody is liable to be entrusted to concerned **Child Welfare Committee** as per provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the JJ Act'). Detainee Simran Kaur has been rightly ordered to be kept in Bal Kunj which is a Child Care Institution and not Special/Observation Home under the JJ Act. The impugned order does not suffer from any illegality and the

petition may be dismissed. In support of their arguments learned State counsel and learned counsel for respondent No.2 have placed reliance on the observations made by Hon'ble Supreme Court in its judgment in ***Independent Thought Vs. Union of India and another, (2017) 10 SCC 800.***

9. The questions which arise in the present case are whether order for keeping the detinue in Child Care Institution namely Bal Kunj, Chhachhrauli, District Yamuna Nagar is illegal and the detinue is liable to be released from there forthwith; whether on such release custody of detinue Simran Kaur is to be entrusted to her parents or detinue Simran Kaur is to be given liberty to go to any place of her choice or the petitioner, against whom criminal case has been registered under Section 363 and 366-A of the IPC, is entitled to entrustment of her custody to him on the ground of his marriage with her as well as on the ground of being her guardian in view of Section 6(c) of the Hindu Minority and Guardianship Act, 1956.

10. Section 3(1) of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before. Under Section 4(1) of the Guardians and Wards Act, 1890 a minor has been defined to mean a person, who has not attained majority under the Majority Act, 1875. Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean a person who has not completed the age of 18 years. Under the provisions of the aforesaid Acts a person, who is a minor and not a major, is not entitled to deal with his/her property. The property of such a minor can be sold or transferred by the guardian with permission

of the Court only if such sale or transfer is for the benefit of the minor. Section 11 of the Indian Contract Act, 1872 provides that only a person who has attained the age of majority and is of a sound mind and is not disqualified from contracting by any law to which he is subject is competent to enter into a contract. A contract entered into by a minor is treated to be a void contract.

11. Section 2(a) of the Majority Act, 1875 provides that nothing in the above-said Act shall affect the capacity of any person to act in the following matters namely marriage, dower, divorce and adoption. So far as marriage laws are concerned till 1929 no minimum age of marriage was legally fixed and it was after passing of the Child Marriage Restraint Act, 1929 (for short 'the CMR Act') that the minimum age for marriage was fixed. The CMR Act was enacted to carry forward the reformist movement of prohibiting child marriages. The CMR Act provided the minimum age of the girl child for marriage as 14 years which was raised to 15 years in 1940 and 18 years in 1978. While the CMR Act made marriage in contravention of its provisions punishable, it did not render the marriage void. Under the Hindu Marriage Act, 1955 (for short 'the HM Act'), as originally enacted, the minimum age for marriage of a bride was 15 years and of a bride-groom 18 years. The HM Act was amended in 1978 and the minimum age of marriage for a bride was enhanced to 18 years and for a bride-groom to 21 years.

12. Under Muslim law marriage of a girl aged 15-18 years is legally permissible though Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to

obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. A marriage performed in violation of Section 5 (iii) of the HM Act prescribing the condition of minimum age of bride as 18 and bride groom as 21 for a valid marriage, is neither void nor voidable though under Section 13(2)(iv) of the HM Act, the wife can file a petition for divorce on the ground that her marriage, whether consummated or not, was solemnized before she attained the age of 15 years and she has repudiated her marriage after attaining the age of 15 years but before attaining the age of 18 years. However, under Section 24(1)(i) of the Special Marriage Act, 1955 marriage performed in breach of Section 4(c) of the Special Marriage Act, 1955 prescribing the age of male as 21 years and female as 18 years is void.

13. A girl below the age of 18 years, treated as minor under the Majority Act, 1875 (for all purposes except marriage, dower, divorce and adoption) and as a child under various enactments including Section 2(1)(d) of the POCSO Act, Section 2(12) of the JJ Act and Section 2(b) of the Protection of Women from Domestic Violence Act, 2005 is entitled to preferential treatment in criminal law jurisdiction (with the exception of juvenile in conflict with law treated and tried as an adult), is not entitled to deal with her property, can not enter into a contract, can not furnish a bail bond in Criminal Court except through her guardian, can not file or defend a civil suit (except through next friend or guardian ad litem) and can not even vote. This is so for the

reason that it is perceived that a person below the age of 18 years is not fully developed and does not know the consequences of his/her actions. Yet strangely enough the law, considering minor girl child to be mentally and physically fit for discharge of matrimonial obligations and bearing and rearing a child despite herself being treated by law as a child, accorded legitimacy and validity to child marriage recognizing her/her guardian's right for her marriage at different ages varying from 10 to 18 at different times, before attaining of majority by her at the age of 18 years for all other purposes and allowed such a girl child at age varying from 10 to 18 years to be subjected to sexual intercourse by her husband with or without her consent.

14. Child and marriage are two contradictory things as observed in similar terms by a Division Bench of Delhi High Court in ***Court on its own motion (Lajja Devi) and others Vs. State and others : 2012(4) R.C.R.(Civil) 821***. When a girl child is married by her parents/guardian at the age of less than 18 years, it is not only her human right of choice, which is violated but she is also deprived of having education and leading a youthful life. Early marriage and consummation of child marriage also affect the health of the girl child as well as child to be born out of the marriage. The ill effects of child marriage have been recognized by the Government of India in its documents the ***National Charter for Children, 2003*** and the ***National Plan of Action for Children, 2005*** and have been adverted to in detail by Hon'ble Supreme Court and various High Courts in numerous judgments. Reference in this regard may be made to judgments of Hon'ble Supreme Court in ***Independent Thought Case (Supra)***,

Karnataka High Court in *Writ Petition No.11154/2006 (GM-RES-PIL) titled as Muthamma Devaya and another Vs. Union of India and others.*, Madras High Court in *T. Sivakumar Vs. Inspector of Police : 2012(4) R.C.R.(Civil) 862*, Delhi High Court in *Association for Social Justice & Research Vs. Union of India and others : 2010 (118) DRJ 324* and *Court on its own motion (Lajja Devi) Case (Supra)*.

15. To curb the menace/social evil of child marriage the CMR Act was replaced by the PCM Act which prohibits marriage of a girl child aged below 18 years and penalizes various criminal acts in respect thereof while declaring the offences to be cognizable and non bailable. However, child marriage is not declared by the PCM Act to be absolutely void ab initio. Under Section 3(1) of the PCM Act a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. Section 12 of the PCM Act provides that marriage of a minor child would be void where minor child was taken or enticed out of the keeping of the lawful guardian or by force compelled or by any deceitful means induced to go from any place or is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes. Section 14 of the PCM Act provides that any child marriage solemnized in violation of an injunction issued by the jurisdictional Judicial Officer under Section 13 of the PCM Act shall be void. Section 9 of the PCM Act provides that any male adult above 18 years of age contracts a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Section

10 of the PCM Act provides that whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees. Section 11 of the PCM Act provides punishment for promoting or permitting solemnisation of a child marriage. A female child who was married before she attained the age of 18 years, can get her marriage annulled before she attains the age of 20 years. When the girl child is a minor, a petition for annulment can be filed by her through her guardian or next friend along with the Child Marriage Prohibition Officer.

16. In view of the provisions of Section 3 of the PCM Act detinue Simran Kaur has a right to get her marriage declared a nullity by filing a petition through her guardian or next friend along with the Child Marriage Prohibition Officer during her minority and herself, on attaining of majority, till she attains the age of 20 years. Further, the petitioner being male adult aged more than 21 years is liable to be prosecuted and punished under Section 9 of the PCM Act for offence of contracting child marriage.

17. Section 361 of the IPC defines kidnapping from lawful guardianship as taking or enticing of any minor under 16 years of age if male and 18 years of age if female or person of unsound mind out of the keeping of lawful guardian without the consent of such guardian. 363 of the IPC provides the punishment for kidnapping of a minor from lawful guardianship. Section 366 of the IPC provides the punishment for kidnapping, abducting or inducing woman to compel her marriage etc. while Section 366A of the IPC provides the punishment for

procurement of minor girl to force or seduce her for illicit intercourse.

18. Since Section 12 of the PCM Act declares child marriage to be void if the child being minor was taken or enticed out of the keeping of the lawful guardianship, the question whether the child being minor was taken or enticed out of the keeping of the lawful guardian assumes significance particularly in cases where FIR under Sections 363, 366 and/or 366-A of the IPC is registered against the husband as in case of the present petitioner.

19. In *S. Varadarajan Vs. State of Madras : AIR 1965 SC 942* the girl aged 17 years and about 10 and a half months left the house of her uncle (in whose care her father had left her on coming to know her love affair with the appellant who was her neighbour), telephoned the appellant therein to meet her at a certain place and accompanied him and thereafter on her own insistence married him. Since the girl had left the house of the legal guardian as per her own choice and not on the basis of any enticement or persuasion on the part of the appellant, their Lordships held that it was not a case of the appellant either enticing or taking away the minor and allowed the appeal and set aside the conviction of the appellant while observing in para 10 of the judgment as under :-

*"It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, **he had at some earlier stage solicited or persuaded the minor to do so.**" (emphasis added)*

20. In *Moniram Hazarika Vs. State of Assam : 2004 (5) SCC 120* appellant who was a regular visitor to the house of brother of the minor, took undue advantage of his friendship and persuaded the minor

to abandon her guardianship with a promise of marriage. Since on facts of the case it was established that the appellant had taken the minor by enticing her for the purpose of marrying the said minor the appellant was held to have been rightly convicted under Section 366 of the IPC.

21. In ***Amninder Kaur and Another Vs. State of Punjab and Others : 2010(1) R.C.R. (Criminal) 261*** marriage of the minor girl aged 16 years 2 months, who had been enticed away out of the keeping of the lawful guardian, was held by this Court to be void ab initio under Section 12 (a) of the PCM Act.

22. In ***Neelam Rani and another Vs. State of Haryana and others : 2011 (1) RCR (Civil) 636*** the petitioners, having married each other, sought protection of their lives and liberty from harm at the hands of the parents and brother of the girl. The parents claimed the girl to be aged about 17 years and 05 months on the date of her marriage and the marriage to be void in terms of Section 12 of the PCM Act. The girl stated before the Court that she had solemnized her marriage with her co-petitioner of her own free will and desire without any pressure or undue influence. This Court held that the girl had reached the age of discretion and in view of her statement her co-petitioner husband could not be said to have enticed or taken her out of the keeping of her parents and the marriage was voidable at the option of the minor girl in terms of Section 3 of the PCM Act and not void under Section 12 of the PCM Act.

23. No doubt, vide order dated 10.09.2020 passed by this Court in CRM-M-16973-2020 the petitioner has been granted anticipatory bail in the criminal case FIR No.115 dated 26.05.2020

registered under Sections 363 and 366-A of the IPC at Police Station Chhachhrauli, District Yamuna Nagar against him but in the eventuality of his conviction for the said offences, his marriage with detainee Simran Kaur would be void under Section 12 of the PCM Act.

24. Further, keeping in view the mounting crimes against children, the Parliament enacted the POCSO Act to prevent the sexual abuse and exploitation of children. The POCSO Act deals with sexual offences committed against a child defined under Section 2(1)(d) thereof to be a person below the age of 18 years. The POCSO Act does not define rape, but it defines penetrative sexual assault under Section 3 and aggravated penetrative sexual assault under Section 5 and the punishments are provided for them under Section 4 and 6 respectively. Section 7 of the POCSO Act defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment. Chapter III of the POCSO Act deals with use of children for pornographic purposes. The POCSO Act creates Special Courts to deal with offences against children. Section 42 of the POCSO Act provides that where an offence is punishable both under the POCSO Act and under the IPC, then the offender found guilty would be liable for that punishment which is more severe. Section 42A of the POCSO Act gives overriding effect to the POCSO Act by providing that the provisions of the POCSO Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of the POCSO Act

shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

25. Section 375 of the IPC defines 'rape'. Section 375 of the IPC, before expansive amendment in 2013, provided that a man is said to commit rape if he has sexual intercourse with a woman under circumstances falling under any of the six (seven after amendment in 2013) descriptions mentioned in the section. A woman is defined under Section 10 of the IPC as a female human being of any age. Among the six (now seven after amendment in 2013) descriptions is clause sixthly defining sexual intercourse against the will or without the consent of the woman under the specified age to be rape. Clause 'Sixthly' of Section 375 of the IPC, as amended in 2013, makes it clear that if the woman is under 18 years of age, then sexual intercourse with her - with or without her consent - is rape. Exception 2 to Section 375 of the IPC provided 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. When the IPC was originally enacted in the year 1860, the age of consent under clause 'Sixthly' of Section 375 IPC and under Exception 2 of Section 375 IPC was 10 years. The IPC was amended from time to time to raise the same. In 1891 the age under both the provisions was raised to 12 years. In 1925 the age of consent was raised under clause 'Sixthly' to 14 years and under Exception 2 to 13 years. In 1940 the age of consent under clause 'Sixthly' was raised to 16 years, but under Exception 2 to Section 375 IPC the age was raised to 15 years. In 2013 age of consent under clause 'Sixthly' was raised to 18 years but no change was made in Exception 2 to Section 375 IPC under which the

age of consent was retained as 15 years. The effect of exception 2 to Section 375 of the IPC even after amendment in 2013 was that a girl child not being under 15 years of age, who was married before attaining the minimum age of 18 years for marriage, could be subjected to sexual intercourse with or without her consent by her husband and the husband could not be charged with offence of rape. In ***Independent Thought Case (Supra)*** Hon'ble Supreme Court held that exception 2 to Section 375 of the IPC is arbitrary and violative of the principles enshrined in Articles 14, 15 and 21 of the Constitution of India and read down the same as providing that **"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."**

26. After the judgment of Hon'ble Supreme Court in ***Independent Thought Case (Supra)*** if a girl child not being under 15 years of age, who was married before attaining the minimum age of 18 years for marriage, is subjected to sexual intercourse with or without her consent by her husband, the husband will be guilty of rape under Section 375 of the IPC punishable under Section 376 of the IPC and in case of penetrative sexual assault more than once, the husband will be guilty of aggravated penetrative sexual assault under Section 5(1) of the POCSO Act punishable with more severe sentence under Section 6 of the POCSO Act of rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine.

27. In view of the above referred statutory provisions the petitioner will not be entitled to consummate his marriage and sexual

intercourse or any sexual acts by him with detenue Simran Kaur will amount to rape under Section 375 of the IPC punishable under Section 376 of the IPC and also aggravated penetrative sexual assault under Section 5 of the POCSO Act punishable under Section 6 of the POCSO Act.

28. In *T. Sivakumar's Case (Supra)* owing to the conflicting decisions on the issue, the matter was referred by a Division Bench of the Madras High Court to the Full Bench, for determination of the following questions :-

“(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be a 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 in view of the provisions of the Juvenile Justice [Care and Protection of Children] Act, 2000, a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law and whether in violation of the procedure mandated by the Juvenile Justice [Care and Protection of Children] Act, 2000, the Court dealing with a Writ of Habeas Corpus, has the power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the Hindu Marriage Act and Section 9 of the Prohibition of Child Marriage Act, 2006 ? and

(5) Whether the principles of Sections 17 and 19 (a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act”?

29. After going through the law cited before their Lordships, the Full Bench answered the reference in the above-said case as under:-

“57. In conclusion, to sum up, our answers to the questions referred to by the Division Bench are as follows:

i. The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" stricto sensu as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.

ii. The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of section 6(c) of the Hindu Minority and Guardianship Act, 1956.

iii. The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the court to set her at liberty if she is illegally detained by anybody.

iv. In a habeas corpus proceeding, while granting custody of a minor girl, the court shall consider the paramount welfare including the safety of the minor girl not withstanding the legal right of the person who seeks custody and grant of custody in a habeas corpus proceeding shall not prejudice the legal rights of the parties to approach the civil court for appropriate relief.

v. Whether a minor girl has reached the age of discretion is a question of fact which the court has to decide based on the facts and circumstances of each case.

vi. The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court cannot compel her to go to the custody of her parents and instead, the court may entrust her in the custody of a fit person subject to her volition.

vii. If the minor girl expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice [Care and Protection] Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice [Care and Protection] Act, 2000.

viii. A minor girl whose marriage has been contracted in violation of section 3 of the Prohibition of Child Marriage Act is not an offender either under Section 9 of the Act or

under Section 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law.

ix. While considering the custody of a minor girl in a habeas corpus proceeding, the court may take into consideration the principles embodied in Sections 17 and 19(a) of the Guardians and Wards Act, 1890 for guidance”.

30. In ***CRM-M-22227-2013 titled Sunita Rani and another Vs. State of Punjab and others decided on 08.05.2014*** a Single Bench of this Court expressed its agreement with the view taken by the Madras High but while disagreeing with the view taken by the Madras High Court regarding liability of the minor girl child to punishment under Section 9 of the PCM Act and Section 18 of the Hindu Marriage Act, 1955 referred the matter to Division Bench which in turn referred the matter to Full Bench and the matter is now pending before the Full Bench.

31. It is pertinent to observe here that ***Writ Petition No.11154/2006 (GM-RES-PIL), Muthamma Devaya and Another vs. Union of India and others*** was filed in the Karnataka High Court, raising the issue of validity of child marriages. Vide order dated 10.11.2010 the Karnataka High Court constituted a four Member committee, headed by Dr. Justice Shivraj V. Patil, former Judge of Hon'ble Supreme Court, to expose the extent of practice of child marriage. The Committee was also requested to suggest ways and means to root out the evil of child marriage from society and to prevent it to the maximum extent possible. The Core Committee submitted its report and made various recommendations. One of its recommendations was that marriage of a girl child below the age of 18 years be declared void ab initio. Pursuant to the report of the Core Committee, an

amendment was made in the PCM Act in the State of Karnataka and Section (1A) has been inserted after subsections (2) and (3) in Section 3 of the PCM Act which provides that “Notwithstanding anything contained in sub-section (1) 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”.

32. In *Independent Thought case (Supra)* Hon'ble Supreme Court in para No. 76 of its judgment recommended that 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 but at the same time assuming that all other State Legislature do not take the Karnataka route proceeded to state the correct position in law as referred to above.

33. In view of the observations made by Hon'ble Supreme Court in para No.76 of its judgment in *Independent Thought Case (Supra)*, the Prohibition of Child Marriage (Haryana Amendment) Bill, 2020 declaring child marriage solemnized on or after the date of commencement of the said Bill to be void *ab initio* has been passed by the Haryana Legislative Assembly which is pending for assent of His Excellency, the President of India.

34. If child marriage is a social evil prohibited by and punishable under the law the same can not become legally enforceable till attaining of majority by the girl child merely because the girl child consents to it. Will the Court, in the face of obligation under Section 13 of the PCM Act to injunct child marriage, permit the parents to conduct

marriage of a girl child below 18 years of age on the ground that the girl child has consented to it. Then, how marriage performed by a girl child below 18 years of age by running away from the custody of her parents or her lawful guardian be legally enforceable by allowing her custody to her husband, on the ground of her husband being her guardian, for consummation of marriage before attaining of majority by her particularly when (i) the husband, in case of being adult above 21 years of age, will be liable to be prosecuted and punished for performing child marriage; (ii) in the eventuality of consummation of marriage the husband will be guilty of rape and aggravated penetrative sexual assault; (iii) the marriage may also be void under Sections 12 on account of circumstances mentioned therein including enticing and taking away of the minor out of the keeping of lawful guardian or Section 14 of the PCM Act due to violation of injunction order issued under Section 13 and (iv) marriage will be voidable under Section 3 of the PCM Act and can be repudiated and got annulled by the girl child below 18 years of age by filing petition till attaining the age of 20 years. Whether the Court should pass a decree for restitution of conjugal rights or issue direction for protection of life and liberty of the girl child below 18 years of age for living in the company of her husband for consummation of marriage in such circumstances is a debatable question which also involves dilemma in appropriately answering the same on taking into consideration her choice and **love** on one side and the **law** on the other. The dilemma is further compounded by the consideration of next question arising: Will not the argument in favour of permissibility of performance of marriage by a girl less than

18 years of age against the legislation prohibiting child marriage for curbing the menace/social evil of child marriage on the grounds of her **fundamental right to life and liberty** and **her own free will** be devoid of any merit and liable to rejection on the same analogy, legitimacy and reasoning of impermissibility of performance of Sati by fully grown up woman of sound mind who in exercise of her **fundamental right to life and liberty** and **with her own free will** wishes to perform the same on death of her husband against legislation banning the practice of Sati on the ground of its being a social evil, though a graver one. How to protect the life and liberty of such run away minor girls becomes a difficult question to answer when instances of honour killing of such run away girls are also not rare. Yet the answer to the same has to be found within the fold of law.

35. In *Independent Thought Case (Supra)* Hon'ble Supreme Court observed as under :-

“By now it is well settled by a catena of judgments of this Court that the "right to life" envisaged in Article 21 of the Constitution of India is not merely a right to live an animal existence. This Court has repeatedly held that right to life means a right to live with human dignity. Life should be meaningful and worth living. Life has many shades. Good health is the *raison d'être* of a good life. Without good health there cannot be a good life. In the case of a minor girl child good health would mean her right to develop as a healthy woman. This not only requires good physical health but also good mental health. The girl child must be encouraged to bloom into a healthy woman. The girl child must not be deprived of her right of choice. The girl child must not be deprived of her right to study further. When the girl child is deprived of her right to study further, she is actually deprived of her right to develop into a mature woman, who can earn independently and live as a self sufficient independent woman. In the modern age, when we talk of gender equality, the girl child must be given equal opportunity to develop like a male child. In fact, in my view, because of the patriarchal nature of our society, some extra benefit must be showered upon the girl child to

ensure that she is not deprived of her right to life, which would include her right to grow and develop physically, mentally and economically as an independent self sufficient female adult.”

36. In *T. Sivakumar's Case (Supra)* Madras High Court held that a marriage contracted with a female less than 18 years and more than 15 years is not a void marriage but is only a voidable marriage and the child bride had the option of getting the marriage annulled till she attains the age of 20 years. The said marriage is not a "valid marriage" *stricto sensu* as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights. Accordingly it was held that if the minor girl expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the JJ Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the the JJ Act.

37. In *Court on its own motion (Lajja Devi) Case (Supra)*, a Full Bench of the Delhi High Court while referring to *Rosy Jacob Vs. Jacob Chakramakkal : AIR 1973 SC 2090; Kumar Vs. Jahgirdar Vs. Chetana K. Ramatheertha : 2001(3) R.C.R.(Civil) 497 : AIR 2001 SC 2179 and AIR 2004 SC 1525* held that in deciding the question of custody of a minor child it is the interest of the child which is paramount and important. In that case the Full Bench of the Delhi High Court observed as under:-

“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 (sic no) 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 will act as a cover up by those who are economically and/or socially powerful to pulverise 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.” (emphasis added)*

38. Section 2(14)(xii) of the JJ Act defines a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage" as a child in need of care and protection. A girl child below 18 years of age who is sought to be married by her parents/guardian being a child in need of care and protection is required to be produced before a Child Welfare Committee constituted under Section 27 of the JJ Act so that she could

be cared for, protected and appropriately rehabilitated or restored to society. In ***Independent Thought Case (Supra)*** Hon'ble Supreme Court observed as under :-

*“95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2 (14) (xii) of the JJ Act). **In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married.** The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. **If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready.** The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. **A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution.** Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.”(emphasis added)*

39. In ***Association for Social Justice & Research's Case (Supra)*** where a girl aged between 16 to 18 years was married off to a man stated to be over 40 years of age, a Division Bench of Delhi High Court noted the ill effects of child marriage and gave a direction that the child will remain with her parents and her marriage will not be consummated till she attains the age of 18 years.

40. In view of the statutory provisions and judicial precedents referred to above, I am also of the considered view that if the minor girl child expresses her desire not to go with her parents or her relatives and the parents of the husband do not come forward for entrusting custody of the minor girl child to them on the condition of keeping the minor

girl child separate from the husband and not allowing the husband to consummate the marriage, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the JJ Act but she shall not be kept in a Special/Observation Home meant for juveniles in conflict with law established under the JJ Act.

41. It may be mentioned here that in support of his submissions learned Counsel for the petitioner relied on judgment of Hon'ble Supreme Court in *Smt. Lila Gupta's Case (Supra)* and judgment of this Court in *Balwinder Singh @ Binder 's Case (Supra)*. In *Smt. Lila Gupta's Case (Supra)* the question involved was as to whether marriage of Rajendra Kumar with the appellant on May 25, 1963 being in contravention of the proviso to Section 15 of the Hindu Marriage Act, 1955 was null and void. In *Balwinder Singh @ Binder 's case Supra* this Court held that even a minor girl cannot be kept in Nari Niketan (Special/Observation Home meant for juveniles in conflict with law established under the JJ Act) against her wishes.

42. In the present case respondent No.3-Mohinder Singh, father of detainee Simran Kaur lodged FIR No.115 dated 26.05.2020 under Sections 363 and 366-A of the IPC at Police Station Chhachhrauli, District Yamuna Nagar against the petitioner. A perusal of order dated 15.07.2020 passed by learned Judicial Magistrate 1st Class, Sub Division Bilaspur shows that as per birth certificate of detainee Simran Kaur her date of birth is **01.03.2004** and detainee Simran Kaur has not attained the age of majority and was aged about 16 years and 3 months on the date of her marriage on 28.05.2020. No

doubt the petitioner has been granted bail in the above-referred criminal case registered against him but in the eventuality of his conviction, his marriage would be void under Section 12 (a) of the PCM Act. Detenue Simran Kaur has a right to get her marriage declared a nullity by filing a petition through guardian or next friend along with the Child Marriage Prohibition Officer during her minority and herself on attaining of majority till she attains the age of 20 years. The petitioner will not be entitled to consummate his marriage and sexual intercourse or any sexual acts by him with detenue Simran Kaur will amount to rape under Section 375 of the IPC punishable under Section 376 of the IPC and aggravated penetrative sexual assault under Section 5 of the POCSO Act punishable under Section 6 of the POCSO Act. The petitioner being male adult aged more than 21 years is also liable to be prosecuted and punished under Section 9 of the PCM Act for offence of contracting child marriage. In these circumstances the petitioner husband is not entitled to custody of detenue Simran, minor girl child on the ground of being her guardian under Section 6(c) of the Hindu Minority and Guardianship Act, 1956 due to marriage with her and the girl child has to be kept in Child Care Institution set up for children in need of care and protection under the provisions of the JJ Act till attaining of majority by her. In these facts and circumstances of the case detenue Simran Kaur has been rightly sent by learned Sessions Judge, Yamuna Nagar vide order dated 04.06.2020 to Bal Kunj, Chhachhrauli, which is children home set up for children in need of care and protection under the provisions of the JJ Act and not a special or observation home meant for juveniles in conflict with law established

under the JJ Act and application filed by the petitioner has been rightly dismissed by learned Judicial Magistrate First Class, Bilaspur vide order dated 15.07.2020 (Annexure P-5).

43. There is no dispute with the proposition of law laid down in *Smt. Lila Gupta's Case (Supra)* and *Balwinder Singh @ Binder 's Case (Supra)* relied on by learned counsel for the petitioner but the same are not applicable to the facts of the present case and are not of any help to the petitioner.

44. In view of the above discussion, the petition being devoid of any merit is dismissed.

24.09.2020

Vinay

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No