

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

**CRWP-5929-2021
Date of decision : 31.08.2021**

Ravneet Kaur and anotherPetitioners

Versus

State of Punjab and othersRespondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Argued by : Mr. K.K. Saini, Advocate
for the petitioners.

Mr. P.S. Walia, Asstt. A.G., Punjab
for respondents No.1 to 3, 13 and 14.

Mr. Sumit Jain, Addl.A.G. Haryana
for respondent No.11.

Mr. Parampreet Singh Paul, Addl. Public Prosecutor
for respondent No.12-U.T. Chandigarh.

Mr. Amit Jhanji, Senior Advocate and
Ms. Gursharan Kaur Mann, Senior Advocate
as Amicus Curiae.

ARUN KUMAR TYAGI, J

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

1. The petitioners have filed the present petition under Article 226/227 of the Constitution of India for issuance of directions to respondents No.2 and 3 to protect their life and liberty from danger at the hands of respondents No.4 to 10.

2. Briefly stated, the petition has been filed on the averments that the petitioner No.1 is aged about 15.5 years and her date of birth is 02.09.2005. Petitioner No.2, being aged about 19 years, is major. The petitioners were known to each other for the last one year and have

developed liking for each other and wanted to perform marriage but could not do so due to petitioner No.1 not being of marriageable age as per Hindu Law. The petitioners started residing together in live-in-relationship. Respondents No.4 to 10, who are parents and paternal uncles of petitioner No.1, have threatened them with dire consequences if they stay together and are bent upon to involve petitioner No.2 in some false case. Respondents No.4 to 10 have also threatened to eliminate the petitioners if they married or stayed together against their wishes. The petitioners made representation dated 23.06.2021 to respondent No.2 but no action has been taken on the same.

3. Vide order date 30.06.2021, while issuing notice of motion, this Court observed that the case involves questions as to whether a minor girl who has not attained marriageable age of 18 years is entitled to reside with a person of her choice in live-in-relationship in the nature of marriage, whether such a minor girl can give consent to her removal from lawful guardianship and also to live-in-relationship in the nature of marriage with consummation thereof by such person, whether such person, not being husband, can purport to act as guardian of the minor girl and claim her custody without seeking order from Guardian Judge/Family Court under the Guardian and Wards Act 1890 or the Hindu Minority and Guardianship and Minority Act, 1956 as the case may be and whether the fundamental right to protection of life and liberty extends to protection of the minor girl for residing with such person in live-in-relationship in nature of marriage and that these questions require thread bare adjudication not only with reference to judgments referred by learned Counsel for the petitioner and learned

State Counsel but also with reference to all relevant judicial precedents in this regard. Since similar cases are also coming from the State of Haryana and U.T. Chandigarh, State of Haryana and U.T. Chandigarh were impleaded as respondents No.11 and 12 to the petition and States of Punjab, Haryana and U.T. Chandigarh were directed to file reply/response and directions were also issued that in case of apprehension of physical harm, petitioner No.1 may go to Protection Home, Amritsar, if so desired, and in such an eventuality respondent No.2-Commissioner of Police, Amritsar shall provide requisite protection to petitioner No.1 during her stay in the Protection Home, Amritsar. All the expenses for stay of petitioner No.1 in Protection Home, Amritsar shall be borne by the State of Punjab.

4. Vide order dated 07.07.2021 passed by this Court Senior Superintendent of Police, Amritsar (Rural) and Senior Superintendent of Police, Gurdaspur were impleaded as respondents No.13 and 14 and respondents No.2, 13 and 14 were directed to take over custody of petitioner No.1 from petitioner No.2 and entrust the same to Incharge, Ashiana, Sector-15, Chandigarh. Custody of petitioner No.1 was accordingly taken from petitioner No.2 and petitioner No.1 was lodged in Ashiana, Sector-15, Chandigarh.

5. In compliance with order dated 30.06.2021, status report by way of affidavit of Sh. Parvesh Sharma, Inspector posted as Station House Office, Police Station Women Cell Sector-17, U.T. Chandigarh and Affidavit of Sh. T.L. Satyaprakash, Secretary to Government of Haryana, Home Department have been filed. However, no reply/affidavit has been filed on behalf of State of Punjab.

6. As per office report respondent No.5 had died and respondents No.4 and 6 to 10 were duly served. None has appeared for respondents No.4 and 6 to 10 despite due service.

7. I have heard arguments addressed by Mr. K.K. Saini, learned Counsel for the petitioners, Mr. P.S. Walia, Asstt. A.G., Punjab for respondents No.1 to 3, 13 and 14, Mr. Sumit Jain, Addl. A.G. Haryana for respondent No.11, Mr. Parampreet Singh Paul, Addl. Public Prosecutor for respondent No.12-U.T. Chandigarh and Mr. Amit Jhanji and Ms. Gursharan Kaur Mann, Senior Advocates appointed as Amicus Curiae.

8. Mr. K.K. Saini, learned Counsel for the petitioners has submitted that the petitioners were living in live-in-relationship on account of love affair between them. The petitioners wanted to marry each other but the marriage could not be performed as petitioner No.1 has not attained the age of majority. The petitioners apprehend physical harm to them and false implication of petitioner No.2 at the instance of respondents No.4 and 6 to 10. The petitioners made representation dated 23.06.2021 to respondent No.2 but no action has been taken on the same. Learned Counsel for the petitioners has accordingly submitted that petitioner No.1 may be allowed to go with petitioner No.2 and respondents No.1 to 3 may be directed to take appropriate action for protection of life and liberty of the petitioners. In support of his submissions, learned counsel for the petitioners has placed reliance on the judgment passed by Coordinate Bench of this Court in ***CRWP-196-2020 titled as 'Poonam and another Vs. State of Punjab and others' decided on 10.08.2020.***

9. Mr. P.S. Walia, learned State Counsel for respondents No.1 to 3, 13 and 14 has submitted that petitioner No.1, who is less than 18 years of age, falls within the definition of child under Section 2(a) of the Prohibition of Child Marriage Act, 2006 (for short 'the PCM Act'). Petitioner No.2 is not entitled to custody of petitioner No.1 on the basis of live-in-relationship in the nature of marriage as marriage with a child is not permissible and is punishable as an offence under Section 9 of the PCM Act. The petitioners are not entitled to live together and to protection of their life and liberty on the ground of and for continuing their live-in-relationship. The life and liberty of petitioner No.1 has to be protected by sending petitioner No.1 to child care institution under the care of Child Welfare Committee, Amritsar. In support of his submissions, learned State Counsel has placed reliance on judgment of Hon'ble Supreme Court in *Independent Thought Vs Union of India and another : 2017(4) R.C.R.(Criminal) 595* and judgment of this Court in *CRM-M-22389-2020 titled as 'Parminder Singh Vs. State of Haryana and others' decided on 24.09.2020*.

10. Mr. Sumit Jain, learned State Counsel for the State of Haryana and Mr. Parampreet Singh Paul, learned Additional Public Prosecutor for U.T. Chandigarh have reiterated the stand taken by learned State Counsel for respondents No.1 to 3 and 13 and 14.

11. Mr. Amit Jhanji, Senior Advocate appointed as learned Amicus Curiae has given following suggestions :-

(i) Protection of life and liberty

The minor or any human being has a legal right for protection of life and liberty as prescribed by Article 21 of the

Constitution of India.

(ii) Custody of minor girl

The decision qua custody of minor girl has to be taken after taking into consideration the facts and circumstances of the case. The order has to be passed keeping in view the overall intelligence/maturity of the minor girl. It is also suggested that at any point of time the custody of a minor girl shall not be handed over to the boy even after marriage till she attains the age of 18 years as the chances are very high that the said minor girl may consummate and she may become pregnant. In those circumstances, the said girl will not be in a position to exercise the statutory remedy as provided under Section 12 of the PCM Act. Moreover, the minor is not mentally and physically developed. Neither, the minor is economically independent. The discretion or choice of minor may also be taken into consideration while deciding the issue qua custody of minor girl. The minor cannot be forced to stay with her parents.

(iii) The preference shall be given to the family members first and if the minor does not want to reside with them then the custody be given to Social Welfare Homes.

(iv) If the custody is given to the family then a child welfare officer shall be appointed who keeps a regular check over the minor till the minor attains the age of majority.

(v) In case of Muslims, there are different pronouncements by this Hon'ble Court qua applicability of the PCM Act. Therefore, the issue qua applicability of the aforesaid Act is to be determined by this

Hon'ble Court.

12. Mr. Amit Jhanji, learned Amicus Curiae has also referred to judgments in *D. Velusamy Vs. D. Patchaimmal : 2010 (4) RCR (Civil) 827*; *Indra Sarma Vs. V.K.V. Sarma : (2013) 15 SCC 755*; *Court on its own motion (Lajja Devi) and others Vs. State and others (Delhi High Court): 2012(4) RCR (Civil) 821*; *T. Sivakumar Vs. Inspector of Police (Madras High Court) : 2012 (7) RCR (Civil) 2052*; *CRWP-4199-2021 titled as 'Gulza Kumari and another Vs. State of Punjab and others' decided on 11.05.2021*; *Special Leave to Appeal (Crl.) No.4028 of 2021 titled as 'Gurwinder Singh and another Vs. The State of Punjab and others' decided on 04.06.2021*; *CRWP-1263-2021 titled as 'Sonu Vs. State of Punjab and others' decided on 07.07.2021*; *Shafin Jahan Vs. Asokan K.M. And others : 2018 (16) SCC 368*; *Independent Thought Vs Union of India and another : 2017(4) R.C.R.(Criminal) 595, CRM-M-29790 of 2009 (O&M) titled as 'Amnider Kaur and another Vs. State of Punjab' decided on 27.11.2009*; *Kammu Vs. State of Haryana : 2010 (4) RCR (Civil) 716*; *CRM-M-35410-2010 titled as 'Neelam Rani and another Vs. State of Haryana' decided on 06.12.2010*; *CRM-M-13312-2013 titled as 'Karmvir Vs. State of Haryana and others' decided on 29.04.2013*; *LPA No.1678 of 2014 (O&M) titled as 'Rajwinder Kaur and another Vs. State of Punjab and others' decided on 09.10.2014*; *CRWP-496-2015 titled as 'Court on its own motion Vs. State of Punjab' decided on 30.03.2015*; *Mohd. Samim Vs. State of Haryana (P&H) : 2019(1) R.C.R.(Criminal) 685*; *CRWP-7317-2020 titled as 'Fareen @ Raj Kumari and another Vs. State of Punjab and others' decided on 17.09.2020*; *CRM-M-22389-2020 titled as 'Parminder*

Singh Vs. State of Haryana and others' decided on 24.09.2020; CRWP-7911-2020 (O&M) titled as 'Divya Vs. State of Punjab and others' decided on 09.10.2020; CRM-M-38750-2020 titled as 'Kulwinder Kaur Vs. State of Punjab and others' decided on 21.12.2020; CRWP-10828-2020 (O&M) titled as 'Priyapreet Kaur and another Vs. State of Punjab and others' decided on 23.12.2020; Ranjeet Kaur Vs. State of Punjab : 2021 (3) RCR (Criminal) 35; CRWP-4725-2021 titled as 'Seema Kaur and another Vs. State of Punjab and others' decided on 03.06.2021 and CRWP-4660-2021 (O&M) titled as 'Yashpal and another Vs. State of Haryana and others' order dated 21.05.2021.

13. Ms. Gursharan Kaur Mann, learned Senior Advocate appointed as Amicus Curiae has also made submissions in similar terms.

14. The questions which arise for consideration are whether a minor girl who has not attained marriageable age of 18 years is entitled to solemnize marriage with a person of her choice, whether such a minor girl is entitled to reside with a person of her choice in live-in-relationship in the nature of marriage, whether such a minor girl can give consent to her removal from lawful guardianship and also to live-in-relationship in the nature of marriage with consummation thereof by such person and whether any such person, not being husband, can purport to act as guardian of the minor girl and claim her custody without seeking order from Guardian Judge/Family Court under the Guardian and Wards Act 1890 (for short ' the GW Act') or the Hindu Minority and Guardianship Act, 1956 (for short 'HMG Act') as the case

may be ?

15. Section 3(1) of the Majority Act, 1875, enacted to amend the law respecting the age of majority, provides that every person domiciled in India shall attain the age of **majority** on completing the age of 18 years and not before. Under Section 4(1) of the GW Act 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 HMG Act a minor has been defined to mean a person who has not completed the age of 18 years.

16. Section 2(a) of the Majority Act, 1875 provides that nothing in the Majority Act, 1875 shall affect the capacity of any person to act in the following matters namely **marriage**, dower, divorce and adoption.

17. A girl below the age of 18 years is 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 Protection of Child from Sexual Offences Act, 2012 (for short 'the POCSO Act'), Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the JJ Act') and section 2(b) of the Protection of Women From Domestic Violence Act, 2005 (for short 'the PWDV Act') and is also entitled to preferential treatment in criminal law jurisdiction under the JJ Act with the exception of juvenile in conflict with law treated and tried as an adult. However, a girl below the age of 18 years is subject to disability under the law and cannot herself (i) deal with or transfer property owned by her; (ii) purchase/acquire property; (iii) enter into a contract; (iv) seek

any employment under the Governmental agencies or commercial establishments etc.; (v) take admission in any educational institution; (vi) take any property on rent for residence; or (vii) furnish a bail bond in Criminal Court **except through her guardian**; and (viii) file or defend a civil suit etc. except through **next friend or guardian ad litem**. 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.

18. 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. 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**. Reference in this regard may be made to observations in *Courts on its own motion (Lajja Devi)'s Case (Supra)*.

However, 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. Further, Section 18 of the HM Act provides that every person who procures marriage for himself or herself to be solemnized under the HM Act in contravention of condition specified in Clause (iii) of Section 5 of the HM Act shall be punishable with rigorous imprisonment which may extend to 2 years or fine which may extend to Rs.1,00,000/- or with both.

19. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 provides as under:-

“2. Application of Personal Law to Muslims. - Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

20. Under the Muslim Personal Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection reference can be made to Article 251 of Mulla's Principles of Mohammedan Law which says that every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, in absence of evidence, on completion of the age of 15 years. Even in

Tyabji's Muslim Law under Article 27 is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. However, marriage performed by girl less than 15 years of age without consent of her parents or guardian is void. For judicial precedents, reference may be made to *Mohd. Idris Vs. State of Bihar and others (Patna High Court): 1980 CriLJ 764; Noor Saba Vs. The State of Bihar (Patna)(D.B.) : 2014(7) R.C.R.(Civil) 2; Mohd. Nihal Vs. State (Delhi) (DB) : 2008(4) R.C.R.(Criminal) 477; Tahra Begum Vs. State of Delhi (Delhi)(D.B.) : 2013(1) R.C.R.(Civil) 798; Rukshana Vs. Govt. of NCT of Delhi (Delhi) : 2007(3) R.C.R.(Criminal) 542; Bholu Khan Vs. State of NCT of Delhi (Delhi) (D.B.) : 2013(1) R.C.R.(Criminal) 980; Kammu Vs. State of Haryana (P&H) : 2010(4) R.C.R.(Civil) 716; Mohd. Samim Vs. State of Haryana (P&H) : 2019(1) R.C.R.(Criminal) 685; Yunus Khan Vs. State of Haryana (P&H) : 2014(3) R.C.R.(Criminal) 518; CRWP No.1568 of 2017 titled as 'Aamir Vs. State of Haryana and others' 26.09.2018 and CRWP No.733 of 2021 (O&M) titled 'Shoukat Hussian and another Vs. State of Punjab and others' decided on 25.01.2021. However, Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a woman married under Muslim Personal 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.*

21. Under Section 4(c) of the Special Marriage Act, 1955 (for short 'the SM Act'), the minimum age for marriage of a female is 18

years and of a male is 21 years. Under Section 24(1)(i) of the SM Act, marriage performed in breach of Section 4(c) of the SM Act is void.

22. 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)'s Case (Supra)***.

23. In ***Independent Thought's Case (Supra)*** a large amount of documentary material was relied on to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life.

24. The relevant part of the judgment referring to such material relied on before Hon'ble Supreme Court is reproduced as under:-

“(a) Reference was made to a report "Delaying Marriage for Girls in India: A Formative Research to Design Interventions for Changing Norms". This report was prepared in March 2011 under the supervision of UNICEF India.

(b) Reference was also made to a report "Reducing Child Marriage in India: A Model to Scale up Results". This report was prepared in January 2016 and also under the supervision and guidance of UNICEF India. The report contains statistics of widowed, separated and divorced girls who were married between 10 and 18 years of age based on Census 2011.

(c) Reference was also made to a useful study "Economic Impacts of Child Marriage: Global Synthesis Report" released in June 2017. This report is a collaborative effort by the International Centre for Research on Women and the World Bank and it deals with the impact of child marriages on (i) fertility and population growth; (ii) health, nutrition, and intimate partner violence; (iii) educational attainment; (iv) labour force participation, earnings and welfare, and (v) women's decision-making and other impacts. The economic cost of child marriages and implications has also been discussed in detail in the

report. A child marriage is defined as a marriage or union taking place before the age of 18 years and this definition has been arrived at by relying on a number of conventions, treaties and international agreements as well as resolutions of the UN Human Rights Council and the UN General Assembly.

(d) Another extremely useful report referred to is "A Statistical Analysis of Child Marriage in India based on Census 2011". This report is prepared by a collaborative organization called Young Lives and the National Commission for the Protection of Child Rights and was released quite recently in June 2017."

25. The ill effects of child marriage referred to in the documentary material relied on were inter alia noticed by Hon'ble Supreme Court as under:-

"Child marriage is not only a violation of human rights, but is also recognized as an obstacle to the development of young people. The practice of child marriage cut shorts a critical stage of self-discovery and exploring one's identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets compromised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation's Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives....."

26. In that case Hon'ble Supreme Court also noticed the

response of the Government of India to studies carried out from time to time and views expressed and referred to in National Policy and National Plan and the relevant part of the judgment reads as under :-

“18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

"11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.

b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.

c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the I.P.C., as it existed in 2006, to decriminalize marital rape of a girl child.

20. The National Charter was followed by the National Policy for Children notified on 26th April, 2013. The National Policy explicitly recognized in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.

21. The large 'to do list' in the National Policy led to the National Plan of Action for Children, 2016: Safe Children – Happy Childhood. The National Plan appears to have been made available on 24th January, 2017. While dealing with child marriage, it is stated as follows:

"In India, between NFHS-3 (2005-06) to RSOC (2013-14), there has been a considerable decline in the percentage of women, between the ages 20-24, who were married before the age of 18 (from 47.4% to 30.3%). The incidence is higher among SC (34.9%) and ST (31%) and in families with lowest wealth index (44.1%). Child marriage violates children's basic rights to health, education, development, and protection and is also used as a means of trafficking of young girls. Child marriage leads to pregnancy during adolescence, posing life-threatening risks to both mother and child. It is indicated by the Age-specific Marital Fertility Rate (ASMFR) which is measured as a number of births per year in a given age group to the total number of married women in that age group. SRS 2013 reveals that in the age group of 15-19 years; there has been an upward trend during the period 2001-2013. ASMFR is higher in the age group 15-19 years in comparison to 25-29 years."

22. The National Plan of Action for Children recognizes that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risks for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking."

27. The ill effects of child marriage have also 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's 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) RCR (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)'s Case (Supra).

28. 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**.

29. 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** contracting a **child marriage** 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 solemnization 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.

30. So far as the question of applicability of the PCM Act is concerned, in ***Independent Thought's Case (Supra)*** Hon'ble Mr. Justice Deepak Gupta observed as under:-

“125.In my opinion, the PCMA is a secular Act applicable to all. It being a special Act dealing with children, the provisions of this Act will prevail over the provisions of both the Hindu Marriage Act and the Muslim Marriages and Divorce Act, in so far as children are concerned.”

31. In ***Mohd. Nihal Vs. State (Delhi) (DB) : 2008(4) R.C.R.(Criminal) 477*** Division Bench of Hon'ble Delhi High Court held that PCM Act so far as its applicability is concerned makes no distinction between race or religion and that the significance of the

PCM Act is that it applies throughout India, except in the State of Jammu and Kashmir, and to all Indian citizens, without and beyond India, regardless of their religious affiliations. Thus, it applies to Muslims also.

32. In ***CRM-M-13312-2013 titled as 'Karmvir Vs. State of Haryana and others' decided on 29.04.2013*** a Coordinate Bench of this Court observed as under:-

“The act of 2006 is applicable to all citizens of India, irrespective of religion, caste, creed etc. Consequently, the petitioner, who is a Muslim, but is citizen of India, is also governed by the Act of 2006. This Act has not saved the Muslim Personal Law or Shariat Law in its application to Muslims for the matters covered by the Act of 2006. Consequently, in respect of matters covered by the Act of 2006, provisions of the Act of 1937, which are inconsistent with the Act of 2006, stand repealed by implication.”

33. In view of the observations made by Hon'ble Supreme Court in ***Independent Thought's Case (Supra)***, observations made by the Co-ordinate Benches of this Court in ***Kammu Vs. State of Haryana (P&H) : 2010(4) R.C.R.(Civil) 716*** and ***Mohd. Samim's Case (Supra)*** holding that “the PCM Act being general legislation does not apply to Muslims in view of Muslim Personal Law (Shariyat) Application Act, 1937 which is special legislation” do not lay down the correct proposition of law.

34. So far as the question of minor girl consenting to her removal from lawful guardianship is concerned, 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. Section 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.

35. 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 on her own insistence married him thereafter. 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, Hon'ble Supreme Court 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 para10 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."

36. 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.

37. In *Anversinh @ Kiransinh Fatesinh Zala Vs. State of Gurugram : 2021 (1) RCR (Criminal) 555* where the evidence on record unequivocally suggested that the accused induced the prosecutrix to reach at a designated place to accompany him, upholding the conviction under Section 363 and 366 of the IPC, Hon'ble Supreme Court observed as under:-

*“12. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. **Thakorlal D Vadgama v. State of Gujarat, (1973) 2 SCC 413** However, mere recovery of a missing minor from the custody of a stranger would not ipso-facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of **King Emperor v. Gokaran AIR 1921 Oudh 226** and **Emperor v. Abdur Rahman AIR 1916 Allahabad 210.***

13. Adverting to the facts of the present case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established sexual intercourse and of having an intention to marry her. Although the victim's deposition that she was forcefully removed from the custody of her parents might possibly be a belated improvement but the testimonies of numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him.

14. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly

below 18 years of age.

*15. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 of IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent. **Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359** Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.*

16. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.

*17. The ratio of **S. Varadarajan (supra)**, although attractive at first glance, does little to aid the appellant's case. On facts, the case is distinguishable as it was restricted to an instance of "taking" and not "enticement". Further, this Court in **S. Varadarajan (supra)** explicitly held that a charge of kidnapping would not be made out only in a case where a minor, with the knowledge and capacity to know the full import of her actions, voluntarily abandons the care of her guardian without any assistance or inducement on part of the accused. The cited judgment, therefore, cannot be of any assistance without establishing: first, knowledge and capacity with the minor of her actions; second, voluntary abandonment on part of the minor; and third, lack of inducement by the accused.*

18. Unfortunately, it has not been the appellant's case that he had no active role to play in the occurrence. Rather the eyewitnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuties and maturity to take care of herself. In addition to being young, the prosecutrix was not much educated. Her support of the prosecution version and blanket denial of any voluntariness on her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully.

19. It is apparent that instead of being a valid defence, the appellant's vociferous arguments are merely a justification which although evokes our sympathy, but can't change the law. Since the relevant provisions of the IPC cannot be construed in any other manner and a plain and literal meaning thereof leaves no escape route for the appellant, the Courts below were seemingly right in observing that the consent of the minor would be no defence to a charge of kidnapping. No fault can thus be found with the conviction of the appellant under Section 366 of IPC."

38. 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.

39. 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 provides 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.

40. In *Independent Thought's Case (Supra)* Hon'ble Supreme Court observed that there is an apparent conflict or incongruity between the provisions of the IPC and the POCSO Act as the rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under the IPC and therefore not an offence in view of Exception 2 to Section 375 thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. Hon'ble Supreme Court observed that the most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka where the State Legislature had inserted sub-Section (1A) in Section 3 of the PCM Act (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 PCM Act, 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.

41. Accordingly, in para No.76 of its judgment in that case

Hon'ble Supreme Court observed as under:-

“76. 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.....”

42. It may be added here that a Coordinate Bench of this Court vide order dated 10.06.2021 passed in **CRWP No.5212 of 2021 titled as 'Daya Ram Vs. State of Haryana'** observed as under:-

“This suggestion of the Hon'ble Supreme Court was given in the year 2017, but the same is yet to attract the attention of the States of Punjab, Haryana and Union Territory Administration, Chandigarh, therefore, this court feels it necessary to remind the States to consider this important issue to eradicate menace of child marriage.

Let a copy of the judgment be sent to the Chief Secretaries of the States of Punjab, Haryana and Advisor to U.T. Chandigarh.”

43. It is also pertinent to observe here that 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.

44. However, in **Independent Thought's Case (Supra)** Hon'ble Supreme Court also examined the correct position in law and 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 accordingly 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."

45. Hon'ble Mr. Justice M.B. Lokur observed that 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.

46. After the judgment of Hon'ble Supreme Court in *Independent Thought's Case (Supra)* if a girl child not being under 15 years of age, 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) (l) and (n) 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 20 years but which may extend to imprisonment for life and shall also be liable to fine. There is no question of a girl child giving express or implied consent for sexual intercourse.

47. In view of the above referred statutory provisions, in case of solemnization of marriage with a girl child less than 18 years of age, her husband will not be entitled to consummate his marriage and sexual intercourse or any sexual acts by him with such girl child less than 18 years of age will amount to rape under Section 375 of the IPC punishable under Section 376 of the IPC and also penetrative sexual assault under Section 3 of the POCSO Act punishable under Section 4 of the POCSO Act and aggravated penetrative sexual assault under

Section 5 of the POCSO Act punishable under Section 6 of the POCSO Act.

48. In *Amninder Kaur and Another Vs. State of Punjab and Others : 2010(1) RCR (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 the Co-ordinate Bench of this Court to be void ab initio under Section 12 (a) of the PCM Act. In that case this Court held that (i) in a case of run away marriage where the girl is admittedly minor, who has been enticed away from the lawful keeping of a guardian by her alleged husband against whom a case under Sections 363/366A of the IPC is also registered, such a marriage is void in terms of Section 12 of the PCM Act, (ii) the person who performs or abets child marriage is also guilty and liable for punishment under Sections 10 and 11 of the PCM Act; and (iii) a person who has enticed/taken away minor from the keeping of lawful guardian and against whom a case under the provisions of the IPC has already been registered cannot be allowed to take the benefit of the Constitutional remedy of protection of his life and liberty on the pretext of his void marriage.

49. 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 out 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.

50. No doubt, there are conflicting decisions from Co-ordinate Benches in this Court also. It may be observed here that in *T. Sivakumar's Case (Supra)* owing to the conflicting decisions on the issue in the State of Tamil Nadu, 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"?

51. 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 notwithstanding 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".*

52. In ***Court on its own motion (Lajja Devi)'s Case (Supra)***,

Full Bench of the Delhi High Court considered the questions formulated by the Division Bench in its order dated 31.07.2008 in W.P.

(Crl.) No.338 of 2008 which are reproduced 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 Indian Penal Code or even 376 Indian Penal Code 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?"

53. The relevant paragraphs recording the answers to the above-said questions by the Division Bench are also reproduced as under:-

“Question No. 1

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.

Question No.2 and 3

42. We are of the opinion that simply because the marriage is not void, it should automatically follow that the husband is entitled to the custody of the minor girl. We have already noted in detail the serious repercussions of child marriage. Some of the ill effects of the child marriage were taken note of in the case of Association for Social Justice & Research v. Union of India & others (supra), some of which are reproduced again :-

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a

young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child brides, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that 'where these elements are linked with gender inequities and biases for the majority of young girls their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control.

43. Section 6 of the Hindu Minority and Guardianship Act, 1956, reads :- "6. Natural guardians of a Hindu minor. - The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a) In the case of a boy or an unmarried girl-the father, and after him, the mother : provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) In case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) In the case of a married girl-the husband :

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section -

(a) If he has ceased to be a Hindu, or

(b) If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation. - in this section, the expression "father" and "mother" do not include a step-father and a step-mother."

44. It was stated that in the case of a minor married girl, the husband is the guardian and in case of an unmarried minor girl father or the mother, is her guardian. It was accordingly submitted that the husband, even if a minor, would be the guardian of his wife. Fortunately, this

*argument has to be rejected. The overriding and compelling consideration governing custody of guardianship of the child is the child's welfare and claim to the status as a guardian under the said section is not a right. This was declared long back in 1973 in **Rosy Jacob v. Jacob Chakramakkal, AIR 1973 SC 2090.***

45. We may also refer Section 13 of the Minority and Guardianship Act, 1956, which reads :-

"13. Welfare of minor to be paramount consideration. -

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

*The said section has been interpreted and it has been repeatedly held that while deciding the question of custody of a minor child, it is the interest of the child, which is paramount and important. (See **Kumar V. Jahgirdar v. Chetana K. Ramatheertha, 2001(3) R.C.R.(Civil) 497 : AIR 2001 SC 2179 and AIR 2004 SC 1525**). 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 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.

Question No. 4

49. In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Section 376 Indian Penal Code is made out. The charge-sheet cannot be quashed on the ground that she was a consenting party. However, there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.

50. Consummation, with the wife below the age of 15 years, is an offence under Section 375. No exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not. Personal law applicable to the parties is also immaterial.

51. If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 I.P.C. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.

Question No. 5

52. In view of our discussion on questions No. 1 to 4, no further observations need to be made in so far as this question is concerned.”

54. It is pertinent to observe here that ***T. Sivakumar's Case***

(Supra) and *Court on its own motion (Lajja Devi)'s Case (Supra)* were decided before judgment of Hon'ble Supreme Court in *Independent Thought's Case (Supra)* and the view taken in both the above-said cases is further fortified by the law laid down by Hon'ble Supreme Court in *Independent Thought's Case (Supra)*.

55. 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 in *T. Sivakumar's Case (Supra)* 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 HM Act 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.

56. In view of conflicting decisions rendered by the Coordinate Benches of this Court, another Coordinate Bench of this Court vide order dated 21.05.2021 passed in CRWP-4660-2021 (O&M) made reference to Hon'ble the Chief Justice to constitute a larger Bench to decide the following questions :-

- “(i) *Where two persons living together seek protection of their life and liberty by filing an appropriate petition, whether the Court is required to grant them protection, per se, without examining their marital status and the other circumstances of that case?*
- (ii) *If the answer to the above is in the negative, what are the circumstances in which the Court can deny them protection?*”

The reference in the above-said case is also pending for decision before the larger Bench.

57. While dealing with petition for protection of life and liberty on the ground of the parties having performed marriage against the wishes of their family members, Coordinate Bench of this Court vide order dated 25.09.2020 passed in **CRWP-6912-2020 (O&M) titled 'Sukhwinder Singh and another Vs. State of Punjab and others'** gave the following directions:-

- “i) *All the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh, will maintain a proper register of marriages, which maintain a counter-file of performing of a marriage.*
- ii) *In the Marriage Certificate, apart from photographs of the boy and girl, the description of the documents like Aadhar Card, Voter I.D. Card, Matriculation Certificate, Birth Certificate, etc., will be strictly mentioned and a photocopy of such document will be pasted on the backside of the counter file, so maintained by the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar.*
- iii) *The affidavit of a person, who is deemed to be a minor will not be taken as a valid document of age, for the purpose of performing the marriage, unless either of the parent of such person appears and file his/her affidavit.*
- iv) *All the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh, after every three months/quarters of year will produce their register with counter-file before the SHO having jurisdiction over the area where such Mandir, Masjid, Gurudwara and Girjaghar are situated and will be returned back after an inspection is done by the concerned SHO for verification of age of the parties. Any violation of these directions by the SHO concerned will make him/her liable for disciplinary action.*
- v) *The SHO of the concerned area, where Mandir, Masjid, Gurudwara and Girjaghar are situated, on receiving a complaint regarding a child marriage, will immediately take action under the Prohibition of Child Marriage Act, 2006, against the accused.*

58. In ***CRWP-7056-2020 titled as Gagandeep Singh and another Vs. State of Punjab and other'*** decided on 21.12.2020 this Court directed the Director Generals of Police, Punjab, Haryana and U.T. Chandigarh respectively to issue appropriate instructions for ensuring:-

- “(i) *that appropriate action is taken for registration of FIR under Section 9 of the Prohibition of Child Marriage Act, 2006 in cases where male adult person aged more than 18 years solemnises marriage with a minor girl less than 18 years of age falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006;*
- (ii) *that appropriate action is taken for registration of FIR under Section 4/Section 6 of the Protection of Children from Sexual Offences Act 2012 where such male adult person having solemnised marriage with a minor girl less than 18 years falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006 had with such minor girl sexual intercourse falling within the definition of penetrative sexual assault/aggravated penetrative sexual assault under Section 3/Section 5 of the Protection of Children from Sexual Offences Act, 2012 as the case may be;*
- (ii) *that appropriate action is taken for registration of FIR under Section 10 of the Prohibition of Child Marriage Act, 2006 where any Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh conducts marriage of a male adult person of the age of 18 years or more with a minor girl less than 18 years of age falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006; and*
- (iv) *that appropriate action is taken for registration of FIR against other persons as provided under Sections 10 and 11 of the Prohibition of Child Marriage Act, 2006, as may be warranted by the facts and circumstances of the case.”*

59. It may be added here, in the context of question of liability of male adult between 18 to 21 years of age to punishment under

Singh Vs. Harpreet Kaur (SC) : 2020(1) R.C.R.(Criminal) 238

Hon'ble Supreme Court observed as under:-

“3.8. Section 9 of the 2006 Act must be viewed in the backdrop of this gender dimension to the practice of child marriage. Thus, it can be inferred that the intention behind punishing only male adults contracting child marriages is to protect minor young girls from the negative consequences thereof by creating a deterrent effect for prospective grooms who, by virtue of being above eighteen years of age are deemed to have the capacity to opt out of such marriages. Nowhere from the discussion above can it be gleaned that the legislators sought to punish a male between the age of eighteen and twenty-one years who contracts into a marriage with a female adult. Instead, the 2006 Act affords such a male, who is a child for the purposes of the Act, the remedy of getting the marriage annulled by proceeding under Section 3 of the 2006 Act. Hence, male adults between the age of eighteen and twenty-one years of age, who marry female adults cannot be brought under the ambit of Section 9, as this is not the mischief that the provision seeks to remedy.”

60. While considering the question of legal enforceability of child marriage, which is voidable and not void, before attaining of majority by the minor girl child, this Court observed in ***Parminster Singh's Case (Supra)*** as under:-

“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.”

61. So far as the question of minor girl child being entitled to live in live-in-relationship in the nature of marriage is concerned, the search for relevant law ends with judgment of Hon'ble Supreme Court in ***Indra Sarma Vs. V.K.V. Sarma : (2013) 15 SCC 755***. In that case Hon'ble Supreme Court observed as under:-

“33. Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood.

Section 2(f), as already indicated, deals with a relationship between two persons (of the opposite sex) who live or have lived together in a shared household when they are related by :

- (a) Consanguinity*
- (b) Marriage*
- (c) Through a relationship in the nature of marriage*
- (d) Adoption*
- (e) Family members living together as joint family”*

34. The definition clause mentions only five categories of relationships which exhausts itself since the expression "means", has been used.....

41. Section 2(f) of the DV Act defines "domestic relationship" to mean, inter alia, a relationship between two persons who live or have lived together at such point of time in a shared household, through a relationship in the nature of marriage. The expression "relationship in the nature of marriage" is also described as defacto relationship, marriage - like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship) etc.

42. Courts and legislatures of various countries now began to think that denying certain benefits to a certain class of persons on the basis of their marital status is unjust where the need of those benefits is felt by both unmarried and married cohabitants. Courts in various countries have extended certain benefits to heterosexual unmarried cohabitants. Legislatures too, of late, through legislations started giving benefits to heterosexual cohabitants.”

62. In ***Indra Sarma Vs. V.K.V. Sarma : (2013) 15 SCC 755***

Hon'ble Supreme Court culled out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression **“live-in-relationship in the nature of marriage”** under Section 2(f) of the PWDV Act as under:-

“55. We may, on the basis of above discussion cull out some guidelines for testing under what circumstances, a live-in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

(1) Duration of period of relationship

Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.

(2) Shared household

The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration.

(3) Pooling of Resources and Financial Arrangements

Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or upkeeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Sexual Relationship

Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

(6) Children

Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.

(7) Socialization in Public

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.

(8) Intention and conduct of the parties

Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily

determines the nature of that relationship.”

63. Since sexual relationship forms an essential part of live-in-relationship in the nature of marriage and there cannot be any sexual relationship with a girl child less than 18 years of age by any person even with her consent, a girl child less than 18 years of age will not be entitled to live in live-in-relationship in the nature of marriage with a person of her choice.

64. It follows from the above discussion a minor girl aged above 15 years who has not attained marriageable age of 18 years may solemnize marriage with a person of her choice but such marriage cannot be legally enforced to allow consummation thereof and entrustment of her custody to her husband; that a minor girl is not entitled to reside with a person of her choice in live-in-relationship in the nature of marriage; that a minor girl cannot give consent to any person of her choice for her removal from lawful guardianship and sexual relationship with her for consummation of marriage or live-in-relationship in the nature of marriage and her consent is immaterial, if she was enticed or taken away out of lawful guardianship and that any such person of her choice with whom she wants to live in live-in-relationship cannot purport to act as her guardian and claim her custody without seeking order from Guardian Judge/Family Court under the GW Act or the HMG Act as the case may be.

65. The question which next arises is whether the fundamental right to protection of life and liberty extends to protection of the minor girl for residing with her husband or person of her choice in live-in-

relationship in the nature of marriage?

66. In *Lata Singh Vs. State of U.P. and another : (2006) 5 SCC 475* was one of the initial cases which came up before the Hon'ble Supreme Court raising the issue of the right of a person to marry a person of his own choice irrespective of caste or religion. In the said case petitioner solemnized her marriage, with her own free will, with a person of another caste. The said marriage was strongly opposed by her brothers and they also committed violence upon her and her husband and also falsely implicated them. Condemning the same, Hon'ble Supreme Court observed as under:-

"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or interreligious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or interreligious marriage with a woman or man who is a major, the couple are not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law." (emphasis added)

67. In *Pardeep Kumar Singh Vs. State of Haryana : 2008(3)*

RCR (Criminal) 376 a Single Bench of this Court issued the following directions:-

“(i) Whenever any intimation is received by the SSP/SP of concerned District regarding the marriage of a young couple with a threat and an apprehension of infringement of the right of life and liberty by the police at the instance of the family members of one of the spouses, the SSP/SP concerned will consider the representation and will himself/herself look into the matter and issue necessary directions to maintain a record of the said intimation under Chapter 21 of the Punjab Police Rules.

(ii) On receipt of above said intimation of marriage by any police officer, necessary directions will be issued to the concerned Police Station to take necessary steps in accordance with law to enquire into the matter by contracting the parents of both boy and girl. The matter regarding age, consent of the girl and grievance of her family will be determined. In the eventuality of any complaint of kidnapping or abduction having been received from any of the family members of the girl generally the boy (husband) will not be arrested unless and until the prejudicial statement is given by the girl (wife). Arrest should generally be deferred or avoided on the immediate receipt of a complaint by the parents or family members of the girl taking into consideration the law laid down by Hon'ble Supreme Court in Joginder Kumar's case (supra);

(iii) If the girl is major (above 18 years), she should not forcibly be taken away by police to be handed over to her parents against her consent. Criminal force against the boy should also be avoided.

(iv) So far as the threat to the young couple of the criminal force and assault at the hands of the private persons is concerned, it would always be open to the police to initiate action if any substantive offence is found to have been committed against the couple;

(v) In case of any threat to the breach of peace at the hands of the family members of the couple it will always be open to the State authorities to take up the security proceedings in accordance with law;

(vi) It will not be open to the "run away couple" to take law in their hands pursuant to the indulgence shown by the police on the basis of their representation sent to the SSP/SP of the concerned District;

(vii) If despite the intimation having been sent to the

SSP/SP there is an apprehension or threat of violation of right of personal life and liberty or free movement, the remedy of approaching the High court should be the last resort;

(viii) In case there is an authority constituted for issuance of marriage certificate as per the law laid down by Supreme Court in Seema's case (supra) in the concerned districts, the couple of so called 'run away marriage' should get the marriage registered in compliance with the directions of the Supreme Court and a copy of the same should also be forwarded to the police along with the representations or any time subsequent thereto.

(ix) Nothing said here-in-above will prevent the immediate arrest of a person who fraudulently entices a girl with false promises and exploits her sexually as per the statement of the girl."

68. In ***Civil Writ Petition No.6717 of 2009 titled as 'Asha and another Vs. State of Haryana and Others' decided on 25.07.2012***

Hon'ble Division Bench of this Court passed the interim order dated 31.03.2010 which reads as under:-

"Therefore, all the District and Sessions Judges in Punjab, Haryana and also U.T. Chandigarh are directed to ensure that if such run away couples approach them for help and assistance, interim protection shall be provided by the learned District and Sessions Judge, pending further orders of this Court. In case the District and Sessions Judge is not available, the senior-most Additional District and Sessions Judge will provide such protection."

69. Thereafter, vide order dated 15.10.2010 passed in the above-said case Hon'ble Division Bench of this Court had given the following directions:-

"i) The direction of this Court dated 31.3.2010 granting liberty to couples who have married against the wishes of their parents to approach the District and Sessions Judges in Punjab, Haryana and U.T. Chandigarh for grant of protection is made absolute.

ii) The Police Officers are directed to deal sternly with parents/relatives/other members of the society who threaten such couples and create law and order situation. The States of Punjab and Haryana, as also the Union Territory of Chandigarh are directed to ensure that the

protection centres indicated by them in various affidavits are properly run so that protection can be given to run away couples.

iii) The States of Punjab, Haryana and the Union Territory of Chandigarh are further directed to form mediation/counselling cells in the offices of Commissioners/Sr. Superintendents of police to guide parents, relatives and such couples to live in peace.

iv) The States of Punjab, Haryana and the Union Territory of Chandigarh are also directed to counsel Gram Panchayats in villages and create Special Cells in cities so as to prevail upon resisting parents/relatives to reconcile with such couples and they be prevailed upon not to take as threat to their honour or family honour at all.

v) False cases be not registered at the behest of parents/relatives under Sections 363/366/376 IPC against such couples who are majors.

vi) Arrest be normally deferred till absolutely necessary in such cases and criminal force against the boy/groom be avoided.

vii) The States of Punjab, Haryana and the Union Territory of Chandigarh are directed to advertise the existence of such protection centres all over the respective states prominently at all police stations and also by issuing periodically advertisements in various Media. The States of Punjab and Haryana are further directed to ensure that a Registrar of Marriages should visit each protection centre atleast once a week at a fixed time and date. However, the visit by the Registrar of Marriages in U.T. Chandigarh shall be at least thrice a week unless there is no occupant of such centres or there is no requirement by a couple for Registration.

viii) The State Legal Services Authorities/the District Legal Services Authorities in the States of Punjab Haryana and the Union Territory of Chandigarh are directed to depute some legal service counsel at the said centres atleast three times a week to provide legal assistance/counseling to such couples who desire that.

ix) There shall be a Committee at every District Headquarters comprising of Deputy Commissioner, Superintendent of Police and District Social Welfare Officer of the district concerned. In districts having Police Commissioner system, the Committee would comprise of Divisional Commissioner, Police Commissioner and District Social Welfare Officer of the district concerned. It would be the duty of this Committee to ensure that directions issued by the respective States, as well as by this Court are implemented in letter and spirit.

x) Initially the run away couples will be provided shelter at the Protection centres/shelter homes for a period of ten days. During the said period the threat perception shall be reviewed by the above Committee. The period of shelter may be further extended by the Committee from time to time, keeping in view the threat perception depending on the circumstances in each case.

xi) It is further directed that for the first ten days, no boarding and lodging charges would be payable by such couples. In case any such couple is constrained to take shelter at the protection centre for a longer period, each committee would determine reasonable charges therefor or given the social circumstances of the couple extend the free stay of the couple for such period as deemed necessary in the facts of the case.”

70. While disposing of the above-said petition vide order dated 25.07.2012 Hon'ble Division Bench of this Court had observed as under:-

“The matter is pending before the Court since long for monitoring only. All the runaway couples are being provided security as and when they approach the Court. The Shelter Homes in both the States and Union Territory, Chandigarh are also available for them. We feel that this petition does not require further monitoring. Accordingly, we dispose of this writ petition by issuing directions to both the States of Punjab & Haryana and Union Territory, Chandigarh to comply with the directions issued by this Court on 15.10.2010. In addition to above, further direction is issued that at every District Headquarters instead of earmarking any particular place(s), the authorities shall keep available minimum two rooms in the Circuit Houses/PWD Rest Houses and shelter be provided to the newly wedded couples as and when orders are issued by the District Judge, Deputy Commissioner and Senior Superintendent of Police of the concerned district. It is made clear that to get protection, the runaway couples can approach any of the District Judge in the States of Punjab & Haryana and Union Territory, Chandigarh and also Deputy Commissioner and Senior Superintendent of Police in all the districts of the above States and Union Territory, Chandigarh, irrespective of the place of their residence.

In view of above, direction No. (x) issued earlier vide order dated 15.10.2010 deemed to have been deleted from the order. The facilities to be provided to runaway couples will be reviewed by the officer who initially will pass an order granting shelter to the runaway couples

and/or by the Committee as mentioned in Clause No. (ix) in the above order. If necessary, legal aid services shall be provided to the couples in need of shelter.”

71. In the very nature of things, these directions for protection of rights of couples will apply in case of marriage by a man or woman who is major with a man or woman who is also major and will not, therefore, apply to cases of child marriages in which the question of protection to the minor girl child will be governed by the provisions of the JJ Act.

72. 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.

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

"176.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'etre 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."

74. In *Independent Thought Case (Supra)* Hon'ble Supreme Court further 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)

75. In *Independent Thought's Case (Supra)* Hon'ble Supreme Court emphasised the need of eradicating the social evil of child

marriages as under :-

“Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today.”

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

“104. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day - Akshaya Trutiya - when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realizes and appreciates this.”

77. The Courts are no less bound by the Constitutional morality and being bound by the oath to “uphold the Constitution and the laws” have to give due effect to the same.

78. 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 enjoy all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoy 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.

79. In ***Court on its own motion (Lajja Devi)'s Case (Supra)***, a 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."

80. It is now well settled that girl child in need of care and protection under Section 2 (14) (xii) of the JJ Act cannot be kept in a Nari Niketan/Special/Observation Home meant for juveniles in conflict with law established under the JJ Act. For judicial precedents reference may be made to ***Neetu Singh v. State (Delhi) : 1999(1) P.L.R. 47; Rukshana Vs. Govt. of NCT of Delhi (Delhi) : 2007(3) R.C.R.(Criminal) 542; Balwinder Singh @ Binder Vs. State of Punjab (P&H) : 2008(3) R.C.R.(Criminal) 1*** and ***CRWP-4725-2021 titled as 'Seema Kaur and another Vs. State of Punjab and others' decided on 03.06.2021.***

81. In ***Parminder Singh's Case (Supra)***, while holding that custody of married minor girl child cannot be handed over to the husband, this Court observed as under:-

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. "

82. It follows from the above referred statutory provisions and judicial precedents that the fundamental right to protection of life and liberty does not extend to protection of the minor girl for residing with

her husband or a person of her choice in live-in-relationship in the nature of marriage and her life and liberty have to be protected by sending her to Child Care Institution under the orders/supervision of the Child Welfare Committee or to her parents, if so consented to by her or to her parents-in-law or some other relative on such terms and conditions as considered appropriate by the Court.

83. It crystallizes from the above discussion that a minor girl aged above 15 years who has not attained marriageable age of 18 years may solemnize marriage with a person of her choice but in view of the provisions of the PCM Act, POCSO Act, the IPC and the observations made by Hon'ble Supreme Court in *Independent Thought's Case (Supra)* such marriage cannot be legally enforced to allow consummation thereof and entrustment of her custody to her husband; that a minor girl is not entitled to reside with a person of her choice in live-in-relationship in the nature of marriage; that a minor girl cannot give consent to any person of her choice for her removal from lawful guardianship and sexual relationship with her for consummation of marriage or live-in-relationship in the nature of marriage and her consent is immaterial, if she was enticed or taken away out of lawful guardianship and that any such person of her choice with whom she wants to live in live-in-relationship cannot purport to act as her guardian and claim her custody without seeking order from Guardian Judge/Family Court under the GW Act or the HMG Act as the case may be. The fundamental right of such minor girl child to protection of life and liberty does not extend to protection of the minor girl for residing with her husband or a person of her choice in live-in-relationship in the

nature of marriage and her life and liberty have to be protected by sending her to Child Care Institution under the orders/supervision of the Child Welfare Committee or to her parents, if so consented to by her or to her parents-in-law or some other relative on such terms and conditions as considered appropriate by the Court.

84. It may also be observed here that judgments delivered before enactment of the PCM Act, POCSO Act and also before reading down of exception 2 to Section 375 of the IPC by Hon'ble Supreme Court vide its judgment in *Independent Thought's Case (Supra)* or judgments passed thereafter per incuriam (in ignorance) thereof are no longer good law. In view of this legal perspective, the observations in ***CRWP-196-2020 titled as 'Poonam and another Vs. State of Punjab and others' decided on 10.08.2020*** are not of any help to the petitioner.

85. In View of the above discussion the petition is partly allowed with directions as under:-

- (i) Petitioner No.1 be kept in Ashiana, Sector-15, Chandigarh till attaining of majority by her but her custody may be entrusted to her father or some other relative, if so consented to by her;
- (ii) The expenses for her boarding and lodging in Ashiana, Sector-15, Chandigarh till attaining of majority by her shall be borne by the State of Punjab;
- (iii) Petitioner No.1 shall be allowed to continue her education and will be provided educational material for skilled development;
- (iv) Some vocational training regarding one of the trades/occupation such as sewing/cooking/computer applications/fashion designing etc. will be provided to her;

- (v) father of petitioner No.1, petitioner No.2 or any other person shall be entitled to meet petitioner No.1 during her stay in Ashiana, Sector-15, Chandigarh subject to her convenience and consent;
- (vi) respondents No.12 to 14 shall take appropriate steps as warranted by threat perception to ensure that the petitioners are protected from any physical harm at the instance of respondents No.4 and 6 to 10 in any manner; and
- (vii) the Member Secretary, State Legal Services Authority, U.T., Chandigarh and Child Welfare Committee, Chandigarh shall look after the welfare of petitioner No.1 during the period she is kept in Ashiana, Sector-15, Chandigarh by having requisite interaction with her through any of the Members or officers/officials and provide requisite assistance including financial help and care to her. Needless to observe that the State Legal Services Authority, U.T. Chandigarh and/or the Child Welfare Committee, U.T. Chandigarh shall be at liberty to approach this Court for appropriate directions as may be required in the facts and circumstances.

86. However, it is clarified that in case any criminal case has been/is registered against petitioner No.2, then nothing in this order shall be construed as a bar for taking of appropriate action by the police authorities against him in respect thereof in accordance with law.

87. Before parting with this case it may be observed that in ***CRWP-496-2015 titled as 'Court on its own motion Vs. State of Punjab' decided on 30.03.2015*** a Coordinate Bench had observed as under:-

“This Court on its visit had also noticed the deplorable state of affairs existing in the protection home.

More than 30 girls were cramped in a small room with hardly any light or air. Similarly, the sanitation conditions were offensive. It would be a moot question that these young girls would be even getting all the requisites necessary for their personal hygiene. Apart from this, there would be issues related to the girls who are destitutes having no place to go and forced to live under the only roof available to them as a protection home. Such girls are likely to grow idlers in the absence of any educative facility or constructive activity available to them. Even though there is a semblance of a school being run in the protection home but that may not be sufficient if such girls are to be equipped with knowledge and skill to enable them to stand on their own feet. The Legal Services Authority in the State of Punjab may consider making arrangements on the following subjects, if permissible :-

- (1) Making available educational material to the inmates along with requisite infrastructure for skill development.*
- (2) Local institutions imparting education such as techniques of sewing, cooking, computers, fashion designing etc. be encouraged or roped in to make such training in vocational skills as this would be the best way to prepare these destitutes to meet the challenges of the society and to thwart exploitation.....”*

These directions do not appear to have been fully executed and much more needs to be done for such minor girls who leave their parental homes with paramour on account of love affair or alone or in company of some friend due to maltreatment by their parents or putting of pressure on them to marry a person of the choice of their parents. On being recovered by the police, they are more often than not sent to Nari Niketan/Special Home/Observation Home meant under the JJ Act for juveniles in conflict with law and not to any Child Care Institution. Such Child Care Institution lack the requisite budgetary and infrastructural facilities. In order to ensure the welfare of such minor girls in need of care and protection, to prevent abuse of process and securing ends of justice by due compliance with the provisions of the JJ

Act, directions are issued as under:-

Directions to States of Punjab and Haryana and U.T. Chandigarh

States of Punjab and Haryana and U.T. Chandigarh are directed to :

- (i) identify/notify Child Care Institutions already identified in each district or group of district as may be viable and provide them requisite financial assistance as may be required and to closely monitor/supervise their working so as to ensure that minor girls in need of care and protection are not subjected to any miseries or exploitation;
- (ii) ensure that such minor girls in need of care and protection are prompted and allowed to continue their education from the educational institutions in which they were studying as far as possible; and
- (iii) take all requisite steps for providing vocational training to such minor girls in need of care and protection, apart from continuing of their formal education, in sewing, computer applications, cooking and fashion designing etc. to enable them to earn their livelihood on attaining of majority.

Directions to State Legal Services Authorities, Punjab, Haryana and U.T. Chandigarh :

State Legal Services Authorities, Punjab, Haryana and U.T. Chandigarh are directed to

- (i) prepare a scheme/widen the scope of scheme if already prepared for providing requisite assistance including legal aid to such minor girls in need of care and protection for redressal of their grievances and also such financial help as may be required; and
- (ii) direct Secretary of the concerned District Legal Services Authority to himself visit and also depute some legal aid Counsel to periodically visit such Child Care Institutions where minor girls in need of

care and protection are kept under the orders of this Court or any of the Courts in the District for assessment of their living conditions for the purpose of suggesting any improvement and assisting them in redressal of their grievances.

Directions to District/Subordinate Courts.

The concerned District/Subordinate Courts are directed to ensure that minor girls in need of care and protection are not sent to Nari Niketan/Special Home/Observation Home meant for juveniles in conflict with law and are sent to proper Child Care Institutions with proper budgetary and infrastructural facilities.

88. A copy of this order be supplied to learned State Counsel for the States of Punjab and Haryana and learned Additional Public Prosecutor for U.T. Chandigarh, the Member Secretaries of State Legal Services Authorities, Punjab, Haryana and U.T. Chandigarh and District and Sessions Judges in the States of Punjab, Haryana and U.T. Chandigarh for requisite compliance.

89. This Court also records its appreciation of the hard work done and invaluable assistance rendered to this Court by Mr. Amit Jhanji and Ms. Gursharan Kaur Mann, Senior Advocates, who were appointed as Amicus Curiae, in dealing with the questions involved in the case.

31.08.2021
kothiyal

(ARUN KUMAR TYAGI)
JUDGE

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