A.F.R.

Reserved on 10.02.2021
Delivered on 08.03.2021

Case :- **HABEAS CORPUS WRIT PETITION No.362 of 2020**
Petitioner :- Km. Rachna and another
Respondent :- State of U.P. and 4 others
Counsel for Petitioner :- Avinash Pandey,Amicus,Sri Shagir Ahmad
Counsel for Respondent :- G.A.,J K Upadhyay
Hon'ble Sanjay Yadav,J.
Hon'ble Mahesh Chandra Tripathi,J.
Hon'ble Siddhartha Varma,J.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Saghir Ahmad, learned Senior Advocate/Amicus Curiae and Sri Manish Goyal, learned Additional Advocate General, assisted by Sri Amit Sinha and Sri J.K.Upadhyay, learned Additional Government Advocates for the State of U.P.

2. This writ petition has been listed before us in view of reference made by a Division Bench of this Court, considering the various provisions of the Juvenile Justice (Care and Protection of Children) Act 2015[1] and the law laid down by various Courts. While referring the case to Hon'ble the Chief Justice to constitute a larger Bench, the Division Bench framed following issues to be decided by the larger Bench:-

> "(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?;
>
> (2) Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?; and
>
> (3) Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes, is legally valid or it requires a

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1. J.J. Act

modified approach in consonance with the object of the Act ?"

3. Since the reference is desired to be resolved by the larger Bench, the same has come up for consideration before us under the order of Hon'ble the Chief Justice dated 26.1.2021.

4. Present Habeas Corpus Writ Petition has been filed by the petitioners seeking a writ of habeas corpus, commanding 4th respondent/Superintendent, Children Home (Girl), District Saharanpur to release corpus/2nd petitioner Km. Anchal, who has been illegally detained in the Children Home (Girl) District Saharanpur.

5. Brief matrix of the case, as is reflected from the record, is that the first information report was lodged by the mother of second petitioner on 16.2.2020, alleging that on 15.2.2020 her minor daughter Km. Anchal[2] aged 17 years has been enticed by one Arjun S/o Rishipal. She also alleged that while leaving the house, the petitioner corpus had taken certain ornaments and cash amount. She also alleged that the father, mother and brother of Arjun had helped him in taking the petitioner corpus. The first information report was registered under Sections 363 and 366 of IPC against Arjun, his parents and relatives at Police Station Behat, District Saharanpur. The petitioner corpus was recovered on 04.3.2020 and on the same day, her statement under Section 161 Cr. P.C. was recorded, wherein she alleged that as quite often, she was beaten by her mother and out of frustration, without informing her parents, she had left home on 15.2.2020 and gone to the house of her friend namely Km. Rachna-first petitioner (sister of Arjun). She made a statement that she had gone of her own freewill and was living with her friend. However, she refused for medical examination. As per High School Certificate,

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2. petitioner corpus

her age has been found to be 17 years, whereas as per radiological examination conducted on 06.3.2020, her age was found to be about 20 years. Her statement under Section 164 of Cr. P.C. was also recorded on 07.3.2020, wherein she also reiterated her previous statement made under Section 161 Cr.P.C.

6. Thereafter, the petitioner corpus was produced before the Chief Judicial Magistrate, Saharanpur on 13.3.2020. It was submitted by the police that as per High School Certificate, the age of the petitioner corpus is 17 years & 20 days and, therefore, suitable order be passed in regard to her custody. The mother of petitioner corpus also filed an application before the Chief Judicial Magistrate to the effect that the petitioner corpus is minor and, therefore, in the interest of justice, she may be sent to Balika Vikas Grih/Child Development Home. The finding was recorded by the Magistrate, determining the age of petitioner corpus to be 17 years. The Magistrate had directed for producing her before Bal Kalyan Samiti/Child Welfare Committee[3] for issuance of further direction with regard to the custody of petitioner corpus. Pursuant to the order passed by the Magistrate, the petitioner corpus was produced before the Committee and an order was passed by the Committee for keeping her in Children Home (Girl). Pursuant to the said order, the petitioner corpus is in Children Home (Girl) Saharanpur.

7. Aggrieved with the said order, the present petition has been preferred for issuance of a writ of habeas corpus. While pressing the writ petition before the Division Bench, it has been urged that in her statement under Section 164 of Cr. P.C., the petitioner-corpus has categorically stated that on account of torture by her mother and brother, she left her house and is living happily with the first petitioner. Once the custody of the petitioner corpus has

3. 'the Committee'

been denied by her parents, the petitioner corpus wanted to go with the first petitioner and therefore, she cannot be sent to Children Home (Girl) against her wishes. Even if the petitioner corpus is minor, she cannot be kept in Children Home (Girl) against her wishes.

8. Before the Division Bench, learned A.G.A. opposed the petition by claiming that the petitioner corpus is minor as per her date of birth recorded in the High School certificate. It has been urged that the age of the petitioner corpus is to be determined by applying the principles provided in Section 94 of the J.J. Act under which primacy is to be recorded to the date of birth entered in the educational certificate over the medical evidence. It has also been objected by learned A.G.A. that the writ of habeas corpus is not maintainable as the order impugned has been passed by the Committee pursuant to the order of the Magistrate and the judicial order, right or wrong cannot be questioned/assailed in petition seeking writ of hapeas corpus. It has also been urged that the petitioner corpus has efficacious alternative remedy of filing an appeal under Section 101 of the J.J. Act. The plea was taken that the Committee had exercised the power of Magistrate and in view of the provisions of Section 27 of the J.J. Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate then it can only be assailed before the appropriate Court by filing an appeal.

9. The Division Bench considered two sets of judgements; (i) the first set of judgements laid down the law that writ of habeas corpus is maintainable, even if the same has been filed against a judicial order of the Magistrate, sending the corpus to Juvenile Home/Nari Niketan/Child Care Home or any other Home duly authorized/recognized and (ii) in second set of judgements,

contrary view has been taken by the coordinate Benches of this Court, wherein it has been held that if a corpus has been sent to the Juvenile Home/Nari Niketan/Child Care Home pursuant to the order passed by the Committee, detention of the corpus cannot be said to be illegal, requiring issuance of a writ of habeas corpus.

(**FIRST SET OF JUDGEMENTS**)

10. The reliance has been placed before the Division Bench on the judgement of this Court in **Menu Patel vs. State of UP**[4], wherein it has been held as under:-

> "9. The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that: "no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

11. Similar view has also been taken in (**Smt. Neelam vs. State of Uttar Pradesh and** ors[5] in which a Division Bench of this Court has again held that:-

> "The issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of Smt. Kalyani Chowdhary v. State of U.P. reported in 1978 Cr. L.J. 1003 (D.B.), a Division Bench of this Court has taken the view that: "no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

12. The reliance has also been placed on the judgement in

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4. 2015 SCC OnLine All 5892
5. Habeas Corpus Writ Petition No.36519 of 2015 decided on 20.7.2015

Pushpa Devi vs. State of Uttar Pradesh & ors[6], wherein it was held:-

> "In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.
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> We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.
>
> Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct detention of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors."
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> (emphasis supplied)

13. The Division Bench in the case of **Smt. Raj Kumari vs. Superintendent, Women Protection, Meerut &** ors.[7] had taken a similar view and held as under:-

> "In view of the above, it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter, petitioner has desired to go with Sunil Kumar besides this according to the two medical reports, i. e. of the Chief Medical Officer and L. L. R. M., College Meerut, the petitioner is certainly not less than 17 years and she understands her well being and also is capable of considering her future welfare. As such, we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23.11.96 passed by the Magistrate directing her detention till the party

6. 1994 HVVD (All) C.R. Vol. II 259
7. 1997 (2) A.W.C. 720

> concerned gets a declaration by the civil court or the competent court of law regarding her age, is not sustainable and is liable to be quashed."

14. Before the Division Bench, the reliance has also been placed on the judgement passed in **Kajal & another vs. State of Uttar Pradesh & ors**.[8], wherein it has been held as under:-

> "It may also be appreciated that the issue whether the victim/corpus who is a minor, can be sent to Nari Niketan against her wish, is no longer res-integra and has been conclusively settled by a catena of decisions of this Court. In the case of **Smt. Kalyani Chowdhary v. State of U.P**.[9], a Division Bench of this Court has taken the view that:
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> "no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."
> ... ...
> Thus, merely because the petitioner has been sent to Nari Niketan pursuant to a judicial order which per se appears to be without jurisdiction, her detention cannot be labelled as "legal" rendering this Habeas Corups writ petition liable to be dismissed as not maintainable."

(**SECOND SET OF JUDGEMENTS**)

15. Contrary view has been taken by the coordinate Bench of this Court in the case of **Saurabh Pandey v. State of Uttar Pradesh**[10], which reads as under:-

> "10. Once the corpus is found a child, as defined by Section 2 (12) of the J.J. Act, 2015, and, allegedly, a victim of a crime (in this case Case Crime No.475 of 2018 detailed above), she would fall in the category of child in need of care and protection in view of clauses (iii), (viii) and (xii) of sub-section (14) of section 2 of the J.J. Act, 2015. Hence, the order passed by the Child Welfare Committee placing the corpus in a protection home would be within its powers conferred by section 37 of the J.J. Act, 2015.
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> 11. In view of the above, as the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the

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8. Habeas Corpus Writ Petition No.3914 of 2018 decided on 22.2.2019
9. 1978 Cr. L.J. 1003 (D.B.)
10. 2019 SCC OnLine All 4430

> provisions of the J.J. Act, 2015, the detention of the corpus cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order of the Child Welfare Committee, the petitioner is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015."

16. Similar view has also been taken in the case of **Smt. Shahjahan v. State of Uttar Pradesh & Ors**.[11], wherein it has been observed as under:-

> "6. Having considered the submissions raised and the aforesaid background, once the petitioner has already filed a revision in relation to the custody of the same victim against the order dated 8.10.2014 that is stated to be pending, it cannot be said that the victim is under unlawful custody.
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> 8. The victim, therefore, does not appear to be in unlawful custody and, therefore, the present Habeas Corpus Writ Petition in the aforesaid background would not be maintainable. It is open to the petitioner to seek her remedy in the revision which she has filed before the appropriate Court."

17. Further, in the case of **Km. Mona @ Reema v. State of Uttar Pradesh**[12] it has been held as under:-

> "After considering the facts and circumstances of the case, the corpus was sent to Muzaffarnagar by learned A.C.J.M., Court No. 3, Muzaffarnagar on 9.5.2013. It is a very serious case in which a girl of the Bihar State has been kidnapped who herself lodged the FIR in police station, Nai Mandi, Muzaffarnagar (U.P.). On the application moved by the I.O. she has been sent to Nari Niketan, Meerut by learned A.C.J.M., Court No. 3, Muzaffarnagar vide order dated 9.5.2013. The order dated 9.5.2013 is not suffering from any illegality and irregularity. The order has been passed in welfare of the corpus. The deponent of this writ petition Nadeem Ahmad is real brother of the accused Intazar, it appears that this petition has been filed with ulterior motive without disclosing the credential of the person who has filed this writ petition on behalf of the corpus Km. Mona @ Reema. The corpus has been sent from Muzaffarnagar to Meerit in pursuance of the judicial order dated 9.5.2013, in any case her detention is not illegal. The present writ petition is devoid of merit, therefore, the prayer for setting the corpus on her liberty is refused."

18. In the case of **Guria Bhagat @ Guria Rawani v. State of Jharkhand & Ors**[13] it has been held as under:-

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11. 2015 SCC OnLine All 5224
12. 2014 SCC OnLine All 7099
13. 2013 SCC OnLine Jhar 2149

> "5. ... ... Thus, in no circumstances, it can be said that the custody of the petitioner with the Nari Niketan at Deoghar is an illegal custody. If the petitioner is aggrieved by the order of Judicial Magistrate, First Class, Dhanbad, she is at liberty to challenge the same in accordance with law before an appropriate forum. So far this writ of Habeas Corpus is concerned, the same is not tenable at law as the custody of the present petitioner with the Nari Niketan at Deoghar is by virtue of the order of Judicial Magistrate, First Class, Dhanbad dated 26.9.2013 and more particularly, when the application preferred by the petitioner for her release has been rejected by the Judicial Magistrate, First Class, Dhanbad by a detailed speaking order dated 22.10.2013. These two orders, make the custody of the petitioner with the Nari Niketan at Deoghar is a legal one. Unless these two orders are challenged in an appropriate matter before the appropriate forum as per the law applicable to the petitioner as well as the respondent, there is no substance in this writ petition. Hence, the same is hereby dismissed, reserving the liberty with the petitioner to challenge the orders passed by the Judicial Magistrate, First Class, Dhanbad."

19. In **Smt. Himani v. State of Uttar Pradesh & Ors**.[14] it has been held that:-

> "9. Considering the facts, circumstance of the case, submission made by learned counsel for the petitioner, learned A.G.A.for the State of U.P., counsel appearing on behalf of respondent no.4 and counsel appearing on behalf of Pt. Vigyan Prakash Sharma, it appears that in the present case the corpus was allegedly kidnapped by Devendra Singh alias Bunty on 20.6.2012, its FIR has been lodged on 2.7.2012 in case crime no. 111 of 2012 under sections 363, 366 I.P.C., Police Station Nangal District Bijnor. According to the school certificate, the date of birth of the corpus is 10.5.1996, but according to the first medical examination report she was aged about 19 years but according to second medical examination done by Medical Board, constituted by C.M.O. Bijnor, she was found above 18 years and below 20 years of age. According to the statement recorded under section 164 Cr.P.C., she has not supported the prosecution story, she stated that she had gone in the company of Devendra Singh alias Bunty with her free will and consent. The Marriage certificate filed with this petition as Annexure-2 shows that it has been issued by Pt. Vigyan Prakash Sharma, Purohit of Sri Jharkhand Mahadeo Mandir on 24.2.2012 mentioning therein that the corpus and Devendra Singh have performed marriage in the temple on 24.2.2012 at 5.30 P.M. but marriage certificate shows that it was not bearing the signatures of family members of corpus and Pt. Vigyan Prakash Sharma was not legally authorized to issue such type of marriage certificate but Pt. Vigyan Prakash Sharma who appeared before this Court tendered his unconditional apology and assured the Court that in future he shall not issue such type of certificate, therefore, this Court is restrained to proceed further against Pt. Vigyan Prakash Sharma by accepting unconditional apology tendered by him. According to the school record, the date of birth of the corpus is 10.5.1996, according to her

14 2013 SCC Online ALL 1308

date of birth she was minor aged about 16 years on the date of the alleged incident. In such an age, she was playing with emotions and she was not capable to foresee her future prospects of her life. The corpus has refused to go in the company of her father. In such circumstances, the learned Judicial Magistrate/Civil Judge (J.D.) Najibabad, District Bijnor sent the corpus to Nari Niketan Moradabad vide order dated 24.7.2012. The order dated 24.7.2012 is not suffering from any illegality or irregularity. The corpus has been detained in Nari Niketan Moradabad in pursuance of the judicial order dated 24.7.2012, therefore, her detention is not illegal. The present petition is devoid of the merits. The prayer for quashing the impugned order dated 24.7.2012 is refused."

20. In the case of **Akash Kumar v. State of Jharkhand & Ors.**[15] it has been held by the Jharkhand High Court that:-

"4. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, we see no reason to entertain this writ of Habeas Corpus mainly for the following facts and reasons:

(i) It appears that the custody of this petitioner is with the respondent State in pursuance of the judicial order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 which is at Annexure-5 to the memo of this writ application. Once the custody with the State is in pursuance of the judicial order, it cannot be said that the State is having illegal custody of the petitioner and, hence, the writ of Habeas Corpus is not tenable, at law.

(ii) Learned counsel for the petitioner has relied upon Sections 6, 7 and 14 of the Juvenile Justice Act, 2000 and submitted that the order passed by the Judicial Magistrate, 1st Class in G.R. No. 2366 of 2013 is de hors the provisions of this Act and, hence, custody with the respondent is illegal. The contention for issuance of prerogative writ of Habeas Corpus under Article 226 of the Constitution of India, is not accepted by this Court. For issuance of the writ of Habeas Corpus in exercise of power under Article 226 of the Constitution of India, it must be established by the petitioner that the custody with the State of any person is illegal. Here, there is no illegal custody of the petitioner with the respondents, on the contrary, this is as per the order passed by the Judicial Magistrate, 1st Class, Ranchi in G.R. No. 2366 of 2013 dated 27th May, 2013 (Annexure-5). The order passed by the concerned trial court may be illegal, but, the custody with the respondent State is absolutely legal. It is one thing that the order passed by the Judicial Magistrate, 1st Class, Ranchi may be illegal and it is altogether another thing so far as custody with respondent-State is concerned, otherwise, in all bail matters, there shall be writ of Habeas Corpus. If the argument of the counsel for the petitioner is accepted, in bail application also under Section 439 of the Code of Criminal Procedure, where person is in judicial custody by virtue of the order

15. 2014 (19) R.C.R. (Criminal) 816

> passed by the learned trial court, writ of Habeas Corpus should be filed. This is a fallacy in the argument canvassed by the counsel for the petitioner. Until and unless the order passed by the Judicial Magistrate, 1st Class, Ranchi in this case is quashed and set aside by the competent court in appropriate proceeding, the custody of the petitioner with the respondent-State is legal."

21. The Division Bench has also considered the judgement passed by Madhya Pradesh High Court in the case **Irfan Khan v. State of MP & Ors**.[16] The Gujarat High Court, in **Manish S/o Natvarlal Vaghela vs. State of Gujarat**[17] has dealt with the similar question and held that:

> "11. It is pertinent to note that the allegations of the petitioner are regarding non-compliance of various provisions of the Act and Rules. Against this, the Child Welfare Committee has came with a case that after following procedure and getting order from the Court, it has given the child to adoptive father. Therefore, when the child has been given in adoption by the order of the Court to adoptive parents, then that act cannot be treated as an illegal act of granting custody of minor. Even if there is lack of following due procedure under the Act and Rules by the Child Welfare Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings. When there is an efficacious alternative remedy available, writ of habeas corpus cannot be issued especially when the Child Welfare Committee has got necessary orders from the Court before handing over the custody of minor to adoptive parents.

22. The Division Bench also considered the Full Bench judgement passed by Patna High Court in the case of **Shikha Kumari v. State of Bihar**[18], wherein the matter was referred to the larger Bench and it has held by the Bench that:

> "67. Thus, it is evident that a writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate forum under the statutory provisions of law but cannot be reviewed in a petition

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16. 2016 (3) MPLJ 449
17. Special Criminal Application No.5659 of 2019 decided on 23.12.2019
18. 2020 CRI. LJ 2184

seeking the writ of habeas corpus.

68. We, accordingly, sum up our conclusions in respect of the first three issues for determination as follows:-

Question No.1 : "Whether, in a petition for issuance of writ of habeas corpus, an order passed by a Magistrate could be assailed and set-aside?"

Answer : Our irresistible conclusion in view of the ratio laid down by the Supreme Court in the aforementioned cases is that a writ of habeas corpus would not be maintainable, if the detention in custody is as per judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction. Consequently an order of remand passed by a Judicial Magistrate having competent jurisdiction cannot be assailed or set aside in a writ of habeas corpus.

Question No.2: "Whether an order of remand passed by a Judicial Magistrate could be reviewed in a petition seeking the writ of habeas corpus, holding such order of remand to be an illegal detention ?"

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate passing an order of remand can be cured by way of challenging the legality, validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate court under the statutory provisions of law. Such an order of remand passed by a Judicial Magistrate of competent jurisdiction cannot be reviewed in a petition seeking the writ of habeas corpus.

Question No.3: "Whether an improper order could be termed/viewed as an illegal detention ?"

Answer: In view of the clear, unambiguous and consistent view of the Supreme Court in the aforediscussed cases, we unhesitatingly conclude and hold that an illegal order of judicial remand cannot be termed/viewed as an illegal detention."

23. The Division Bench has also proceeded to observe that apart from above mentioned cases, attention of this Court has also been drawn to many other cases, wherein issuance of a writ of habeas corpus has been held to be maintainable, whereas in some cases, the view of this Court is otherwise. Such situation impelled the Division Bench for formulating the aforementioned questions to be decided by the larger Bench.

24. Sri Saghir Ahmad, learned Senior Advocate/Amicus Curiae submitted that the habeas corpus writ petition is not maintainable

and the efficacious remedy of the petitioner is to file an appeal.

25. Sri Manish Goyal, learned Additional Advocate General, appearing for the State of U.P., submitted that the writ of habeas corpus is not maintainable as the order impugned has been passed by the Committee pursuant to the order of the Magistrate and the judicial order, right or wrong, cannot be challenged in a petition seeking writ of habeas corpus. The petitioner corpus has an efficacious alternative remedy of filing an appeal under Section 101 of J.J. Act and the judicial order can only be challenged before the appellate Court. While passing the order impugned, the Committee has exercised the power of Magistrate and in view of the provisions of Section 27 of the J.J. Act, for all purposes, the Committee acts like the Magistrate. Once the order has been passed by the Magistrate, then it can only be assailed before the appropriate Court by filing an appeal.

26. It has been submitted that sub-section (4) of Section 1 of J.J. Act provides that provision of the J.J. Act shall apply to all the matters concerning children in need of care and protection and children in conflict with law. He has also placed reliance on Section 2 (14) (iii) (a) of J.J. Act, which provides that “child in need of care and protection” means a child who resides with a person (whether a guardian of child or not) and such person has injured, exploited, abused or neglected the child or has violated any other law for the time being in force for the protection of child. Therefore, the girl child detained in Nari Niketan/Children Home will come under child in need of care and protection. In such situation, Section 27 of J.J. Act would be attracted, wherein there is provision of Child Welfare Committee, which deals with child in need of care and protection and the State Government has been empowered to constitute for every district, one or more

Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection. Section 27 (9) provides that the Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class. Under Sections 29 and 37 of J.J. Act, the Child Welfare Committee has powers to send the children to children's home or fit facility etc. Therefore, he submitted that a person aggrieved by an order passed by the Child Welfare Committee can file an appeal in the Children Court under Section 101 of the J.J. Act. The order passed by the Committee pursuant to which the corpus has been sent to Children's Home or Nari Niketan is a judicial order and hence, the detension of corpus cannot be termed to be illegal. Moreover, the order passed by the Committee is appealable and hence the Habeas Corpus Petition is not maintainable and is liable to be dismissed.

27. Shri Manish Goyal, learned Additional Advocate General further submitted that in **Smt. Neelam vs. State of UP & 4 others** (supra); **Rahul Kumar Singh & another vs. State of UP** [19] and **Kajal & another vs. State of UP and ors** (supra), as relied upon by the Division Bench, wherein the Habeas Corpus Writ Petitions had been maintained, the Court had failed to consider the provisions of J.J. Act and as such, it may safely be said that the orders passed in the aforesaid cases are per incuriam. In support of his submission, he has placed reliance on the judgement passed by the Full Bench of Patna High Court in **Shikha Kumari vs. State of Bihar** (supra) and submitted that so far as the questions formulated by this Court are concerned, in

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19. Habeas Corpus Writ Petition No. 47442 of 2015 decided on 15.9.2015

similar circumstances, the Patna High Court in **Shikha Kumari**'s case (supra) has considered and answered all the three questions.

28. Having heard the parties, apart from considering the issues referred by the Division Bench, we need to deal with certain ancillary issues attached in cases of elopement of minor girls and on recovery, sending them to Nari Niketan/Protection Home/Care Home. We find increasing number of habeas corpus petitions being filed by the parents/guardians or alleged husband for production of their wards or wife, who leave their parental houses in these “Run away Marriages”. While the parents of the couples go through agony, the couples are on the run with husband being accused of kidnapping and/or rape. The Court while dealing with habeas corpus petitions are required to ensure that the person whose production is sought is not illegally detained. For this purpose, the court ascertains whether the person is being detained against his/her wishes or is otherwise illegally detained and gives directions, as required. In most of the cases, where a minor girl after meeting her parents and/or on reflection has second thoughts about her marriage or escaped, her custody is restored to parents as in the first case. Generally, difficulty arises in cases where the minor girl has entered into matrimonial alliance and is steadfast in her resolve to continue to cohabit with the partner of her choice. At times, the girl is even on family way.

29. Let us notice the legal position with regard to marriages performed with below the prescribed age under the “Hindu Mariage Act, 1955” and the “Child Marriage Restraint Act,1929”. For facility of reference, we reproduce the relevant provisions contained in Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act, 1955.

> "5. **Conditions for a Hindu Marriage.**- A marriage may be solemnized between any two Hindus, if the following conditions are

fulfillled, namely:-
(i) ...
(ii) ...
(iii) the bridegroom has completed the age of (twenty one years) and the bride, the age of (eighteen years) at the time of the marriage;
(iv) ...
(v) ...

11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void any may, on a petition presented by either party thereto (against the other party), be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12. Voidable marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-
(a) that the marriage has not been consummated owing to the impotence of the respondent; or
(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or
(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner (was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force (or by fraud as to the nature of Page 2375 the ceremony or as to any material fact or circumstance concerning the respondent); or
(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.
(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-
(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if -
(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or
(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;
(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-
(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized; after
(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of (the said ground)."

18. **Punishment for contravention of certain other conditions for**

> **Hindu marriage**.- Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions Page 2377 specified in clauses (iii), (iv), and (v) of Section 5 shall be punishable-
> (a) in the case of a contravention of the condition specified in clause (iii) of section 5 with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;
> (b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both."

30. From a perusal of the grounds given in Sections 11 and 12 of the Hindu Marriage Act, as reproduced above, it would be seen that contravention of the prescribed age under Section 5(iii) of the Act is not given as a ground on which the marriage could be void or voidable. We are also conscious that the Legislature at the same time desired to discourage child marriages. To fulfill such an obligation the Legislature enacted “Child Marriage Restraint Act, 1929”. The object and intent of the Act is to prevent child marriages. Definition of child is, "For a male who has not completed 21 years of age and for a female, who has not completed 18 years of age”. The Act aims to restrain performances of child marriages. At the same time, the said Act does not affect the validity of a marriage, even though it may be in contravention of the age prescribed under the Act. In spite of the marriage not being declared void or made voidable, no doubt the Legislature disapproves of child marriages and makes the performance of such marriage punishable under the law with imprisonment which can extend up to three months and with fine. Even Section 12 of the Act provides to issue an injunction to prevent performance of any child marriage. There appears to be a rationale and public policy in the Legislature not making marriages solemnized in breach of the statutory age, as prescribed under the Hindu Marriage Act and the Child Marriage Restraint

Act, void or voidable. The Legislature was conscious of the fact that if such marriages performed in contravention of the age restriction, are made void or voidable it could lead to serious consequences and exploitation of the women, who are vulnerable on account of their social and economic circumstances. Both the Acts are aimed to discourage performance of such marriages by making them punishable with imprisonment and fine, while recognizing the necessity of protecting marriages performed even though in contravention of the prescribed age as valid and subsisting. (Ref. **Seema Devi @ Simran Kaur v. State of H.P.**[20] and **Lila Gupta v. Laxmi Narain**[21]**)**.

31. The Apex Court in **Lila Gupta v. Laxmi Narain** (supra) while reviewing the provisions of the Hindu Marriage Act in the context of a case falling within ambit of proviso to Section 15 observed as under:-

> "4. At the outset it would be advantageous to have a clear picture of the scheme of the Act. Section 5 prescribes the conditions for a valid Hindu Marriage that may be solemnized after the commencement of the Act. They are six in number. Condition No. (i) ensures monogamy. Condition No. (ii) refers t the mental capacity of one or the other person contracting the marriage and prohibits an idiot or lunatic from contracting the marriage. This condition incidentally provides for consent of the bride and the bridegroom to the marriage as the law treats them mature at a certain age. Condition (iv) forbids marriage of parties within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two. Condition No. (v) is similar with this difference that it prohibits marriage between two sapindas. Condition No. (vi) is a corollary to condition (iii) in that where the bride has not attained the minimum age as prescribed in condition (iii) the marriage will none the less be valid if the consent of her guardian has been obtained for the marriage. Section 6 specifies guardians in marriage who would be competent to give consent as envisaged by Section 5(vi). Section 11 is material. It provides that any marriage solemnised after the commencement of the Act shall be null and void and may on a petition presented by either party thereto be so declared by a decree of nullity if it contravenes any one of the conditions Page 2377 specified in Cls. (ii), (iv) and (v) of Section 5. Incidentally at this stage it may be noted that Section 11 does not render a marriage solemnised in violation of conditions (ii),

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20. 1998 (2) Crimes 168

21. AIR 1978 Supreme Court 1351

(iii) and (vi) void, all of which prescibe personal incapacity for marriage. Section 12 provides that certain marriages shall be voidable nullity on any of the grounds mentioned in the section. Clause (b) of sub-section (1) inter alia provides that the marriage in contravention of condition specified in Clause (ii) of Section 5 will be voidable. Similarly, sub-clause (c) provides that the consent of the petitioner or where consent of the guardian in marriage is required under Section 5 and such consent was obtained by force or fraud, the marriagbe shall be voidable, Section 13 provides for dissolution of marriage by divorce on any of the grounds mentioned in the section. Section 14 prohibits a petition for divorce being presented by any party to the marriage within a period of three years from the date of the marriage which period has been reduced to one year by Section 9 of the Marriage Laws (Amendment) Act, 1976. Then comes Section 15 as it stood at the relevant time, which is material for the purpose of this judgment and may be reproduced in extenso ...."

6. A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (i), (iv) and (v) of Section 5 only, void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of any one of them would be treated as a breach of a pre-requisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent on the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the fact is that while a marriage solemnised in contravention of Clauses (iii), (iv), (v) and (vi) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year ha not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the Court or first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (iii), (iv), (v) and (vi) of Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of a marriage being void though not Page 2378 covered by Section 11 such as in

> breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable."

32. The reference to "age of discretion" is to be seen in the context of the girls having left of their own without inducement or enticement for the purpose of the charge of kidnapping and not to suggest any approval of the errant conduct.

33. The matter is no longer res-integra. The question has been considered in several cases. In **Gindan and others v. Barelal**[22] the High Court of Madhya Pradesh held that a marriage solemnised in contravention of age mentioned in Section 5(iii) of Hindu Marriage Act is neither void ab initio nor even voidable and such violation of Section 5(iii) does not find place either in Section 11 or in Section 12 of the Act. The Court has said that it is only punishable as an offence under Section 18 and the marriage solemnised would remain valid, enforceable and recognisable in courts of law.

34. In **Smt. Lila Gupta v. Laxmi Narain and others** (supra) the Apex Court considered the proviso to Section 15 of the Hindu Marriage Act. While doing so, the Apex Court referred to the provisions of Section 5 and also Sections 11 and 12 of the Hindu Marriage Act. The following passages in the judgment of the Supreme Court are quite relevant and instructive:

> “6. A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (i), (iv) and (v) of Section 5 only' void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and

22 . AIR 1976 Madhya Pradesh 83

a contravention, violation or breach of anyone of them would be treated as a breach of a prerequisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent of the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the face is that while a marriage solemnised in contravention of clauses (iii), (iv), (v) and (vi) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year had not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the court of first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (i) (iv) and (v) are expressly declared void and marriages in breach of conditions Nos. (iii), (iv), (v) and (vi) of Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of a marriage being void though not covered by section 11 such as in breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable.

19. Similarly, a reference to Child Marriage Restraint Act would also show that the Child Marriage Restraint Act was enacted to carry forward the reformist movement of prohibiting child marriages and while it made marriage in contravention of the provisions of the Child Marriage Restraint Act punishable, simultaneously it did not render the marriage void. It would thus appear that voidness of marriage unless statutorily provided for is not to be readily inferred.

20. Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void."

35. Hon'ble Supreme Court had also considered the provisions of the Child Marriage Restraint Act and observed that any marriage in contravention of the provisions of the said Act would only lead to punishment and that the marriage would not be void.

In **Shankerappa v. Sushilabai**[23], the Court held that the marriage solemnised in violation of the conditions concerning age of eligibility of Section 5 (iii) would not be a nullity and such a violation is only made punishable under Section 18. The Court relied upon the judgment of the Supreme Court in Lila Gupta's case (supra). In most of the cases it has also been urged that the custody cannot be entrusted to the accused as he is facing a criminal trial under Sections 363, 366, 368 and 376 of the Indian Penal Code. So long as he is the husband and the marriage between him and the petitioner is valid, he is entitled to custody unless a competent Court passes an order otherwise.

36. In order to bring clarity to the matter, we deem it appropriate to consider whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee under Section 27 of the J.J. Act sending the victim to the Juvenile Home/Nari Niketan/Child Care Home and to firstly examine the literal meaning and ambit of writ of habeas corpus. In Halsbury Laws of England[24], it is observed :

> "The writ of habeas corpus ad subjiciendum" which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal."

37. According to Dicey (A. V. Dicey), Introduction to the Study of Law of the Constitution, Macmillan and Co., Ltd.,

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23. AIR 1984 Karnataka 112
24. 4th Edition, Vol.11, p.1452, p.768

p.215(1915): *"if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free."*

38. In **Greene vs. Home Secretary**[25], it has been observed :

> "Habeas corpus is a writ in the nature of an order calling upon the person who has Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

39. In India, by Articles 32 and 226 of Constitution of India, the Supreme Court and all the High Courts got jurisdiction to issue writ of habeas corpus throughout their respective territorial jurisdiction when the Constitution came into force. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

40. In **Smt. Maneka Gandhi vs. Union of India & Anr.**[26], it has been held by the Apex Court that the procedure established by law as contemplated under Article 21 should be just, fair and reasonable and any unjust, unfair and unreasonable procedure by which liberty of a person is taken away shall destroy such freedom. There is also difference between a writ of Habeas Corpus maintained under Article 32 and under Article 226 of Constitution of India. A writ of habeas corpus under Article 32 of the Constitution of India in the Supreme Court is available in case of violation of fundamental rights guaranteed under Article 21 but

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25. (1941) 3 All ER 388

26. AIR 1978 SC 597

it does not relate to interference with the personal liberty by a private citizen. However, the High Court has jurisdiction to issue writ of habeas corpus under Article 226 of the Constitution of India not only for violation of fundamental rights of freedom but also for other purposes. The High Court can issue such writ against a private person also.

41. The nature and scope of the writ of habeas corpus has been considered by the Constitution Bench of the Hon'ble Apex Court in the case of **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors.**[27] and it was held:-

> "It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice -- immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody -- together with the day and cause of his being taken and detained -- to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C., in Cox v. Hakes (supra), "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end. ..."

42. It is also well settled that in dealing with a petition for habeas corpus the Court has to see whether the detention on the

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27. (1973) 2 SCC 674

date, on which the application is made to the Court, is legal, if nothing more has intervened between the date of the application and the date of hearing. ..." (Ref. **A.K. Gopalan v. Government of India**[28]**)**.

43. In **Janardan Reddy & Ors. vs. The State of Hyderabad & Ors.,**[29] the petitioners, who were convicted by a Special Tribunal of Hyderabad of murder and other offences and sentenced to death by hanging and whose conviction and sentence have been confirmed by the Hyderabad High Court, applied to the Supreme Court under Article 32 for writs of prohibition, certiorari and habeas corpus. While considering the maintainability of the writ petition, the Supreme Court observed that there is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction, mere non-compliance with the rules of procedure (e.g, misjoinder of charges) cannot be made a ground for granting a writ under Article 32 of the Constitution. The defect, if any, can, according to the procedure established by law, be corrected only by a court of appeal or revision, and if the appellate court, which was competent to deal with the matter, has considered the matter and pronounced its judgment, it cannot be reopened in a proceeding under Article 32 of the Constitution. The Supreme Court further observed that the writ of habeas corpus could not be granted as a return that the person is in detention in execution of a sentence on indictment of a criminal charge, is sufficient answer to an application for such a writ.

44. It can be safely said that a writ of habeas corpus could not be issued, firstly, in cases where the detention or custody is authorized by an order of remand issued by a competent court of

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28. AIR 1966 SC 816

29. 1951 SCR 344

jurisdiction and secondly, where a person is committed to jail by a competent court by an order which does not appear to be without jurisdiction. The order has to be passed by a court of competent jurisdiction. It is, moreover, well settled that no writ of habeas corpus lies against the order of remand made by a court of competent jurisdiction. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical or wholly illegal manner. In **B. Ramachandra Rao vs. State of Orissa**[30] and **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors** (supra) it has been held by the Apex Court that the Court is required to scrutinise the legality or otherwise of the order of detention, which has been passed. Unless the Court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted.

45. In **State of Maharashtra & Ors. vs. Tasneem Rizwan Siddiquee**[31] the question before the Supreme Court was again as to whether a writ of habeas corpus could be maintained in respect of a person, who is in police custody pursuant to remand order passed by the Jurisdictional Magistrate in connection with offence under investigation. In that case, relying on the ratio laid down in **Saurabh Kumar vs. Jailor, Koneila Jail & Anr**.[32] and **Manubhai Ratilal Patel vs. State of Gujrat & Ors.**[33] the Supreme Court held as follows :-

"The question as to whether a writ of habeas corpus could be

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30. (1972) 3 SCC 256
31. (2018) 9 SCC 745
32. (2014) 3 SCC 436
33. (2013) 1 SCC 314

> maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436 : (2014) 5 SCC (Cri) 702] and Manubhai Ratilal Patel v. State of Gujarat [(2013) 1 SCC 314 : (2013) 1 SCC (Cri) 475] . It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3- 2018/19-3-2018 and decided by the High Court on 21-3-2018 [Tasneem Rizwan Siddiquee v. State of Maharashtra, 2018 SCC OnLine Bom 2712] her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order Patna High Court CR. WJC No.1355 of 2019 dt. 05-03-2020 passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued."
> (emphasis supplied)

46. In **Serious Fraud Investigation Office vs. Rahul Modi & Anr.,**[34] the Supreme Court cancelled bail granted by the Delhi High Court to Rahul Modi and Mukesh Modi accused of duping investors of several hundred crores through a ponzi scheme run by their Gujarat based other co-operative societies. Both the accused were released by the Delhi High Court in a habeas corpus writ petition even though they were remanded to judicial custody under the orders of a competent court. After elaborately dealing with the ratio laid down by the Supreme Court in earlier cases, the Supreme Court held as follows :-

> "The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14-12-2018. The legality, validity and correctness of the order or remand could have been challenged by the original writ petitioners by

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34. (2019) 5 SCC 266

> filing appropriate proceedings. However, they did not raise such challenge before the competent appellate or revisional forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in the said order dated 20-6-2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14-12- 2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14-12-2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of habeas corpus petition, the High Court was not justified in entertaining the petition and passing the order."
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> (emphasis supplied)

47. Before we proceed to set out our answer and examine the provisions of J.J. Act, we will pause to observe that J.J. Act is a self-contained Act and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of J.J. Act is to ensure and cater the need of the child, who is in conflict with law and child in need of care and protection etc. The language of J.J. Act is conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt, in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail. We may now proceed to examine the relevant sections of the J.J. Act, which generally deals with the issue before us. Sub-section (4) of Section 1 of the J.J. Act reads as under:-

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including --

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

Sub-section 14 (iii) (a) of Section 2 of the Act is as under:
"(14) "child in need of care and protection" means a child--
... ...

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child"

48. The "juvenile" has been defined in Section 2(35) of the J.J. Act to mean a child below the age of eighteen years. The word "child" has been defined in Section 2(12) of the J.J. Act to mean a person who has not completed eighteen years of age. The phrase "child in conflict with law" has been defined under Section 2(13) of the J.J. Act to mean a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 2(14) of the J.J. Act defines the phrase "child in need of care and protection", as under:-

"(14) "child in need of care and protection" means a child--
(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or
(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of

child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) 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 solemnisation of such marriage;"

49. The 'Child Welfare Committee' finds place in Section 27 of Chapter-V of the J.J. Act. Section 27 (1) provides that the State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act. The powers of the Comittee are defined in Section 27 (9). Provisions of Section 27 (9) of the

J.J. Act make it clear that while passing such orders, the Committee exercises the power of Judicial Magistrate. Section 27 of the Act reads as under:

> "27. Child Welfare Committee.--(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.
> (2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.
>
> (3) The District Child Protection Unit shall provide a Secretary and other staff that may be required for secretarial support to the Committee for its effective functioning.
>
> (4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.
>
> (5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.
>
> (6) No person shall be appointed for a period of more than three years as a member of the Committee.
>
> (7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if--
>
> (i) he has been found guilty of misuse of power vested on him under this Act;
>
> (ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;
>
> (iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.
>
> (8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.
>
> (9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate

of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

50. Section 29 of the J.J. Act is as under:-

"29. Powers of Committee. (1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."

51. The functions and responsibilities of the Committee are defined in Section 30 of the J.J. Act, which read as under:-

"30. **Functions and responsibiliteis of Committee**.- The functions and responsibilities of the Committee shall include—

(i) taking cognizance of and receiving the children produced before it;

(ii) conducting inquiry on all issues relating to and affecting the safety and wellbeing of the children under this Act;

(iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(v) directing placement of a child in foster care;

(vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(vii) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(viii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012;

(xiv) dealing with cases referred by the Board under sub-section (2) of section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed."

52. Section 36 of the J.J. Act deals with the Inquiry. It reads as under:-

36. **Inquiry.-** (1) On production of a child or receipt of a report under section 31, the Committee shall hold an inquiry in such manner as may be prescribed and the Committee, on its own or on the report from any person or agency as specified in sub-section (2) of section 31, may

pass an order to send the child to the children's home or a fit facility or fit person, and for speedy social investigation by a social worker or Child Welfare Officer or Child Welfare Police Officer:

Provided that all children below six years of age, who are orphan, surrendered or appear to be abandoned shall be placed in a Specialised Adoption Agency, where available. (2) The social investigation shall be completed within fifteen days so as to enable the Committee to pass final order within four months of first production of the child:

Provided that for orphan, abandoned or surrendered children, the time for completion of inquiry shall be as specified in section 38.

(3) After the completion of the inquiry, if Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may send the child to a Specialised Adoption Agency if the child is below six years of age, children's home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child, as may be prescribed, or till the child attains the age of eighteen years:

Provided that the situation of the child placed in a children's home or with a fit facility or person or a foster family, shall be reviewed by the Committee, as may be prescribed.

(4) The Committee shall submit a quarterly report on the nature of disposal of cases and pendency of cases to the District Magistrate in the manner as may be prescribed, for review of pendency of cases.

(5) After review under sub-section (4), the District Magistrate shall direct the Committee to take necessary remedial measures to address the pendency, if necessary and send a report of such reviews to the State Government, who may cause the constitution of additional Committees, if required:

Provided that if the pendency of cases continues to be unaddressed by the Committee even after three months of receiving such directions, the State Government shall terminate the said Committee and shall constitute a new Committee.

(6) In anticipation of termination of the Committee and in order that no time is lost in constituting a new Committee, the State Government shall maintain a standing panel of eligible persons to be appointed as members of the Committee.

(7) In case of any delay in the constitution of a new Committee under sub-section (5), the Child Welfare Committee of a nearby district shall assume responsibility in the intervening period."

53. Section 37 empowers the Child Welfare Committee that on being satisfied through the inquiry that the child before the

Committee is a child in need of care and protection, it may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders as provided in clauses (a) to (h) of Sub-Section (1) of Section 37. Section 37 of the J.J. Act is reproduced below:

> "37. **Orders passed regarding a child in need of care and protection**.- (1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:--
>
> (a) declaration that a child is in need of care and protection;
>
> (b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;
>
> (c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;
>
> (d) placement of the child with fit person for long term or temporary care;
>
> (e) foster care orders under section 44;
>
> (f) sponsorship orders under section 45;
>
> (g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;
>
> (h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

54. We are also of the opinion that the Magistrate or the Committee in case directing the girl to be kept in protective home under the J.J. Act the Magistrate or the Committee, as may be, should give credence to her wish.

55. Section 101 of the Act reads as under:-

"101. Appeals.- (1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Childrens Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal, take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from,--

(a) any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years; or

(b) any order made by a Committee in respect of finding that a person is not a child in need of care and protection.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure

specified in the Code of Criminal Procedure, 1973 (2 of 1974)."

56. Section 102 of the Act is as under:

> "102. Revision.- The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:
>
> Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

57. In **Kanu Sanyal vs. District Magistrate, Darjeeling & Ors.** (supra), while dealing with writ of habeas corpus, the Supreme Court has held that it is essentially a procedural writ. It deals with the machinery of justice and not the substantive law. The object of the writ is to secure release of a person, who is illegally restrained of his/her liberty. In **Manubhai Ratilal Patel vs. State of Gujrat & Ors.** (supra), the Supreme Court has held that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical or wholly illegal manner. In **Saurabh Kumar vs. Jailor, Koneila Jail & Anr.** (supra), the Supreme Court has held that since the petitioner was in judicial custody by virtue of an order passed by a Judicial Magistrate and, hence, it could not be held to be an illegal detention. The Supreme Court has further held that even if the Magistrate has acted mechanically in remanding the accused to judicial custody and has dealt with the process in a cavalier fashion which shows inconsistencies towards the denial of personal liberty of citizen, a writ of habeas corpus would not be maintainable. In **State of Maharashtra & Ors. vs. Tasneem**

Rizwan Siddiquee (supra), the Supreme Court has held that no writ of habeas corpus could be issued when the detenue was in detention pursuant to an order passed by the Court. In **Serious Fraud Investigation Office vs. Rahul Modi & Anr.** (supra), the Supreme Court has held that the action of directing remand of an accused is a judicial function and challenge to the same is not to be entertained in habeas corpus writ petition.

58. In **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Others**[35], it was held by Hon'ble Supreme Court as under:

> "9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention; Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert in October, 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school going boy. It equally appears that there was some upheaval in the educational institutions. This young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.
>
> 10. We must record our appreciation that Mr. Altaf Ahmed, learned standing counsel for the State of Jammu and Kashmir submitted the State case with utmost fairness."

59. In order to bring clarity to the matter, we deem it appropriate to consider the judgement of **Raj Kumari vs. Superintendent Women Protection House and others** (supra), wherein it has been held that a minor cannot be sent to Nari Niketan against her wishes and the same preposition of law is being incorporated in

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35**.** (1982) 2 Supreme Court Cases 538

the orders passed by this Court while entertaining the Habeas Corpus Writ Petition of minor girl, who has been detained in Nari Niketan by a judicial order.

60. So far as the reliance over the judgements given by the Division Bench of this Court in the first set of judgments, as referred above, are concerned, all the Division Benches have referred the judgement in **Ms. Kalyani Chaudhary vs. State of UP** (supra) and **Raj Kumari vs. Superintendent Women Protection House and others** (supra)

61. In **Ms. Kalyani Chaudhary vs. State of UP** (supra) the petitioner claimed that she was wrongully detained in Mahila Ashram, Moti Nagar, Lucknow. She accordingly had prayed for a writ in the nature of habeas corpus. The Court had formulated the question for determination as to whether her deterntion in Mahila Ashram, which is a Protective Home, is in accordance with law and proceeded to observe that Protective Homes find a mention in the Suppression of Immoral Traffic in Women and Girls Act, 1956 (in short, the Act of 1956). Sub-section (2) of Section 10 of the Act of 1956 provides that where a woman or girl is convicted of any offence under Section 7 or Section 8, she may be kept in the protective homes. The Court further proceeded to consider the provisions of Suppression of Immoral Traffic in Women and Girls Act and observed that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. The Court categorically proceeded to observe that “it is admitted that the case does not fall under this Act, no other law has been referred to. The order of the learned

Magistrate gives no reason why the girl be kept in the Protective Home. His order mentions no provision of law under which he has passed such a direction. The order of the Magistrate directing the girl to be kept to the 'Protective Home' thus suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody". The relevant portion of the judgement is reproduced herein below:-

> "4. A reading of the provision of the Suppression of Immoral Traffic in Women and Girls Act clearly shows that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. It is admitted that the case does not fall under this Act, no other law has been referred to.
>
> 5. The order of the learned Magistrate gives no reason why the girl be kept in the Protective Home. His order mentions no provision of law under which he has passed such a direction. The order of the Magistrate directing the girl to be kept in the 'Protective Home' thus suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody.
>
> 6. Learned Counsel for the father of the girl has urged that because, according to him, the girl was a minor she could be kept in the protective home, and if not, she should be given in custody of the father as she was not a legally married woman. The evidence of the girl shows that she is a major. Moreover, in the present case the question of minority is Irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home. The question of giving the girl in the custody of the father also does not arise in the present case as the father was himself instrumental in getting the girl, sent into the Protective Home through the aid of the Police. We are, in these proceedings, also not required to determine the question about the minority or marriage of the girl or about the right of any person to keep In his custody the petitioner, as that is a matter which can arise in proceedings such as under the Guardians and Wards Act and not in a petition for Habeas Corups where the petitioner seeks freedom from illegal detention. The objection raised on behalf of the father cannot therefore be sufficient for our holding that the petitioner is not entitled at liberty from her illegal detention.
>
> 7. Learned Counsel for the petitioner Mrs. Kalyani Chowdhary (Kumari Kalyani Devi) and the girl herself have stated that she will appear In the criminal court whenever she is summoned in connection with the case which the police may be investigating and in connection with which the order was secured from the City Magistrate.
>
> 8. There is no allegation that the petitioner has committed any offence; there can therefore be no legal validity for the curtailment of

> the petitioner's liberty. The order of the learned Magistrate cannot accordingly validate the detention.
>
> 9. In the result, the petition is allowed and Mrs. Kalyani Chowdhary (Kumari Kalyani Devi) is set at liberty forthwith."

62. In **Raj Kumari vs. Superintendent Women Protection House and others** (supra) the Court has also considered the case of **Ms. Kalyani Chaudhary vs. State of UP** (supra) wherein the Division Bench of this Court has taken the view that no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home. The Court had also considered the Division Bench judgement of **Pushpa Devi vs. State of UP** and allowed the habeas corpus writ petition. Relevant portion of the judgement is extracted herein below:-

> "16. In view of the above it is well settled view of this Court that: even a minor cannot be detained in Government Protective Home against her wishes, In the instant matter petitioner has desired to go with Sunil Kumar, besides this according to the two medical reports i.e. of the Chief Medical Officer and LLRM, Medical College, Meerut, the petitioner is certainly not less than 17 years and she understands her well being arid also is capable of considering her future, As such we are of the opinion that her detention in govt. Protective Home, Meerut against her wishes is undesirable and impugned order dated 23-11 -1996 passed by the Magistrate directing her detention till the party concerned gets a declaration by the Civil Court or the competent Court of law regarding her age, is not sustainable and is liable to be quashed.
>
> 17. I n the result the writ petition succeeds and is allowed.
>
> 18. The impugned order dated 23-11-1996 passed by the City Magistrate, Bulandshahr in case No. 2/96 under Section 97/98 Cr.P.C. is quashed and the Supdt. Govt. Women Protective Home, Meerut is directed to set the petitioner at liberty according to her wishes."

63. The Court had also considered an issue as to whether there is any authority for detention of the corpus with any person in law. Though it was pleaded that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing is to

be seen as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. The petitioner would not be accused of the offence under Sections 363, 366 IPC because she could only be a victim of it. A victim may at best be a witness and there is no law atleast now has been quoted before us as to whether the Magistrate may direct detention of a witness simply because she does not like to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal.

64. Similar view has also been taken in **Pushpa Devi vs. State of UP** (supra) wherein the Division Bench of this Court had also formulated an issue as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. The relevant portion of the aforesaid judgement is reproduced hereinbelow:-

> "In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it.
>
> We have no mind to enter into the question and decide as to when a particular minor is to be set at liberty in respect of her person or whether she shall be governed by the direction of her parents. The question of custody of the petitioner as a minor, will depend upon various factors such as her marriage which she has stated to have taken place with Guddu before the Magistrate.
>
> Apart from the above factors, the more important aspect is as to whether there is any authority for detention of the petitioner with any person in law. Though, it is said that she has been detained in the Nari Niketan under the directions of the Magistrate, the first thing to be seen should be as to whether the Magistrate can direct the detention of a person in the situation in which the petitioner is. No Magistrate has

> an absolute right to detain any person at the place of his choice or even any other place unless it can be justified by some law and procedure. It is very clear that this petitioner would not be accused of the offence under Sections 363 and 366 I. P. C. We are taking the version because she could only be a victim of it. A victim may at best be a witness and there is no law at least now has been quoted before us whereunder the Magistrate may direct dentition of a witness simply because he does not like him to go to any particular place. In such circumstances, the direction of the Magistrate that she shall be detained at Nari Niketan is absolutely without jurisdiction and illegal. Even the Magistrate is not a natural guardian or duly appointed guardian of all minors"

65. All the three questions raised above can be considered together conveniently. In the first set of judgements in most of the cases reliance has been placed upon the judgments in **Smt. Kalyani Chowdhary v. State of U.P** and **Seema Devi @ Simran Kaur v. State of H.P. w**herein it has been held that no person can be kept in Protective Home, unless required to be kept, either in pursuance to the suppression of Immoral Traffic in Women and Girls Act or some other Act for protection in such a Home. The Court pointed out that where the Magistrate's order mentions any provision of law under which he has passed such a direction, the order directing the girl to be kept in the protective home suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody. The Court said that the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a protective home and the question of giving the girl in the custody of the father also did not arise in that case as the father was himself instrumental in getting the girl sent to the protective home through the aid of the police. It is thus clear that in **Smt. Kalyani Chowdhary v. State of U.P** the Division Bench has clearly proceeded to observe that the Magistrate's order mentioned no provision of law under which he has passed such a direction. The order directing the girl to be kept in protective

home suffers from inherent lack of jurisdiction, whereas in the present matter we are dealing with the matters under the J.J. Act.

66. In **Independent Thought. v. Union of India**[36] the Apex Court after taking a conspectus of the provisions contained in the Constitution of India, the Indian Penal Code, the Prevention of Children from Sexual Offences Act, 2012[37] and the J. J. Act, 2015, held as follows:

> "107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is -- this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC -- in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years -- this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC -- this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." 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."

67. In most of the cases, wherein it has been held that the habeas corpus writ petition is maintainable, the Division Benches placed reliance on the judgement of **Jaya Mala vs. State of Jammu and Kashmir** (supra). The judgement of Jaya Mala was distinguished by the Full Bench of Patna High Court in **Shikha Kumari vs. State of Bihar** (supra) in paragraphs 86 and 87.

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36. (2017) 10 SCC 800

37. POSCO Act

68. If we look at the relevant Sections of the J.J. Act, the object of the J.J. Act is pro-child legislation. The J.J. Act itself provides all remedial measures of rehabilitation and care to a child who is in need of care and protection. We attach equal importance to other Sections of the J.J. Act. They are emphatic, and in case the petitioner is aggrieved, and the corpus is sent to the shelter home arbitrarily, then the said situation may also be looked into and examined in the regular appeal or revision. Section 37 of J.J. Act clearly provides that the Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by the Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders. The framers have also consciously taken due care of child's wishes in case the child is sufficiently mature to take a view. It is the paramount responsibility of the Committee to take all necessary measures for taking into account the child's wishes after making due enquiry, which contemplates under Section 36 of J.J. Act and take final decision.

69. Therefore, in such situation it cannot be presumed that in case the corpus is in Women Protection Home pursuant to an order passed by the Child Welfare Committee, which is neither without jurisdiction nor illegal or perverse, keeping in mind the provisions of the J.J. Act, the detention of the corpus cannot be said to be illegal and in case the petitioner is aggrieved by the order of the Child Welfare Committee, or the Magistrate, the petitioner is at liberty to take recourse of remedy of an appeal or revision provided under Sections 101 and 102 of the J.J. Act.

70. In afore-mentioned matters the Court clearly proceeded to

observe that no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home. No such situation contemplates under the J.J. Act and therefore, it cannot be said that the Magistrate or by the Committee does not inher the power. The Juvenile Justice (Care and Protection of Children) Act, 2000[38] was initially enacted in the year 2000 to provide for protection of children. The Act was amended in the years 2006 and 2011. However, several issues, such as increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in Homes, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions, sale of children for adoption purposes etc. had cropped up in recent times. Such numerous change was required in the Act of 2000 to address the above mentioned issues. Such situation impelled the legislature to re-enact a comprehensive legislation. The J.J. Act ensures proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child. It had also prompted the legislature to make drastic changes in the Act of 2000 to tackle child offenders in the age group and re-enact a comprehensive legislation inter alia to provide for general principles of care and protection of children, procedures in case of children in need of care and protection and children in conflict with law, rehabilitation and social re-integration measures for such children, adoption or orphan, abandoned and surrendered children, and offences committed against children.

38. the Act of 2000

71. Analysing the orders passed by this Court as well as Jharkhand High Court, Madhya Pradesh High Court and Patna High Court, it can be safely concluded that the writ of Habeas Corpus is not maintainable against the judicial order or an order passed by the Child Welfare Committee under the J.J. Act.

72. It is also apparent from perusal of the documents available on record and the statement of the petitioner corpus/victim recorded under Section 164 Cr.P.C. That the petitioner corpus refused to go with her mother and insisted that she may be sent alongwith her friend, first petitioner. As per High School Marksheet, her date of birth is 05.02.2003 and on the said date, she was 17 years, one month and eight days' old. Consequently, the Child Welfare Committee, by an order dated 16.3.2020, directed the petitioner corpus to be placed in Women Protection Home, upon finding her to be minor. Once the petitioner corpus is found as child, as defined in Section 2 (12) of J.J. Act, and allegedly a victim of crime in Case No.64/2000, detailed above, she would fall in the category of child in need of care and protection in view of clause (iii), (viii) and (xii) of sub-section (14) of Section 2 of J.J. Act. Once the order passed by the Committee placing the petitioner corpus in protection home would be within its power conferred by Section 37 of the J.J. Act then it cannot be presumed that the said order is without jurisdiction, illegal or perverse, keeping in mind the provisions of the J.J. Act and the detention of the corpus cannot be said to be illegal.

73. In that view of the matter, it was not a case of illegal detention but the petitioner corpus was in Children Home (Girl) Saharanpur by virtue of an order passed by Jurisdictional Magistrate. Even if there is lack of following due procedure

under the Act and Rules by the Magistrate or by the Committee that can be agitated by the petitioner under the provisions of appeal/revision, as referred to above by taking out separate proceedings.

74. In **Janardan Reddy & Ors. vs. The State of Hyderabad & Ors.** (supra) the Apex Court, while considering the maintainability of the writ petition, has observed that there is a basic difference between want of jurisdiction and illegal or irregular exercise of jurisdiction, Mere non-compliance of the rules of procedure cannot be made a ground for granting a writ under Article 32 of the Constitution. The defect, if any, can, according to the procedure established by law, be corrected only by a court of appeal or revision, and if the appellate court, which was competent to deal with the matter, has to consider the matter and pronounce its judgment, it cannot be reopened in a proceeding under Article 32 of the Constitution. The Apex Court further observed that the writ of habeas corpus could not be granted as a return that the person is in detention in execution of a sentence on indictment of a criminal charge, is sufficient answer to an application for such a writ.

75. Section 27 of the J.J. Act deals with Child Welfare Committee, wherein sub-section (8) provides that the District Magistrate shall conduct a quarterly review of the functioning of the Committee. Sub-section (9) also provides that the Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class. Section 29 provides the powers of Committee, which shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of

care and protection, as well as to provide for their basic needs and protection. Sub-section (2) of Section 29 of the J.J. Act provides that where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection. Section 30 of the J.J. Act deals with the functions and responsibilities of Committee, which include taking cognizance of and receiving the children produced before it. Most importantly Section 30 (ii) of the J.J. Act provides for conducting inquiry on all issues relating to and affecting the safety and well-being on the children under the Act. Sub-section (iii) of Section 30 of the J.J. Act provides for directing the Child Welfare Officers or Probation Officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee. Section 30 (vi) of the J.J. Act provides for ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard.

76. Full fledged mechanism is also provided in sub-section (viii) of Section 30 of J.J. Act for conducting an inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government. Sub-section (1) of Section 37 of the J.J. Act, which deals with orders passed regarding a child in need of care and protection, provides that the Committee on being satisfied

through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely (a) declaration that a child is in need of care and protection; (b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker; (c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child; (d) placement of the child with fit person for long term or temporary care; (e) foster care orders under section 44; (f) sponsorship orders under section 45; (g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies and (h) declaration that the child is legally free for adoption under Section 38.

77. Once corpus is minor and the girl had refused to go with her parents, then in such situation arrangement has to be made. Her

interest is paramount and before proceeding to pass order for custody of the minor, the welfare of the minor has to be kept in mind. The wish of minor and the wish/desire of girl can always be considered by the Magistrate concerned/Committee and as per her wishes/desire further follow up action be taken in accordance with law under the J.J. Act.

78. Thus, it is evident that a writ of habeas corpus would not be mintainable, if the detention in custody is pursuant to judicial orders passed by a Judicial Magistrate or a court of competent jurisdiction or by the Child Welfare Committee. Suffice to indicate that an illegal or irregular exercise of jurisdiction by the Magistrate passing an order of remand or by the Child Welfare Committee under J.J. Act cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality, validity and correctness of the order by filing an appropriate proceeding before the competent appellate or revisional forum under the statutory provisions of law but cannot be reviewed in a petition seeking writ of habeas corpus.

79. We accordingly come on our conclusions in respect of question nos.1, 2 and 3 for determination as follows:-

> Question No.1 : “(1) Whether a writ of habeas corpus is maintainable against the judicial order passed by the Magistrate or by the Child Welfare Committee appointed under Section 27 of the Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home?;
>
> Answer : If the petitioner corpus is in custody as per judicial orders passed by a Judicial Magistrate or a Court of Competent Jurisdiction or a Child Welfare Committee under the J.J. Act. Consequently, such an order passed by the Magistrate or by the Committee cannot be challenged/assailed or set aside in a writ of habeas corpus.
>
> Question No.2: "Whether detention of a corpus in Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home pursuant to an order (may be improper) can be termed/viewed as an illegal detention?”

Answer: An illegal or irregular exercise of jurisdiction by a Magistrate or by the Child Welfare Committee appointed under Section 27 of the J.J. Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home cannot be treated an illegal detention.

Question No.3 : “Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes is legally valid or it requires a modified approach in consonance with the object of the Act ?”

Answer: Under the J.J. Act, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/Committee must give credence to her wishes. As per Section 37 of the J.J. Act the Committee, on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the orders mentioned in Section 37 (1) (a) to (h).

80. Thus, all the three issues referred for determination are answered, accordingly.

81. Let the matter be placed before the appropriate Bench for orders.

82. Before parting with the matter we place on record our appreciation for the active assistance rendered by learned Senior Advocate Shri Shagir Ahmad and the learned Addl. Advocate General.

Order Date :- 08.03.2021

RKP

(Siddhartha Varma,J.) (Mahesh Chandra Tripathi,J.) (Sanjay Yadav,J.)