RESERVED

A.F.R.

Court No. - 74

Case :- HABEAS CORPUS WRIT PETITION No. - 451 of 2020

Petitioner :- Manish Kumar And Another
Respondent :- State Of U.P. And 7 Others
Counsel for Petitioner :- Satyawan Yadav,Ranjeet Yadav,Sri Anand Kumar Srivastava
Counsel for Respondent :- G.A.,Ashutosh Yadav,Sudhanshu Kumar, Rajeev Lochan Shukla A.C.

Hon'ble J.J. Munir,J.

The facts giving rise to this Habeas Corpus Writ Petition are rather unconventional and not commonplace; or so it seems.

2. Manish Kumar is a youth, aged about 16 years and a half. He has married Jyoti, as he says, of his freewill. Jyoti is a major and an adult in the cognizance of law, just above the age of 18 years. Pramila Devi is Jyoti's mother and Manish Kumar's mother-in-law. Arjun and Bheem are Jyoti's brothers and Pramila Devi's sons. Manish Kumar, after his marriage to Jyoti, was staying with his wife, his mother-in-law and his two brothers-in-law, Arjun and Bheem. Haushila Devi is Manish Kumar's mother. She appears to have thought that Jyoti, her mother Pramila Devi and her brothers, Arjun and Bheem have enticed away her minor son and forced him into a marriage of sorts, which is illegal for want of the minor's competence under the law. She has gone on to say that Manish Kumar, her minor son, is illegally detained by Pramila Devi, Arjun, Bheem and Jyoti, arrayed as respondent nos. 5, 6, 7 and 8 in that order. In keeping with her thought and word, Haushila Devi has effectively instituted the present Habeas Corpus Writ Petition, arraying Manish Kumar as the first petitioner and herself as the second, asking this Court to order Manish Kumar, her minor son, to be produced on a *Rule Nisi*

before this Court and upon production, set at liberty in the manner that Manish Kumar be entrusted to her care and custody.

3. Upon the petition coming up before this Court on 18.09.2020, it was admitted to hearing, and a *Rule Nisi* was issued, ordering the production of Manish Kumar, said to be in the illegal confinement of respondent nos. 5 to 8. The *Rule* was made returnable on 23.09.2020. On the date of return, Manish Kumar was produced before this Court, and what he said before us about the nature and character of his association with respondent nos. 5, 6, 7 and 8 spares no doubt that Manish Kumar was never under any kind of coercion to stay with Jyoti or the other respondents, who are claimed to be illegally detaining him. He also does not appear to have been enticed away. This conclusion on facts can best be fathomed by what he stated before the Court in answer to questions that were put to him. His stand recorded in the Court's order on 23.09.2020 is extracted below:

> **Q.1.** Aapka naam kya hai?
> **Ans.** Manish Kumar
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> **Q.2.** Aapke pitaji ka kya naam hai?
> **Ans.** Paras Nath
>
> **Q.3.** Aapki aayu kya hai?
> **Ans.** 16 Saal
>
> **Q.4.** Aap kaha se aaye hain?
> **Ans.** Chauki Narshinghpur
>
> **Q.5.** Aap waha kiske pas rahte hain?
> **Ans.** Apni Sas ke pas
>
> **Q.6.** Aapki sas ka kya naam hai?
> **Ans.** Pramila
>
> **Q.7.** Jyoti kaun hai?
> **Ans.** Hamari Aurat
>
> **Q.8.** Aap apni marji se rahte hain Pramila aur Jyoti ke pas?
> **Ans.** Ji Sir
>
> **Q.9.** Haushila Devi kaun hai?
> **Ans.** Hamari maa hai
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> **Q.10.** Aap apni maa ke pas jana chahte hain?

Ans. Nahi

Q.11. Kaha jana chahte hain?

Ans. Sas aur Aurat ke pas

4. Upon the Court asking Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, about Haushila Devi's stand in the matter, he insisted that Manish was a minor and did not have the legal competence to marry Jyoti. He said that their marriage is void, in view of the provisions of The Hindu Marriage Act, 1955[1] and The Prohibition of Child Marriage Act, 2006[2]. It was contended by Mr. Srivastava that Manish being a minor, cannot exercise his choice to stay with strangers like respondent nos. 5 and 8, and that Haushila Devi, being his mother and natural guardian, is entitled to ask this Court, in the interest of the minor's welfare, to restore him to her custody.

5. In view of the stand of parties, and the way the law would tentatively bear upon their conflicting rights and claims, this Court formulated the following questions for consideration, again *vide* order dated 23.09.2020 :

> "**1.** Whether the marriage of a minor in contravention of the Hindu Marriage Act and Section 14 of the Prohibition of Child Marriage Act, 2006 is void *ab initio*?
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> **2.** Whether a minor who does not want to stay with his parents, is entitled to stay with a person of his choice, particularly, where he is on the verge of attaining majority and in the age group of expressing his intelligent choice?
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> **3.** Whether a minor who decides to stay away from his parents or natural guardian with a stranger of his/her choice can be compelled by the natural guardian to be restored to his custody, particularly, through a writ of habeas corpus?
>
> **4.** Whether a minor can be permitted to live with an utter stranger other than a natural guardian, if the welfare of the minor is better ensured to the Court's satisfaction in the hands of the utter stranger?"

6. This Court being mindful of the fact that the minor was not inclined to go along with his mother, Haushila Devi, on the one hand, and on the

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1 **for short "HMA"**
2 **for short "PCMA"**

other, she seriously objected to her minor child being in the custody of utter strangers, as she has chosen to characterize it, this Court directed that in the meanwhile, Manish Kumar and Jyoti, both be housed in a State facility, other than a Child Reform Home or Nari Niketan. The matter was directed to come up again on 24.09.2020. On 24th September, the Court found that Manish's wife and mother-in-law wanted to stiffly contest the proceedings, but did not have legal counsel to represent them. On an inquiry being made by the Court, both Pramila Devi and Jyoti disclosed their inability to secure the services of a legal counsel. In those circumstances, the Court appointed Mr. Sudhanshu Kumar, Advocate, from the Panel of learned Counsel maintained by the High Court Legal Services Committee, High Court, Allahabad to represent each of the respondent nos. 5 and 8, in the cause. At the same time, this Court felt the need for assistance of an *amicus curiae*, looking to complexities of the issues involved. Accordingly, Mr. Rajeev Lochan Shukla, Advocate was requested to assist the Court as *amicus curiae*.

7. It must also be placed on record that Manish Kumar, during hearing and pending judgment, continues to be housed in a State facility, looking to the stand of parties, including his own stand. Respondent no. 5, who too was initially required to be housed in a State facility, has gone back home, as the Court did not pass any further orders requiring her to be housed after 24.09.2020. The order requiring respondent no. 5 to stay in a State facility was made on 23.09.2020, as she was reported to be in the family way. On the following day, as it was clarified that she would be looked after well by her mother, respondent no. 8, no further orders regarding housing her were made and she went back home.

8. On 30.09.2020, when the matter was again taken up, at the intervention of Mr. Shukla, the learned *Amicus Curiae* and by agreement of all parties, Question No. 1, formulated on 23.09.2020, was modified and rephrased in the following terms :

> "Whether the marriage of a minor in contravention of Section 5 of the Hindu Marriage Act, 1955 and Sections 3(1) and 12 of the Prohibition of Child Marriage Act, 2006 is void *ab initio*?"

9. A further question was framed at the instance of Mr. Sudhanshu Kumar, learned Counsel appearing for respondent nos. 5 and 8, by consent of all parties, including the learned *Amicus Curiae*, which reads :

> "Whether a wife who is a major can be entrusted with the custody of a husband who is a minor, where the marriage is voidable?"

10. Hearing commenced on 07.10.2020, with Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent nos. 5 and 8, Mr. Indrajeet Singh, learned Additional Government Advocate appearing on behalf of the State and Mr. Rajeev Lochan Shukla, Advocate appearing as the *Amicus Curiae* addressing the Court. Mr. Ashutosh Yadav, Advocate, was also requested to act as *amicus curiae* in the matter, and he too, addressed the Court.

11. The Court proposes to examine and answer the questions formulated as pure propositions of law and then examine the way answers to those questions bear on the facts of the case.

QUESTION NO. 1

12. Section 5 of the HMA stipulates conditions that ought to be fulfilled in order to solemnize a marriage between two Hindus. Section 11 of the HMA spells out what kind of marriages would be void, whereas Section 12 details those marriages that would be voidable, and also limitations on the right of a party to seek annulment of a marriage, claimed to be voidable. Much of those statutory provisions are not relevant to the issue in hand, for those deal with many a different contingency, besides the one of concern here. A reading of Section 5 (iii) of the HMA would show that one of the conditions to be fulfilled for a marriage to be solemnized between two Hindus is that the bridegroom should have completed the

age of 21 years, and the bride, the age of 18 years at the time of marriage. Section 11 of the HMA makes marriages held in contravention of clauses (i), (iv) and (v) of Section 5 void, but not marriages held in violation of clause (iii) of Section 5. Sub-section (1) of Section 12, spells out contingencies, where a Hindu marriage may be annulled by a decree of nullity. Clauses (a) to (d) of sub-section (1) of Section 12 enumerate those grounds that afford a cause of action to the party aggrieved to seek annulment. Clause (b) of sub-section (1) of Section 12 specifies clause (ii) of Section 5 as one carrying a condition, the contravention whereof would render a marriage voidable on a petition for a decree of nullity. A plain reading of Sections 5, 11 and 12 of the HMA do not indicate the consequences that would attach to a marriage solemnized in breach of Section 5 (iii). However, Section 18 (a) of the HMA provides that a person who *"procures a marriage for himself or herself to be solemnized under this Act in contravention of the conditions specified in clause (iii), ….. of Section 5"* becomes liable to rigorous imprisonment that may extend to two years, with or without fine, the fine imposable being a maximum of Rs. One lakh. It is on the terms of these statutory provisions that Mr. Srivastava, learned Counsel for the petitioners and Mr. Shukla and Mr. Yadav, the two learned *Amicus Curiae* appearing in the matter, have urged that the marriage would not be void under Section 5 (iii) of the HMA, though all of them say that it would be either void or voidable, depending on the circumstances attending the marriage, under Sections 3(1) and 12 of the PCMA.

13. Broadly in agreement with the learned Counsel for the petitioners *vis-à-vis* the effect of a breach of Section 5 (iii) of the HMA and the validity of the Hindu marriage, Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent nos. 5 and 8, submits that the legislature has not provided for any consequence about a marriage solemnized in breach of Section 5 (iii) regarding its validity; the marriage would neither be void nor voidable. It would be valid, albeit inviting

punishment for the party, who is a major. He says that if both be minors, their guardians, with whose consent the marriage has been solemnized, would be liable for the offence. He goes on to say that if the two minors are runaways from home and have married of their own, the liability would be upon those who could have prevented the marriage, but did not take reasonable steps to do so. Nevertheless, Mr. Sudhanshu Kumar submits that whatever be the penal consequences of a marriage solemnized in breach of Section 5 (iii) of the HMA under Section 18, the scheme of the Act considered wholesomely, cannot lead one to the conclusion that a breach of the clause under reference would render the marriage either void or voidable; the marriage would be valid. However, Mr. Kumar submits that in order to render a marriage void under Section 12 of the PCMA, the conditions stipulated under clauses (a), (b) and (c) of Section 12 would have to be strictly established by the person who impugns the marriage; else the marriage would be voidable at the option of the party, who was a child at the time of marriage. He submits that if they happen to be children, the marriage would be voidable at the instance of either of them. The right to action, the limitation for the purpose would all be governed by the special rules in sub-section (2) and (3) of Section 12.

14. Mr. Indrajeet Singh, learned A.G.A. appearing for the State, however, submits that the marriage would be void. He says that Section 5 (iii) of the HMA is clear in that, that it stipulates as a condition precedent to the solemnization of a Hindu marriage, the statutory minimum age for prospective spouses, differentially prescribed according to their sex. He urges that the legislative prescription about a valid Hindu marriage *vis-à-vis* age of the parties postulated under Section 5 (iii) cannot be construed in a manner that it becomes a source of its own nullification. It is Mr. Singh's submission that the prohibition *vis-à-vis* age of the parties to a Hindu marriage is cast in clear and absolute terms, under Section 5 (iii). The fact that Section 18 (a) of the PCMA makes a contravention of clause

(iii) of Section 5 an offence that invites rigorous imprisonment and fine, makes the legislative intent clear that a marriage in violation thereof would be void. He has drawn the Court's attention to Section 4 of the Act, which gives it overriding effect over any text, rule or interpretation of the Hindu law, or any custom or usage to the contrary, as also any other law in force, immediately before the commencement of the HMA. It is the learned A.G.A.'s emphatic submission that even if marriages by any custom or usage, earlier prevalent amongst Hindus be valid, notwithstanding the age of the spouses at the time of solemnization, the Act unequivocally renders a marriage void between two Hindus, who do not fulfill the statutory minimum requirement of age on the date of marriage. He elucidates his submission by a reference to Section 5 (v) of the HMA to point out that the prohibition there about a marriage between *Sapinda* is qualified by a custom or usage governing each of them, if that permits a marriage between the two. Likewise, he submits that the prohibition in clause (iv) of Section 5 is also qualified by the existence of a custom or usage to the contrary, permitting a marriage within degrees of prohibited relationship. The learned A.G.A. submits that by contrast, the prohibition under clause (iii) of Section 5 is absolute and admits of no qualification. Therefore, in the submission of Mr. Indrajeet Singh, a marriage solemnized in contravention of Section 5 (iii) is no marriage under the law and has to be ignored; in short, it is void.

15. As regards differential treatment to the validity of a marriage between minors, if the conditions mentioned under Section 12 of the PCMA exist and if they do not, according to the learned A.G.A., would make little difference for an answer to the question involved here. He urges that the PCMA is a Statute of universal application to all persons within the territory of India and to the citizens of India beyond the Indian shores, irrespective of religion, whereas the HMA is applicable to a Hindu, as defined under Section 2, whether resident in India or domiciled in territories to which the HMA extends, but are outside those territories.

He submits that if a marriage is void under Section 5 of the HMA for the violation of clause (iii) thereof, Sections 12 and 3 (1) of the PCMA would not, at all, come into play. He further says that since a marriage in contravention of Section 5 (iii) of the HMA is void in the case of two Hindus, Sections 12 and 3 (1) of the PCMA would not, at all, be attracted.

16. This Court has considered the submissions advanced by learned Counsel for parties, as well as the learned *Amicus Curiae* appearing in the matter. No doubt, the provisions of Section 5 of the HMA spell out conditions, subject to which, a marriage may be solemnized between two Hindus, but the provisions under Sections 4, 5, 11, 12 and 18 have to be read as an integrated whole, in order to find out the conditions, subject to which, marriage between two Hindus may be solemnized, and if solemnized in breach of one or the other or more than one of the conditions laid down by the Statute, the consequences that would attach to the validity of that marriage. So far as the HMA is concerned, the scheme of the Statute across Sections 4, 5, 11, 12 and 18 is unambiguous in that, that while it requires the age of 18 years for a woman and 21 years for a man to be a condition precedent for a valid marriage between two Hindus, the consequences of violation of one or the other clauses of Section 5 of the HMA stipulated under Sections 11 and 12 do not provide for the violation of Clause (iii), that is to say, the condition regarding minimum age for a valid Hindu marriage. This conscious omission about consequence of a violation of the minimum age clause on the validity of a Hindu marriage is no *casus omissus.* The legislature, after providing for the consequences of a violation of the conditions specified in Clauses (i), (iv) and (v) of Section 5 under Section 11, is conspicuously silent about the contingency of a breach of Clause (iii). The legislature has provided for penal consequences under Section 18 (a) of the HMA, where a term imprisonment or fine or both are provided; but the validity of a Hindu marriage solemnized in breach of Section 5(iii) has been left intact by the HMA. So far as Section 5(iii) of the HMA is concerned, read in the

context of that statute, there is good authority and for good reason to hold that a Hindu marriage, solemnized in violation of Section 5(iii) is neither void nor voidable. There are pertinent remarks to that effect, to be found in the decision of a Full Bench of Madras High Court in **T. Sivakumar v. Inspector of Police of Theravallur**[3] where it has been held :

> "14. A close reading of these two provisions would go to show that a marriage solemnized in violation of sub-section (iii) of Section 5 of the Hindu Marriage Act has not been declared either as void or voidable. The marriage which falls within the ambit of Section 11 has been held to be void from its very inception [vide Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, AIR 1988 SC 644]. So far as a voidable marriage as provided in Section 12 of the Act is concerned, the said marriage may be annulled by a decree of nullity on any one or more of the grounds enumerated thereunder. Since the Hindu Marriage Act as well as the Child Marriage Restraint Act do not declare a marriage of a minor either as void or voidable, such a child marriage was treated all along as valid. There were number of judicial pronouncements to this effect. In this legal scenario, the Hindu Minority and Guardianship Act also provided that the husband of a minor wife is her natural guardian."

(Emphasis by Court)

17. This position of law has not been in doubt. So long as the Child Marriage Restraint Act, 1929[4] was in force, a repealed statute that applied to all citizens and *a fortiori* to Hindu marriages too, it did not make much difference to the validity of a Hindu marriage solemnized in breach of Section 5(iii), or so to speak, the corresponding provision about minimum age under the CMRA. This was so because the CMRA did not take the legislative effort to abolish child marriages beyond making the transgression about the statutory minimum age a punishable offence. It did not make the marriage void or voidable. The position, however, has changed much after enactment of the PCMA, by making the marriage voidable at the option of the party who was a child at the time of the marriage and also void under the three specified contingencies postulated under Section 12. Here, the provision of Sections 3 and 12 of the PCMA may be quoted with profit :

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3 **AIR 2012 Mad. 62**
4 **for short "CMRA"**

"**3. Child marriages to be voidable at the option of contracting party being a child**.—(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

12. Marriage of a minor child to be void in certain circumstances.—Where a child, being a minor— (*a*) is taken or enticed out of the keeping of the lawful guardian; or

(*b*) by force compelled, or by any deceitful means induced to go from any place; or

(*c*) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,

such marriage shall be null and void."

18. The Full Bench of the Madras High Court in **T. Sivakumar** *(supra)* considered a very pertinent question, which shares its substance with Question No. 1 here (as reformulated) and somewhat with the content of Question Nos. 3 and 4 (apart from the substance of Question Nos. 3 and 4 here being subject matter of consideration *vide* Question No. 4 in **T. Sivakumar**). For the present, however, the Court is concerned with the holding of their Lordships of the Full Bench in **T. Sivakumar** on the first

part of Question No. 1 formulated there. Question No. 1 in **T. Sivakumar** reads :

> "(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl be given to the husband [if he is not in custody]?"

19. In answering the first part of the question before the Full Bench, their Lordships, after a searching comparison and examination of the provisions of CMRA, PCMA and HMA held :

> "**26.** But, in Saravanand's Case cited supra, the Division Bench has held that such a marriage between a boy aged more than 21 years and a girl aged less than 18 years is not voidable. In other words, according to the Division Bench such a child marriage celebrated in contravention of the Prohibition of Child Marriage Act is a valid marriage. With respect, we are of the opinion that it is not a correct interpretation. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. Therefore, we hold that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a Court of law, such voidable marriage, cannot be either stated to be or equated to a "valid marriage" stricto sensu as per the classification referred to above. Accordingly, we answer the first part of the 1st question referred to above."

20. This issue again came up before a Full Bench of the Delhi High Court in **Court on its own motion (Lajja Devi) and others v. State and others**[5]. In the aforesaid case, the Full Bench took up some four matters arising through varied kind of legal proceedings, but involving one common fact that in each case, the woman was below 18 years and had married a man above 21 years of age of her free consent. The Division Bench referred some five questions, disagreeing with three earlier Division Bench decisions that had taken the view that the marriage of a minor girl was neither void nor voidable under the HMA. All the various questions referred to the Full Bench may be relevant to one or the other question under consideration here, as is the case with the Madras High Court Full Bench in **T. Sivakumar**. Now, so far as the present question is concerned, it is the first part of the first question referred to the Full

5 **2013 CrLJ 3458**

Bench of the Delhi High Court that is relevant. It must also be said that the question referred here bears remarkable resemblance in substance to Question No. 1 that was the subject matter of reference before the Full Bench of the Madras High Court in **T. Sivakumar**. The first question referred to the Full Bench of the Delhi High Court in **Lajja Devi** *(supra)* reads :

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

21. In answering the question, the Full Bench of the Delhi High Court, speaking through A.K. Sikri, A.C.J. (as His Lordship then was of the High Court) held :

> "**31.** We have already reproduced Sections 2(a), 9, 12 and 15 of this Act. It is clear therefrom that marriage of a minor child is treated as void only under the circumstances mentioned in Section 12. Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons. At the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as voidable. The interplay of this Act with other enactments compounds this anomaly and comments on such anomalies are stated in detail at the appropriate stage. At present we confine ourselves to the issue at hand as the status of the child marriage needs to be determined on the basis of statutory provisions, which exists as of now. As pointed out above, under the Hindu Marriage Act, child marriage is still treated as valid and not a void marriage. It is personal law, in codified form, governing Hindus. On the other hand, PCM Act, which is a secular law, treats this marriage as voidable except those events which are covered by Section 12 of the PCM Act. In neither of the aforesaid statutes the child marriage is treated as void ab initio or nullity. Therefore, we cannot hold child marriage as a nullity or void. The next question that follows is as to whether the provisions of personal law, i.e., Hindu Marriage Act should be applied to declare such a marriage as valid or the provisions of PCM Act would prevail over the HM Act.
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> **32.** It is distressing to note that the Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man

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

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

34. Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act-to restrain and to prevent the solemnization of Child Marriage. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.

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

> discouraged by the legislations but it has not been completely banned.
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> **39.** As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.
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> **40.** Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No. 1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void."

22. It must be remarked here that the submission of Mr. Indrajeet Singh, learned A.G.A., that once Section 5 (iii) mandates a minimum age for the marriage of a man or a woman as an essential requirement of a valid Hindu marriage, its violation not being held to render the marriage void, would be an abnegation of the Statute, may not be the correct statement of the law on the terms of the HMA, but does point to an anomaly that may be described by the words 'intended to be forbidden, but permitted'. It is this anomaly about the legislature disapproving of child marriages and yet permitting them, that has led their Lordships of the Full Bench in **Lajja Devi** to discern across provisions of different statutes a kind of "legislative endorsement of child marriage". It is gratifying to note that one facet of this anomalous statutory approval to a child marriage carried in the Penal Code, which has been noticed with distress by their Lordships of the Full Bench in **Lajja Devi** about sex being legitimized with a minor wife for the husband, provided the woman

is above the age of 15 years, has been undone in **Independent Thought v. Union of India and Another**[6]. In the said decision, exception 2 to Section 375 of the Indian Penal Code, 1860[7] has been harmonised with the provisions of the Protection of Children from Sexual Offences Act, 2012[8] and held to be violative of Articles 14, 15 and 21 of the Constitution. And accordingly, Exception 2 to Section 375 IPC has been read down as under :

> "Exception 2–– Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

23. In the aforesaid perspective of the law, it must be held in terms of the question framed that marriage of a minor in contravention of Section 5(iii) of the HMA and Section 3(1) of the PCMA is not void *ab initio* for a rule, but voidable at the option of the minor. But, if any of the contingencies contemplated under Section 12 of the PCMA exist and can be proved, the marriage would be void.

24. Now, with reference to this conclusion about the legal position of the minor's marriage, it has to be examined whether the marriage of Manish Kumar and Jyoti is valid, void or voidable. It must be remarked here that there is one feature of the case here that makes it quite different, if not unique, from those that have received judicial consideration and that is, that the husband is a minor, whereas the wife is a major. The husband was 16 years old at the time of marriage and is now 17 years of age, whereas the wife is a major. This fact would further not make any difference, so far as the present question is concerned. What is worthy of note is Manish's stand before the Court on 23.09.2020, which clearly indicates that he has married Jyoti of his freewill and wishes to stay with his wife and mother-in-law. This stand clearly takes the case out of the mischief of Section 12 of the PCMA, so that the marriage in this case cannot be termed "void". No doubt, this marriage would be voidable at

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6 **(2017) 10 SCC 800**
7 **for short "IPC"**
8 **for short "the Act of 2012"**

Manish's option, that he may exercise in accordance with the provision of Section 3 of the PCMA.

25. Thus, Question No. 1 (as reformulated) is answered in the ***negative***, in the terms indicated hereinabove.

QUESTION NOS. 2, 3 & 4

26. Question Nos. 2, 3 and 4 carry different facets of the same issue, if not precisely, substantially, and are, therefore, being dealt with together.

27. Mr. Anand Kumar Srivastava, learned Counsel for the petitioners submits, particularly with reference to question nos.2 and 4, that a minor, who does not want to stay with his parents, is entitled to stay with a person of his choice, particularly, where he is on the verge of attaining majority and in the age group of expressing his intelligent choice. He says that the paramount consideration is the minor's welfare. In this connection he has drawn the Court's attention to Section 17 of the Guardians and Wards Act, 1890[9] and Section 13 of the Hindu Minority and Guardianship Act, 1956[10].

28. Again, reliance has been placed by the learned Counsel for the petitioners on the decision of the Full Bench of the Madras High Court in **T. Sivakumar** (*supra*) to submit that where the child's marriage is an offence, it would certainly not be in the interest of the minor to be placed in the custody of the other spouse as his/her guardian, for the reason that approving that custody would be sanctifying an offence. Reliance has been placed by the learned Counsel for the petitioners on paragraph no. 34 of the report in **T. Sivakumar**, which reads :

> **"34.** We may also state that since a child marriage as defined in the Prohibition of Child Marriage Act itself is an offence and the same is cognizable, it does not require any complaint to the police to register a case and to investigate. On any information regarding such a child marriage, the Police has got a legal duty to

9 **for short, "the Act of 1890"**
10 **for short "the Act of 1956"**

> register a case and to prosecute the offender by filing an appropriate final report. If the contracting party to the marriage of a female child is a male who is not a child undoubtedly, he is an offender punishable under Section 9 of the Act. The scheme of the Act would go to show that punishment has been provided only against an adult male marrying a female child but an adult female marrying a male child is not an offender as she does not fall within the ambit of Section 9 of the Act. Sections 10 & 11 provide for punishment for solemnising a child marriage and promoting or permitting solemnisation of child marriages. So, it needs to be underscored that only the male namely the husband is liable to be punished and not the girl whether child or an adult. This scheme of the Act would also go to support the view that an adult male who marries a female child cannot be allowed to enjoy the fruits of such marriage because the solemnisation of the marriage itself is an offence insofar as the male is concerned. If we have to accept the contention that as per Section 6(c) of the Hindu Minority and Guardianship Act, the husband of a female child shall be the natural guardian, it will only amount to giving premium for the offence committed by the male. When the law aims at eradicating the evil menace of child marriages, declaring the adult male who marries a female child, as her natural guardian would only defeat the very object of the Act. A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence punishable under Section 9 of the Act, the adult male cannot acquire the legal status of the natural guardian of the female child. In view of these discussions, we hold that Section 6(c) of the Hindu Minority and Guardianship Act stands impliedly repealed by the Prohibition of Child Marriage Act. Therefore, we conclude that an adult male who marries a female child in violation of Section 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child."

29. Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent no. 5, on the other hand, has repelled the submissions of the petitioners on this score. He submits that a minor on the verge of attaining majority and one who is in the age group of expressing his intelligent choice, if expresses a desire not to stay with his parents, cannot be compelled to be in the parents' custody. He has, particularly, drawn the attention of the Court to sub-Section (3) of Section 17 of the Act of 1890, which provides that preference of a minor may be considered in appointing a guardian, if he is old enough to form an intelligent preference.

30. Interestingly, Mr. Sudhanshu Kumar, learned Counsel for the fifth respondent has also reposed faith in the Full Bench decision of the Madras High Court in **T. Sivakumar**. He has invited the attention of this Court to paragraph no. 57 of the report, where in answer to the various questions referred by the Division Bench, it has been held :

> "**57.** In conclusion, to sum up, our answers to the questions referred to by the Division Bench are as follows:
>
> (i) The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" *stricto sensu* as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage *stricto sensu*, instead he will enjoin only limited rights.
>
> (ii) The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of Section 6(c) of the Hindu Minority and Guardianship Act, 1956.
>
> (iii) The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the Court to set her at liberty if she is illegally detained by anybody.
>
> (iv) In a Habeas Corpus proceeding, while granting custody of a minor girl, the Court shall consider the paramount welfare including the safety of the minor girl not withstanding the legal right of the person who seeks custody and grant of custody in a Habeas Corpus proceeding shall not prejudice the legal rights of the parties to approach the Civil Court for appropriate relief.
>
> (v) Whether a minor girl has reached the age of discretion is a question of fact which the Court has to decide based on the facts and circumstances of each case.
>
> (vi) The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion of the Court she has capacity to determine, the Court cannot compel her to go to the custody of her parents and instead, the Court may entrust her in the custody of a fit person subject to her volition.
>
> (vii) If the minor girl expresses her desire not to go with her parents, provided in the opinion of the Court

she has capacity to determine, the Court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice (Care and Protection) Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice (Care and Protection) Act, 2000

(viii) A minor girl whose marriage has been contracted in violation of Section 3 of the Prohibition of Child Marriage Act is not an offender either under Section 9 of the Act or under Section 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law.

(ix) While considering the custody of a minor girl in a Habeas Corpus proceeding, the Court may take into consideration the principles embodied in Sections 17 & 19(a) of the Guardians and Wards Act, 1890 for guidance."

(Emphasis by Court)

31. Particularly, with regard to the contents of Question No. 4, that concerns the minor, who has expressed his intelligent choice of not living with his parents, it is urged that he is entitled to stay with a person whom he chooses. Mr. Sudhanshu Kumar has placed reliance on a decision of this Court in the case of **Akbar and Another v. State of U.P. and Others**[11]. It is pointed out that the aforesaid decision in **Akbar** (*supra*) was affirmed by the Supreme Court in **Special Leave to Appeal (Crl.) No.2664 of 2008, Shahnaz Begum v. State of U.P. & Ors., decided on 23.02.2016**. The impact of all these decisions would be considered during the course of our answer to these questions, a little later in this judgment.

32. Generally, on the foot of these decisions, Mr. Sudhanshu Kumar has submitted that the position of the law is that a minor may be allowed to stay with a person of his choice and not to stay with his parents, if he so desires, particularly when such a minor is found to be possessed of sufficient intelligence and understanding to determine his own well being. It is emphasized by Mr. Sudhanshu Kumar, that Manish Kumar was aged 16 years and 6 months, when he expressed his choice before this Court on 23.09.2020 that he does not want to go with his mother, but wishes to stay with respondent nos.5 and 8. Dilating on this submission, learned Counsel

11 **2008 (2) ADJ 98**

for the fifth respondent says that Manish Kumar is on the verge of attaining majority and is in the age group of expressing his intelligent choice. He possesses sufficient understanding to make that choice. He has not expressed this choice rashly or without comprehending the impact of the same on his life and future. Learned Counsel for the fifth respondent also says that there is nothing on record to show that Manish Kumar is under the influence or threat of respondent nos.5 to 8, particularly, going by the tenor of expression of his choice before this Court on 23.09.2020. Learned Counsel submits that the reason behind the choice expressed by Manish Kumar appears to be the fact that he married respondent no. 8 of his free will and wishes to stay with her in matrimony.

33. To the contrary, Mr. Sudhanshu Kumar submits that the second petitioner is against Manish's marriage and refused to permit Manish and respondent no. 8 to live together in her house. It was in those circumstances that petitioner no. 1 approached the fifth respondent to stay with her along with his wife. Respondent no. 5 took Manish in her custody and permitted him to stay with her along with his wife, once Manish's mother gave up his custody. It is strongly suggested by the learned Counsel that this arrangement was with the consent of the second petitioner, as evident from the agreement dated 22.02.2020, where she has appended her thumb impression. A copy of the agreement is on record as Annexure no. CA-1 to the counter affidavit.

34. Attention of this Court has been drawn by the learned Counsel for the fifth respondent to paragraph nos.5 and 15 of the said respondent's counter affidavit, where it is said that petitioner no.2 threw out Manish from her home and it was then that the fifth respondent gave him shelter. It is emphasized by the learned Counsel for the fifth respondent that there is no specific denial to the said averments in the rejoinder affidavit. The learned Counsel for the fifth respondent submits that it seems that Manish expressed his choice of not staying with his mother due to her conduct in

throwing him out of her home, along with his wife, at a time when his wife was in the family way. At a time of such turmoil, Manish was given shelter, love, affection and care by the fifth respondent. Therefore, Manish has expressed a choice, in all these circumstances, to forsake his mother's custody for that of his mother-in-law. Mr. Sudhanshu Kumar says that the expression of Manish's choice, therefore, is not only intelligent, but one that is well-informed by his experience and circumstances.

35. On the third question, Mr. Sudhanshu Kumar, learned Counsel for the fifth respondent submits that the rights of a parent as the minor's natural guardian cannot be enforced against the minor's wishes and welfare, inasmuch as guardianship is akin to a trust where the guardian has to act as a trustee for the benefit of the minor. *A fortiori*, guardianship - like the right of a trustee, cannot be enforced against the interest of the beneficiary, the minor. Learned Counsel for the fifth respondent further submits that the position of law is beyond cavil that in determining the question of custody, welfare of the minor is of paramount consideration and not the legal right of the parent. In this context, he has drawn the attention of the Court to the provisions of Section 13(2) of the Act of 1956, which specifically provide that no person is entitled to guardianship by virtue of the provisions of law, if in the opinion of the Court, his/ her guardianship will not be for the minor's welfare. To support his contention, learned Counsel for the fifth respondent has placed reliance on the decision of the Supreme Court in **Gaurav Nagpal v. Sumedha Nagpal**[12] and once again on the Full Bench decision of the Madras High Court in **T. Sivakumar** (*supra*). It is submitted by the learned Counsel for the fifth respondent that it figures clearly on record that Manish's mother, the second petitioner, refused to allow him to live with her and threw out Manish along with his wife. It was then that Manish took shelter with the fifth respondent. In this connection, Mr. Sudhanshu Kumar has emphasized that in **Gaurav Nagpal** *(supra)*, their Lordships of the

12 **(2009) 1 SCC 42**

Supreme Court have emphasized that children are not mere chattels nor toys for their parents. He submits, therefore, that the second petitioner cannot be allowed to throw Manish out of her house and then compel him to live with her, as and when she desires. Mr. Sudhanshu Kumar would, therefore, submit that for a blanket proposition of law, a minor, who stays away from his parents or natural guardian with a stranger of his/ her choice, cannot be compelled by the natural guardian to be restored to his custody, particularly through a Writ of Habeas Corpus. Of course, it would depend upon the Court coming to the conclusion that the minor's welfare is adequately secured with the stranger, in the totality of circumstances governing this rather unconventional move.

36. Mr. Rajeev Lochan Shukla, learned *Amicus Curiae* has struck a discordant note to the stand taken on behalf of fifth respondent, generally as regards the rights of a minor to choose strangers for their guardian over parents. In his submission on the second question, it is urged that there are two facets about the minor choosing a stranger for a guardian over his parent. He submits that the first is about the intelligent choice exercised by the minor, and the second, is about the minor being on the verge of majority. Mr. Shukla has, in this connection, referred to the law on the subject in the United States of America, but for the purpose he has largely depended on internet resources. Nevertheless, some reference may be gainfully made to it. He points out that in the United States of America and in Canada, there are laws for emancipation of the minor. The emancipation of minor is based on a doctrine governing rights of a mature minor. The mature minor doctrine is a rule of law, where an unemancipated minor patient may possess the maturity to choose or reject a particular health care treatment, sometimes without the knowledge or the agreement of the parents. In this connection, reference has been made to a decision of the Supreme Court of Washington in **Albert G. Smith v. Walter W. Seibly**[13], where the doctrine in the case of a mature minor, who

13 **72 Wn.2d 16 (1967) 431 P.2d 719**

had married and had a family, was applied to infer valid consent to a vasectomy procedure given by Albert G. Smith, who was 18 years old and the married father of a child. He was employed and had a family. He also maintained a home. The facts in the decision show that Smith was afflicted by a progressive muscular disease, Myasthenia Gravis, which is chronic and incurable and would possibly affect his future earning capacity and ability to support his family. Under the circumstances, Smith and his wife decided to limit their family, with the husband consenting to undergo sterilization. It appears that Smith was not of the age of majority by the law in force in the State. After Smith attained age of majority, he brought an action saying that the doctor was negligent in performing the vasectomy upon a minor of 18 years; he was negligent in failing to explain to the appellant the perennial consequences of the surgery and further that the procedure was done without valid consent. In this case, the Court appears to have applied the principle of mature minor, being emancipated from his disability to give a valid consent by virtue of his marriage and being the head of his family. Mr. Shukla points out that the concept of emancipation of a minor is defined in the Black's Law Dictionary, Ninth Edition, thus :

> "**emancipation**. (17c) **2.** A surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child; the act by which a parent (historically a father) frees a child and gives the child the right to his or her own earnings. • This act also frees the parent from all legal obligations of support. Emancipation may take place by agreement between the parent and child, by operation of law (as when the parent abandons or fails to support the child), or when the child gets legally married or enters the armed forces."

Likewise, emancipation in the context of a minor is defined in the Law Lexicon by P. Ramnatha Aiyar, 3rd Edition (2012) at page 545, in the following words :

> "Ordinarily speaking, one of these things must happen before a SON CAN BE SAID TO BE EMANCIPATED FROM HIS FATHER, either he must have obtained a settlement for himself–or have become the head of a family,–or at most he must have arrived at that age when he may set up in

> the word for himself." (Per Kenyon, C.J. R. v. Off-Church, 3 T.R. 116)"

37. These principles, Mr. Shukla submits, do indicate that in some foreign jurisdictions, marriage of a minor at a matured age and supporting his family may entitle him to an end of guardianship for him, but there is no principle in the *Corpus Juris* of India akin to emancipation of the minor, or the mature minor doctrine, so as to liberate the minor from the guardian's control and launch him out into the world as a major, before he attains the legal age of majority. He submits that the question about the minor exercising an intelligent choice does not bring about an end to his disability flowing from his minority, but is confined to the choice about his guardian. Mr. Shukla submits that it is not that the law in India completely disregards that watershed age of minors, where they are about to enter adulthood. He points out that it is for this reason that under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015[14], the law provides for a child in conflict with law, who is in the age group of 16 to 18, to be tried as an adult after a preliminary assessment with respect to his mental and physical capacity to commit the offence charged and to understand the consequences of the offence. In substance, therefore, the law in India does recognize the ability of the minors on the verge of attaining majority to understand the consequences of their action, and on that basis, gives them some rights and imposes certain additional liability; but it does not emancipate them unconditionally.

38. In the matter of choice of a guardian, other than his parents, Mr. Shukla says that the law in India has recognized the welfare of the minor, in certain cases, to be secured better in the hands of strangers. In this connection, reference has again been made to the case of **Akbar** (*supra*). He points out that **Akbar** was a case, where a minor child of 10 years, a Muslim was given into the custody of one Aiku Lal, a stranger and a Hindu, professing a religion different from that of the child, with this Court giving weight to the preference expressed by the child. The natural

14 **for short, "the Act of 2015"**

guardians were denied custody, bearing in mind the child's welfare, on a consideration of various circumstances, amongst which, the preference of the child was accorded decisive weight. The decision in **Akbar** *(supra)* was upheld by the Supreme Court in **Shahnaz Begum** *(supra)*. It is urged that there is, thus, no impediment where in the facts of a given case, a minor's custody can be given to a stranger over the claim of his natural guardian, if the minor's welfare is better secured. In doing so, it is argued that welfare of the minor is decisive. It is pointed out by Mr. Shukla that the question that arises here is one of great complexity. The minor has clearly expressed his choice to stay with his wife and mother-in-law and not his mother. On the other hand, the Act of 2012 makes cohabitation of a minor boy with a major girl an offence, which would certainly be committed, if Manish is entrusted to the custody of his wife, who is now a major. The imminent likelihood of cohabitation is demonstrated by the fact that the wife has now given birth to a child, begotten of Manish. It is submitted that allowing Manish to be given into the custody of his wife or the mother-in-law would lead to perpetration and perpetuation of an offence under the Act of 2012, which this Court cannot permit.

39. It is next contended that the PCMA punishes the solemnization of a child marriage as also promoting or permitting the solemnization of such marriages. It is contended that here, the mother-in-law is within the mischief of Sections 10 and 11 of the PCMA. Therefore, Manish cannot be given into her custody, being a victim of the crime she has perpetrated by getting him married to her daughter, who is now a major. It is urged that for different reasons, Manish's custody cannot be given to either the wife or the mother-in-law. It is, in the last, urged by Mr. Shukla, so far as Question No. 2 goes, that the decision of the Supreme Court in **Independent Thought** (*supra*) clearly spells out the serious consequences of a child marriage, albeit from the perspective of a girl child. He submits that there is no reason why those consequences and the resultant

disapproval to child marriages would not be equally applicable to a male minor married to a female major.

40. The submissions on Question Nos. 3 and 4 put forward by Mr. Shukla, learned *Amicus Curiae* proceed on the same line. He says that a writ of habeas corpus can issue in this case, because Manish is in the unlawful custody of a stranger and his mother is entitled to maintain the writ, relying on the decision of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others**[15].

41. On the fourth question, Mr. Shukla says that while there is no cavil about the principle that in certain cases, custody of a minor can be entrusted to an utter stranger, ignoring the right of the natural guardian, if the minor's welfare is better secured, as was the case in **Akbar** (*supra*), the present case stands in sharp distinction on its facts. The reason, according to Mr. Shukla, is that the mother-in-law is guilty of an offence under the PCMA, whereas the wife, who is a major, is guilty of committing an offence under the Act of 2012 and would be guilty of a continuing offence under that Act, if Manish's custody is entrusted to her (the wife).

42. Mr. Ashutosh Yadav, the other *Amicus Curiae* appearing in the matter on the second question, has submitted that the Court would have to consider the overall facts and circumstances of the case to determine whether a minor of mature years with sufficient intelligence would have his welfare better secured in the hands of a stranger over that of his parents and natural guardian. He submits that if the Court considers that a person of the minor's choice, who is a stranger, is better placed to secure his welfare and take care of his needs in comparison to his parents or the natural guardian, there is no fetter on the Court's power to grant custody of a minor to a person of the minor's choice. The learned *Amicus Curiae* has said that this Court would have to assess on the facts here, whether the

15 **(2019) 7 SCC 42**

wife and the mother-in-law are better placed to take care of the minor's need and to ensure his welfare in comparison to his mother.

43. On the third question, Mr. Yadav says that there would be a decisive divide between the criteria to be adopted while compelling custody of a minor to be restored to his natural guardian, taking it away from a stranger through a writ of habeas corpus, depending on the minor's age. He submits that in case of minors aged 12 - 13 years, who have not developed sufficient understanding and intelligence to decide about their welfare, the Court may lean in favour of restoring custody to the parents, but in the case of a minor, who is on the verge of attaining majority and has sufficient understanding about his interest, must receive due deference about his choice in the matter of his custody. All that is required is that the minor must give strong reasons as to why he does not wish to remain with the natural guardian; and if he has valid reasons to forsake the custody of his natural guardian for a stranger, the Court must give due weight to it, together with other relevant circumstances. This is the purport of Sections 17(2) and 17(3) of the Act of 1890.

44. Now, so far as the fourth question is concerned, Mr. Yadav submits that if the Court is convinced that the welfare of the minor is better secured in the hands of an utter stranger, compared to his natural guardian or parent, there is no impediment in entrusting the minor's custody to a stranger, depriving the natural guardian. The Court has to ensure that the welfare of the minor is best secured (in the hands of a stranger) and that conclusion is to be based on a number of factors, that have to be inferred from evidence, the facts and circumstances on record, on a case-to-case basis. But, for a principle, an utter stranger may be preferred by the Court over a natural guardian.

45. This Court has considered the rival submissions, *vis-à-vis* Question Nos. 2, 3 and 4 and perused the record.

46. The substance of all the three questions, which this Court has indicated in the earlier part of this judgment to be dealt with together, is no more than this : *Whether a minor, going by his choice, can be permitted to live with an utter stranger, though his natural guardian claims his custody?* It does not brook doubt that guardianship and custody may not always be the same thing; though, for the most part, they coalesce. There are cases under various Statutes governing guardianship and custody, where guardianship being with one parent, the custody is given to the other, where the two do not live together. No doubt, between parents, arrangements have to be made through devises, such as visitation rights in order not to further deprive the child's company to the other parent, who has been denied custody. But, all that is not relevant here. The distinction between "guardianship" and "custody" is well elucidated in the decision of the Bombay High Court in **Ramesh Tukaram Gadhwe and Others v. Sumanbai Wamanrao Gondkar and Another**[16], where it has been held:

> **"20.** There is subtle distinction between expression "Custody" and "Guardianship". The concept of custody is related to physical control over a person or property. The concept of guardianship is akin to trusteeship. A guardian is trustee in relation to the person of whom he is so appointed. The position of guardian is more onerous than of mere custodian. The custody may be for short duration and for specific purpose. …....."

47. Like custody, guardianship, which is, truly speaking, a responsibility and a trust reposed in an adult to take care of the needs and welfare of his ward, generally arises in two ways : (1) by the nature of the relationship of the guardian to the ward, what is generally referred to as a natural guardianship, say a father and son or a mother and son; and (2) by appointment or declaration made by the Court or by testament. The Act of 1890 is a law of universal application to minors of all creeds and races, as the statement of objects and reasons discloses, and is thus applicable to all persons domiciled in territories to which the Act extends, irrespective of caste, creed, religion etc. There are then Statutes that enforce personal

16 **2007 SCC OnLine Bom 975**

laws of different religious communities, governing the subject of guardianship, like the Act of 1956 in relation to Hindus, the rules of uncodified Muslim Personal Law, that are applied by virtue of being law in force in India, when the Constitution was enforced. But, whatever rules might have been devised as personal to different communities, the principles in the Act of 1890 have overriding effect. One of the principles that has withstood the test of time and is so universal in its application that it is recognized as good in jurisdictions beyond India, is that in the matter of appointment of a guardian or enstrustment of custody of a minor to a guardian, welfare of the child is of paramount importance. Section 17 of the Act of 1890 may be quoted *in extenso*:

> "17. Matters to be considered by the Court in appointing guardian.—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Court shall have regard the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
>
> (4) [*omitted* by Act 3 of 1951 by S. 3 and Sch.]
>
> (5) The Court shall not appoint or declare any person to be a guardian against his will."

(Emphasis by Court)

48. Generally speaking, the criteria to determine welfare of the minor are the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor. The wishes of the deceased parent and any existing or previous relations of the proposed guardian with the minor or his property have also to be taken into account. All these factors find mention in sub-Section (2) of Section 17. Sub-Section (3) of Section 17 adds one more factor for the Court to take into consideration, while determining the minor's welfare, and that is the

minor's intelligent preference, if the minor is old enough. The scheme of Section 17, in particular, sub-Sections (2) and (3) read together, shows that for older minors, capable of forming an intelligent preference, special emphasis has been placed by the legislature on their choice in the matter of determining their welfare. Unlike the other criteria that must go into the Court's decision about the minor's welfare, the choice of an older minor, capable of forming an intelligent preference, has been separately placed in a different sub-Section, whereas the other relevant criteria are mentioned together in sub-Section (2). To this Court's understanding, the legislative intent is clear that an older minor's choice is to be accorded some higher weightage by the Court, together with the other criteria, while deciding the question of his/her welfare. This is not to say that for an older minor, who is in a position to form an intelligent preference, his expressed choice is a substitute for the Court's determination about his welfare. Many factors have to enter the Court's determination while deciding the vexed question about the minor's welfare.

49. It must also be remarked that the criteria mentioned in sub-Section (2) of Section 17 do not appear to be exhaustive, but illustrative; also those criteria are not binding or unignorable in the given circumstances of a case. If that were not so, the decision of this Court in **Akbar**, which met with approval of the Supreme Court in **Shahnaz Begum** (*supra*), would not have held Aiku Lal, a Hindu, unrelated to the minor in that case, a Muslim, better entitled than his natural guardian, who had petitioned the Court for the minor's custody. The decision in **Akbar** countervailed two of the relevant criteria, enumerated under sub-Section (2) of Section 17 of the Act of 1890, to wit, the natural guardian's nearness of kin to the minor and the religion of the two. The totality of circumstances, that were noticed in **Akbar** and weighed with the Court, are expressed thus :

> **"12.** That child is now 10 year and during the conversation in court with him, we found that he was possessed of sufficient understanding to comprehend matters and visualise his own well being. The child explicitly and categorically stated before us, that he

> does not want to go with his parents, and wants to continue to live with Aiku Lal.
>
> **13.** It will be seen, that the father did not take proper care, of the child, in consequence whereof, the child disappeared. It will be seen that the father was careless, and, that is what led to disappearance of the child. On the contrary, respondent Aiku Lal has maintained the same name of the child, in the school, and is not trying to change his Religion and is taking proper care of the child, and under his pateria-potesta, the child is receiving education in school, and he has developed an attachment for him and is keeping him like a son.
>
> **14.** In these circumstances, the respondent seems more suitable to look-after the welfare of the minor, as compared to his parents.
>
> **15.** It was argued that respondent Aiku Lal is a Hindu, while, the child is a Muslim and this will create dichotomy and disharmony in the social sphere and in their relationship. As mentioned earlier, the foremost consideration has to be the welfare of the minor and the mere fact that respondent Aiku Lal is a Hindu, while the child is a Muslim, should not dis-entitle respondent Aiku Lal from holding the custody of the child. We are after all a secular country and the consideration of caste and creed should not be allowed to prevail. If there can be inter-caste marriages, which is not very uncommon, there can also be an inter-caste 'Father and Son' relationship and that need not raise eyebrows. It would not be fair and equitable to return the minor to his parents against his will. The preference of the child must be given due weightage.
>
> **16.** On a consideration of the entire matter, we are of the view that the child should be allowed to remain with Aiku Lal, and should not be returned, to his parents against his wishes."

50. In the affirming judgment of the Supreme Court in **Shahnaz Begum** (*supra*), their Lordships generally approved of this Court's view and also did not disturb the custody given to Aiku Lal, but made an arrangement for Akbar to go during the summer vacations every year to his mother, till he attained the age of majority, and come back to Aiku Lal at the end of the vacation. It was, thus, a kind of visitation right given to the mother; but custody was approved for Aiku Lal, as directed by this Court. The decision in **Akbar** (*supra*) is a sterling illustration about many things relating to guardianship and custody of minors. It unshackled the preconceived notions of a society of yesteryears, where kinship and religion played a decisive role in judging the suitability of a guardian for appointment, as such, to take care of a minor or to be given a minor's

custody. The evolving society has done better to realize that there could be far subtler dimensions to human qualities and human relationship, that would better serve the attainment of the object of securing the minor's welfare, than stereotyped prejudices passed on from an older social order. This is not to say in the least measure that whatever considerations have been engrafted in the Statute are irrelevant, or required to be ignored in the present day. All that is to be emphasized is that if the welfare of the minor, in the judgment of the Court in a given case, is to be found better served, cutting across one or the other criteria statutorily laid down, the Court must lean in favour of welfare of the minor, ameliorating the letter of the law.

51. The question of intelligent preference of an older minor must be judged differently in contrast to a younger child, who may not understand many things. But again, unless the child is very young, chronological age may not be decisive in all cases. There could be cases of 8 or 10 year olds coming out to express very intelligent preferences about their guardian, which must be accorded due weightage by the Court. At the same time, there could be converse cases too. A fairly old boy or girl, who is just technically a minor, may still be found by the Court not expressing an intelligent preference that best subserve his/her welfare. These situations could all be there and have to be assessed on a case-to-case basis. Nevertheless, there is certainly a presumption that with a minor moving towards the age of majority, his mental faculties are oriented more towards attaining that maturity of intellect, where he could be generally trusted for the expression of an intelligent preference in the matter of choice of his guardians or custody of the person, he would be liked to be with.

52. It is no matter of legislative adventure that children in conflict with law in the age group of 16 to 18 years have been recognized as a different class under Section 15(1) read with Section 18(3) of the Act of 2015,

where the Board is required to conduct a preliminary assessment with regard to the child's mental and physical capacity to commit such offence, the ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, to borrow the phraseology of the Statute. And once the Board finds, after a preliminary inquiry under Section 15, that a child in that age group has the necessary physical and mental capacity to understand the consequences of the offence and the attendant circumstances, he may be ordered to be tried as an adult, quite removed from the protective regime of the Act of 2015. Though in a very different context, the provisions of the Act last mentioned are a legislative acknowledgment of the possibility of near adult mental faculties of a child in the age group of 16 - 18, though still not a major. In this context, therefore, with a child, who is knocking at the doors of majority, and certainly where he is above the age of 16, the Court may be more liberal in inferring an intelligent choice, or expecting an intelligent choice from a minor in that age group, in the matter of choice of his guardian or custody.

53. The decision of the Full Bench of the Madras High Court, though rendered in the context of a minor girl marrying an adult man, but the principles laid down there would apply equally in answer to the three questions, that have been dealt with here together. Particularly, the answers in sub-paras (v), (vi) and (vii) of paragraph no. 57 of the report in **T. Sivakumar** (*supra*) are apposite to the issues involved here.

54. It must be mentioned in the passing here that the question about emancipation of a minor was very interestingly raised by Mr. Sudhanshu Kumar during the course of the hearing, which lasted several days in this case. Though the parties were much handicapped in laying hands on dependable material about the principles relating to emancipation and the mature minor doctrine, it must be said in all fairness to learned Counsel appearing on all sides and the two learned *Amicus Curiae*, particularly Mr.

Shukla, that they did place before the Court best material that they could lay their hands on. Much of it depended on internet resource, about which this Court has some hesitation accepting in the absence of very dependable and authentic websites/resources. But, be that as it may, there is no quarrel between parties that emancipation of a minor or the mature minor doctrine does not appear to have gained foothold, at least in the context of the guardianship law in India, and, therefore, this Court refrains from expressing any opinion about all that was argued about it by the learned Counsel for the parties, as well as the learned *Amicus Curiae*.

55. It also deserves particular mention that the principles about utter strangers being appointed guardians or entrusted the custody of minors, in preference to a natural guardian, going by the intelligent preference expressed by minors in the facts of a given case, are all based on cases where it was not a minor boy marrying a major girl or a girl, who had become a major when the cause came up. Most of the authorities have been rendered in the context of either a non-matrimonial background, or where the girl was a minor and the husband, a major. About a minor girl and a major husband, the law has certainly not favoured a minor girl, notwithstanding a marriage that is not void under the PCMA to be permitted to stay with the husband, as that would be clearly an offence by the husband under the PCMA, as well as under the Penal Code, after the decision of the Supreme Court in **Independent Thought**. In the case of a minor boy and a girl, who is a major, the PCMA does not make it an offence for the major girl to marry a minor boy in violation of the PCMA, and likewise, the principles in **Independent Thought** may not squarely apply to the case of a minor boy and a major girl. Mr. Rajeev Lochan Shukla argued with great vehemence that this approach would be discriminatory. He may have some point to be considered on this score, but not in the conspectus of the questions that arise here for consideration, and may be, within the scope of the cause of action that arises in this habeas corpus petition, where there is no challenge to the *vires* of the

statutory provisions, that seem to discriminate between citizens on the ground of sex in the matter of marriage. One such provision is Section 6(c) of the Act of 1956, which provides that in the case of a married girl, the husband would be the natural guardian of her person as well as property (excluding her undivided interest in the joint family property). The Full Bench in **T. Sivakumar** have read the provisions of the PCMA as an implied repeal of Section 6(c) of the Act of 1956. There are similar provisions under some other Statutes, to which allusion would be made in answer to the fifth question.

56. In view of what has been said above, Question No. 2 is answered in the ***affirmative*** in the terms that depending on the totality of circumstances of a given case and the expression of his intelligent choice by a minor, who is on the verge of attaining majority, the Court may, in a given case, permit a minor to stay with a person of his choice in preference to his parents or other natural guardians.

57. Question No. 3 is answered in the ***negative*** in terms that where a minor decides to stay away from his parents or natural guardian with a stranger of his choice, he cannot be compelled to be restored to the custody of a natural guardians through a writ of habeas corpus, subject to the condition that the Court comes to the conclusion that the welfare of the minor is better secured with the stranger, in comparison to the natural guardian. Of course, the Court must go about this exercise very carefully.

58. Question No. 4, for the same reason as those relevant to question no.3, is answered in the ***affirmative*** with the qualification that the Court before entrusting custody of a minor to an utter stranger, should be clearly and unequivocally satisfied on evidence in the case, that the minor's welfare is decidedly better secured in the stranger's hands, than the natural guardians.

59. The Court must add a postscript to the answers rendered to these three questions that are all substantially to the same effect. It is this that while it may be permissible for the Court in a given case to choose an utter stranger over a natural guardian, that choice must be exercised with utmost sagacity, care and circumspection, and upon a careful evaluation of the *bona fides* and circumstances of the stranger; and the decisive and marked poorer prospects of welfare for the minor in the hands or the company of a natural guardian. It should be done in very rare cases.

QUESTION NO. 5

60. The further question formulated on 30.09.2020, which, for the sake of convenience, is referred to as Question No. 5, has been set out in paragraph no. 9 of this judgment. This Court now proceeds to examine Question No. 5.

61. Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, submits that a major wife cannot be entrusted with the custody of a minor husband, who is on the verge of attaining majority and in the age group of expressing his intelligent choice. He submits that this is so, because the welfare of the minor is of paramount consideration. Mr. Srivastava has again reposed faith in the decision of **T. Sivakumar** (*supra*) and has drawn the Court's attention to paragraph no. 50 of the report, where it is observed :

> "**50.** Nextly, coming to the question whether a minor could be said to have reached the aged of the discretion, we may refer to Section 17(3) of the Guardians and Wards Act which states that one of the matters to be considered by the Court in appointing guardian is, if the minor is old enough to form an intelligent preference, the Court may consider that preference also. Whether a minor has attained the intelligent preference is a question of fact which depends upon the capacity of the minor in each case. It cannot be put in a straight-jacket formula. As per the law laid down by the Hon'ble Supreme Court though the wish of the minor is also a factor to be taken into consideration by the Court while deciding the custody of the minor, it is not the only matter which is to be taken into consideration. Therefore, the minor cannot walk away to her whims and fancies from the lawful

guardianship of her parents. At this juncture, we may refer to the Tamil Nadu Juvenile Justice [Care and Protection of Children] Rules, 2001 wherein Rule 18 states as follows:

> *"18. Orders that may not be passed.— (i)* No child shall be ordered to be kept in jail or prison.
>
> *(ii)* No child shall be sent back to family against the wishes of the child who shall have an evolving capacity to determine the concept."

62. It is urged by the learned Counsel for the petitioners that a perusal of the pleadings would reveal that neither Jyoti, respondent no. 8 nor the second petitioner, Manish Kumar, were 18 years or 21 years old on the date of marriage. It is submitted that the marriage between parties for one is not in accordance with the provisions of Section 5(iii) of the HMA and even if the marriage be not void under the HMA or the PCMA, it is decidedly voidable. He submits that in the event Manish seeks annulment of the marriage under Section 3(1) of the PCMA or the wife chooses, that course because she too was minor on the date of marriage, it would be a proposition fraught with great risk to entrust the custody of Manish, still a minor, to the wife, who is now a major. This is a situation, according to Mr. Srivastava, that stands on the frail bond of a determinable marriage at the instance of both parties. For these reasons, it would be imprudent to entrust Manish into the care or custody of his wife. So far as the mother-in-law, respondent no. 5 is concerned, she expresses her willingness to accept Manish because of the relationship in which he stands to her daughter. If the relationship between Manish and his wife is no more than a voidable marriage on account of which the wife ought not to be entrusted with Manish's custody, *a fortiori* the mother-in-law also ought not to be given his custody.

63. Mr. Sudhanshu Kumar appearing for respondent no. 5, on the other hand, submits that Section 6(c) of the Act of 1956, that constitutes a husband the natural guardian of a Hindu married minor girl, is discriminatory in that, that it does not provide the major wife of a Hindu minor boy to be her guardian. It is urged that the provision is utterly

discriminatory, as it discriminates on the ground of sex alone. It is violative of Article 15 of the Constitution. Mr. Sudhanshu Kumar is quick to add that instead of the provision being held discriminatory and violative of Article 15, which it certainly would be if read the way it is, the provision ought to be read down by adding the words to Clause (c) of Section 6 to the effect "and in the case of a married boy, the wife, after the word, the husband".

64. Learned Counsel for respondent no. 5 urged that it is always desirable to read down a Statute in a manner that it makes it *intra vires*, rather than construing it on its plain language and hold it to be *ultra vires*. In support of this proposition, Mr. Sudhanshu Kumar has placed reliance on the decision of the Supreme Court in **Githa Hariharan (Ms.) and another v. Reserve Bank of India and another**[17]. He points out that the aforesaid decision also related to interpretation of a provision of the Act of 1956, to wit, Section 6(a), which by the letter of it provides thus :

> "**Section 6. Natural guardians of a Hindu minor**.—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
>
> (a) in the case of a boy or an unmarried girl—the father, and after him, the mother:"

65. It is submitted by the learned Counsel that in **Githa Hariharan**, the issue was about construction of the word 'after', occurring in Clause (a) of Section 6 between the words 'and' and 'him', which relegated the mother to a secondary position and made her the minor's guardian, after the lifetime of the father. The principal issue before their Lordships was that Section 4(c) of the Act of 1956 defined natural guardian to mean any of the guardians mentioned in Section 6. This placed the parents at par and if the mother were held to be the natural guardian after the father's lifetime, it would be discrimination between the mother and the father in the matter of their right as natural guardians of the minor, only on the ground of sex.

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17 **(1999) 2 SCC 228**

This would have been violative of Articles 14 and 15 of the Constitution.

In this context, it was held in **Githa Hariharan** :

> "**8.** Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word "after" in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as the guardian of the minor *during* the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is *not* the legal guardian of the minor in view of Section 6(*a*) (*supra*). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only *after* the lifetime of the father and not during his lifetime.
>
> **9.** Is that the correct way of understanding the section and does the word "after" in the section mean only "after the lifetime"? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the *fundamental rights* guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion — No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.
>
> **10.** We are of the view that Section 6(*a*) (*supra*) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(*a*) (*supra*), it means "*in the absence of*", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be *absent* and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such

> an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(*a*) (*supra*)."

66. It is urged by Mr. Sudhanshu Kumar, learned Counsel for respondent nos. 5 and 8, that a similar approach should be adopted here to relieve the Statute of the vice of discrimination on the ground of sex alone and save it from unconstitutionality.

67. Mr. Rajeev Lochan Shukla, learned *Amicus Curiae*, has submitted that the provisions of Section 6(c) of the Act of 1956, that provide for a Hindu minor girl being subject to the guardianship of her husband, are now redundant in view of the provisions of the PCMA, and more particularly, the decision of the Supreme Court in **Independent Thought**, which has read down Exception (2) to Section 375 IPC by holding that in place of the words, "the wife not being 15 years", the words "the wife not being 18 years" be read. It is urged by Mr. Shukla that in view of the decision of the Supreme Court in **Independent Thought**, a husband being regarded the natural guardian of a Hindu minor wife, would constitute statutory rape. As such, the provisions of Section 6(c) are no more than a dead letter now. It ought to be suitably amended by the legislature to bring it in accord with the prevalent law, that in any case, renders it otiose.

68. This Court has keenly considered the submissions on this question, which is of decisive importance to the event in this case. Though much has been made by the parties about the possibility, the legality or illegality of a minor husband's custody being entrusted to his major wife, so much so that Mr. Sudhanshu Kumar has called in question the *vires* of Section 6(c) of the Act of 1956, saying that it is discriminatory on the ground of differential treatment based on sex alone, this Court is of opinion that given the present state of laws, much of those issues really do not arise. The question about the provisions of Section 6(a) being discriminatory, inasmuch as it provides for the husband being the natural guardian of a minor Hindu wife, but not *vice versa*, urged by Mr. Sudhanshu Kumar

with great vehemence, is indeed attractive and not entirely without substance. But, in the opinion of the Court, the way the law has now moved on, that provision of the Act of 1956 has become otiose and unenforceable because of the operation of certain other statutes, like the Act of 2012 and the decision of the Supreme Court in **Independent Thought**. This Court must also place on record here that the submission of Mr. Sudhanshu Kumar that Section 6(c) ought to be read down on the same lines as done in **Githa Hariharan** by the Supreme Court is slightly misplaced. In **Githa Hariharan** the Court did not apply the doctrine of reading down, but brought about a harmonious construction of the provisions of Sections 4(c) and 6(a) of the Act of 1956.

69. It is true, no doubt, that the purpose of the harmonious construction in **Githa Hariharan** was ultimately to save the Statute from unconstitutionality, which was apparent, if it was read in any other manner, but to this Court's understanding the doctrine of reading down was not applied. These remarks, though again academic, the Court is compelled to make, because in the present case, there is no challenge laid to the *vires* of the provisions of Section 6(c) of the Act of 1956 by any of the parties, where the Court may have considered reading down the provision, instead of striking it down, if a case of constitutionally prohibited discrimination were ultimately established. In any case, that question does not seem to arise here. The reason is that Section 6(c) of the Act of 1956 appears to be a rudimentary provision, that was enacted in a different world and in a different social order. It was a time when going by the norms prevalent in society, much younger girls were married to older boys. Some of the girls would not qualify as major under the Indian Majority Act, 1875 as they would be less than 18 years and still regarded old enough by the prevalent social values to be married. It was in that context that the provisions of Section 6(c) were enacted, which were happily placed with the Penal provisions in the Code, where, according to Exception (2) to Section 375 “Sexual intercourse or sexual acts by a man

with his own wife, the wife being not under 15 years of age, is not rape". Thus, Exception (2) excluded sex with a wife, who was not under 15 years of age, from the purview of statutory rape, though the definition of rape otherwise provides that any of the acts of sex mentioned in Clauses (a) to (d) of Section 375, if done by a man, with or without the woman's consent, when she is under 18 years of age, would be rape.

70. The contemporaneous provisions of Section 6(a) and Exception (2) to Section 375 IPC would show that at the point of time when Section 6(c) was enacted, it was widely acceptable in society for a minor girl, not below the age of 15, to be married to a major husband. The provisions in the CMRA were also to similar effect. The CMRA was enacted in the year 1929, and the Statute, as originally enacted, provided the minimum legal age for a girl's marriage as fourteen years. It was raised to fifteen years by Amending Act no.41 of 1949. It was further raised to eighteen years by the Child Marriage Restraint (Amendment) Act, 1978. The Act of 1956 was enacted when the CMRA provided the minimum legal age for a girl's marriage as fifteen years. The provisions of Section 6(c) were enacted in that context and have not been legislatively rectified to bring it in accord with the law, as it now stands. In the present time and as the law has evolved, there is no scope for Section 6(c) of the Act of 1956 to be an operative clause of the law any more.

71. Dilating on the effect of the Act of 2012 in relation to sex with a child, as defined there, it has been held by the Supreme Court in **Independent Thought** :

> "**189.** Section 42-A of the Pocso Act has two parts. The first part of the section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of the Pocso Act are in addition to and not above any other law. However, the second part of Section 42-A provides that in case of any inconsistency between the provisions of the Pocso Act and any other law, then it is the provisions of the Pocso Act, which will have an overriding effect to the extent of inconsistency. The Pocso Act defines a "child" to be a person below the age of 18 years. "Penetrative sexual assault" and "aggravated penetrative sexual assault"

have been defined in Section 3 and Section 5 of the Pocso Act. Provisions of Sections 3 and 5 are by and large similar to Section 375 and Section 376 IPC. Section 3 of the Pocso Act is identical to the opening portion of Section 375 IPC whereas Section 5 Pocso Act is similar to Section 376(2) IPC. Exception 2 to Section 375 IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of the Pocso Act. Therefore, this is a major inconsistency between the Pocso Act and IPC. As provided in Section 42-A, in case of such an inconsistency, the Pocso Act will prevail. Moreover, the Pocso Act is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, the Pocso Act will prevail over IPC and Exception 2 insofar as it relates to children, is inconsistent with the Pocso Act.

Is the Court creating a new offence?

190. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as in Sections 3 and 5 of the Pocso Act. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and the Pocso Act.

191. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

192. The aforesaid principle, commonly known as Hale's principle, was recorded in *The History of the Pleas of the Crown* [(1736) Vol. 1, Ch. 58, p. 629] and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

193. The aforesaid principle was followed in England for more than two centuries. For the first time in *R.* v. *Clarence* [*R.* v. *Clarence*, (1888) LR 22 QBD 23 (CCR)] , some doubts were raised by Wills, J. with regard to this proposition. In *R.* v. *Clarke* [*R.* v. *Clarke*, (1949) 2 All ER 448] , Hale's principle was given the burial it deserved and it was held that the husband's immunity as

expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held [*R.* v. *R.*, (1992) 1 AC 599, p. 616 : (1991) 3 WLR 767 : (1991) 4 All ER 481 at p. 484 (HL)] as follows: (*R. case* [*R.* v. *R.*, (1992) 1 AC 599, p. 616 : (1991) 3 WLR 767 : (1991) 4 All ER 481 at p. 484 (HL)] , AC p. 611E)

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

194. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

Relief

196. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

197. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

> (*i*) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India;
>
> (*ii*) it is discriminatory and violative of Article 14 of the Constitution of India; and
>
> (*iii*) it is inconsistent with the provisions of the Pocso Act, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

> "*Exception 2*.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

It is, however, made clear that this judgment will have prospective effect.

198. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.

(Emphasis by Court)

72. The decision in **Independent Thought** leaves no scope for a minor girl now to be lawfully married or permitted any kind of matrimonial alliance, even a live-in-relationship with a major, or for that matter, a

minor man. This being so, the provisions of Section 6(c) of the Act of 1956, that have regarded the husband as the natural guardian of a minor Hindu wife, have truly become otiose and a dead letter. This change in the law is the outcome of the way social values have evolved and if the decision of their Lordships in **Independent Thought** is looked into, it is eloquent on a similar evolution and change of values in England, where it speaks about the Hales Principle and its decimation in R v Clarke, (1949) 2 All ER 448.

73. Now, just as there cannot be the case of a minor Hindu wife being married to a major and the husband regarded as her natural guardian under Section 6(c) of the Act of 1956, the Act of 2012 similarly works to prohibit sex between a man, who is a minor and a woman, who is a major. If Section 3 is carefully seen, the offence of penetrative sexual assault is gender neutral, and has for its subject, a child. Section 2(d) defines a child to mean any person below the age of 18 years. The offence defined under Section 3 together with the penal clause under Section 4, would be attracted to the case of a person, who commits penetrative sexual assault as defined under Section 3, irrespective of the offender's age or sex. Therefore, a minor, who commits an assault on another child, would be equally liable. The same position obtains in the case of an offence as defined under Section 7 and punishable under Section 8 of the POCSO Act.

74. It has already been held in **Independent Thought** and truly those are the clear words of Section 42-A of the Act of 2012 also, that the provisions of the Act have overriding effect over the provisions of any other law, in case of any inconsistency, to the extent of it. Therefore, the mere fact that the marriage is not void under the PCMA, or that Section 9 makes a male above 18 years of age liable to punishment, if he contracts a child marriage, but not a female above 18 years of age, likewise liable, would not make any difference. A female, who is a major, if she were

permitted to marry, or more particularly, consummate marriage with a child, would be liable under Section 3/4 of the Act of 2012, subject, of course, to the charge being established at the trial, after a prosecution is instituted.

75. Here, if Manish, who is still below the age of 18, were to be placed in the custody of his wife, respondent no. 8, it would be virtually sanctioning the imminent commission of the offence under Section 3/4 of the Act of 2012, or the other penal provisions of the said Statute. Therefore, to entrust the minor Manish Kumar to the custody of his major wife, would not only be patently illegal, but virtually permitting an offence under the Act of 2012, in violation of the interest of the child that the said Statute is designed to protect. If that were done, by application of no principle or yardstick, can it be regarded as an option that would secure the welfare of the minor.

76. The fifth question is answered in the ***negative*** and it is held that a wife, who is a major, cannot be entrusted the custody of her minor husband, where the marriage is voidable for reason that entrusting a minor husband's custody to a major wife, would be sanctioning cohabitation between an adult/major and a child – an offence under Section 3/4 or 7/8 of the Act of 2012. The custody or care of a minor, that inherently makes or has the potential of making the minor the victim of an offence and his adult guardian an offender under the Act of 2012, cannot be regarded as a custody or arrangement made to ensure the welfare of the minor.

77. The conclusion would, therefore, be that the petitioner, Manish Kumar, shall stay in a State Facility, like a Protection Home or a Safe Home or a Child Care Institution, other than an institution meant for delinquents or a Correction Home, until Manish attains the age of 18 years, that is to say, 04.02.2022 (according to Manish's recorded date of birth in his High School Certificate). On 04.02.2022, Manish shall be set free to go wherever he wants and stay with whomsoever he likes,

including his wife, Smt. Jyoti, respondent no. 8 and her family. This arrangement has been made considering Manish's stand before this Court on 23.09.2020 and maintained throughout the proceedings, where he said that he does not want to go back to his mother, Haushila Devi, petitioner no.2. If for any reason before 04.02.2022, Manish desires to go back to his mother, petitioner no. 2, it will be open to him, through an official of the Home where he is housed, to make an application for the purpose to the Child Welfare Committee, appointed under the Act of 2012. He will then be produced before the Child Welfare Committee, who will ascertain his stand in the matter by recording his statement *viva voce*. If Manish's stand is clear that he wishes to go back to his mother during the period of his minority and the Child Welfare Committee are satisfied that it is a voluntary statement, Manish shall be permitted to go back to his mother and shall stay there until he attains the age of 18 years. After that Manish would be free to go wherever he likes and stay with whomsoever he wants, including his wife.

78. In the result, this Habeas Corpus Writ Petition **succeeds** and stands ***allowed***. The *rule nisi* is, therefore, made **absolute** in terms of the above orders.

79. There shall, however, be no order as to costs.

80. Mr. Rajeev Lochan Shukla, Advocate, who consented to assist the Court as an *Amicus Curiae*, rendered invaluable assistance to the Court in dealing with the subtle issues involved and the rights of parties, doing so through the rather prolonged hearing in the case, where he took time out of his busy schedule to assist the Court. Likewise, this Court must also place on record its gratitude to Mr. Ashutosh Yadav, Advocate, who also assisted the Court on our request as an *Amicus Curiae* and was of immence help, particularly on certain vexed issues. Mr. Sudhanshu Kumar, learned Counsel appearing for respondent no. 5, was appointed by the Court to appear on behalf of the said respondent, inasmuch as both

respondent nos. 5 and 8 expressed their inability to engage Counsel to represent them. Mr. Sudhanshu Kumar was, therefore, nominated by the Court from the Panel of Lawyers maintained by the High Court Legal Services Committee, High Court, Allahabad to appear on behalf of respondent nos. 5 and 8. It must be placed on record that Mr. Sudhanshu Kumar rendered both invaluable and enthusiastic assistance throughout the hearing. This Court must record its appreciation that Mr. Sudhanshu Kumar very ably discharged his brief to the great advantage of this Court. He will be entitled to receive in fee a consolidated sum of Rs. 15,000/- from the High Court Legal Services Committee, High Court Allahabad.

81. Let this order be communicated to respondent nos. 2 to 8, the Child Welfare Committee, Azamgarh, and the Superintendent of the State Facility or Safe Home, where the minor is/shall be housed, through the Chief Judicial Magistrate, Azamgarh by the Joint Registrar (Compliance). Let a copy of this order be also communicated to the Secretary, High Court Legal Services Committee, High Court, Allahabad by the Joint Registrar (Compliance).

Order Date :- May the 31st, 2021
Anoop / I. Batabyal