

**A.F.R.**

**Neutral Citation No. - 2024:AHC:197157**

**Reserved On: 18.10.2024**

**Delivered On: 17.12.2024**

**Court No. - 86**

**Case :- CRIMINAL REVISION No. - 4107 of 2023**

**Revisionist :- Julius Masih @ Sintu Masih @ Ajay**

**Opposite Party :- State of U.P. and Another**

**Counsel for Revisionist :- Araf Khan**

**Counsel for Opposite Party :- G.A.**

**Hon'ble Ram Manohar Narayan Mishra,J.**

1. Heard learned counsel for the revisionist, learned counsel for the respondent No.2, learned AGA for the State and perused the material placed on record.

2. Pleadings have already been exchanged between the parties.

2. Instant criminal revision has been preferred against the order dated 19.7.2023, passed by the Special Judge (POCSO Act), Hamirpur, in Special Sessions Trial No.397 of 2020, arising out of Case Crime No.241 of 2020, under sections 363, 366 IPC and Section 8 of POCSO Act, Police Station Maudaha, District Hamirpur (State of UP vs. Julius Masih @ Sintu Masih @ Ajay). By the impugned order learned Special Judge has disposed of application 25-Kha with finding that a prima facie case is made out against the accused Julius Masih @ Sintu Masih @ Ajay to put him on trial for charge under sections 363, 366 IPC and Section 8 of POCSO Act. The learned court below has also observed that on perusal of academic documents produced on behalf of the prosecution, the date of birth of victim is found to be 25.11.2004. Accordingly, she was of 15 years, 7 months of age on the date of incident.

3. Learned counsel for the revisionist submitted that according to the the prosecution version the informant Prakash Soni lodged an FIR on the basis of written report at police station Maudaha, District Hamipur on

12.6.2020 that his daughter whose date of birth is 25.11.2004 had gone to purchase some household goods on 11.6.2020, at 5:00 PM at a grocery shop lying on the side of road, but she did not come back; the informant tried to gather her whereabouts and he came to know that his daughter was seen in the company of Julius Masih @ Sintu Masih @ Ajay as both were moving towards Bada Chauraha. He believed that his minor daughter was seduced and kidnapped by accused Chintu Masih and any untoward incident might have occurred with her. The FIR was lodged against named accused under Section 363 and 366 IPC. The police investigated the case and recorded statement of victim twice under Section 161 Cr.P.C. and her statement was also recorded by learned Judicial Magistrate under Section 164 Cr.P.C. during the course of investigation. In statement under Section 164 Cr.P.C. she categorically stated that her age is 19 years as per her date of birth recorded in Birth Certificate by Nagar Palika, Hamirpur issued on 21.9.2019, which is 13.1.2001. In fact, her date of birth in her High School Marksheet shown as 25.12.2004 has been wrongly recorded on the information supplied by her parents. She willingly accompanied the accused. She herself called the accused Julius Masih @ Sintu Masih @ Ajay on 11.6.2020 when she went out of her house on pretext of purchasing some household goods. When the accused visited her, they went together. They had already solemnized marriage on 27.1.2020 and got the marriage registered on 17.3.2020 with Registrar of Marriages. She has also stated that they left their home with intention that they would live together. He had not kidnapped her. She accompanied him on her own volition. She has studied up to class 11th and she is ready to get herself medically examined. Similar statements were give by her to the Investigating Officer and a video CD has been prepared of her statement under Section 161 Cr.P.C. The revisionist got converted to Hindu religion by remnciating Christianity prior to solemnize marriage at Arya Samaj in accordance with Hindu rites and rituals.

4. Learned counsel for the revisionist further submitted that nevertheless the Investigating Officer submitted chargesheet against the revisionist for charges under Section 363, 366, 376(3) IPC and Section 4(2) of POCSO Act only due to the fact that as per the school record, the victim was minor. He next submitted that the trial judge has not placed reliance on the conclusion of Investigating Officer with regard to charges for which the revisionist has been sent up for trial by the Investigating Officer and dropped the charge under Section 376(3) IPC and a major charge under Section 4(2) of POCSO Act has been diluted under Section 8 of POCSO Act in impugned order, after initial charge framing order dated 24.9.2020 was set aside by this Court in Criminal Revision No.1539 of 2021, by order dated 15.9.2021 and remanded the matter to trial court for deciding the issue of framing of charge afresh. He further submitted that on proper analysis of the facts and circumstances of the case and on application of law thereon it is crystal clear that even charges under Sections 363, 366 IPC and Section 8 of POCSO Act are not made out and learned trial judge has wrongly given a finding that these charges are made out against the revisionist accused and there are sufficient ground to frame charges against him under these penal sections. He further submitted that for that Hon'ble Apex Court in **S.Vardarajan vs. State of Madras, AIR 1965 SC 942** has considered the scope of Section 363 IPC meticulously and has observed as under:-

*9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of [s. 361](#) of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active*

participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

13. While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in [ss. 497](#) and [498](#) of the Indian Penal Code should be given a wide interpretation so as to effectuate the object underlying these provisions there is no reason for giving to that word a wide meaning in the context of the provisions of [s. 361](#) and cognate sections.

14. The last case relied upon by the High Court is [Ramaswami Udayar v. Raju Udayar](#)(2) which is also a case under [s. 498](#), I.P.C. In that case the High Court has followed the two earlier decisions of that Court to which we have made reference but in the course of the judgment the learned Judge has observed that it is not open to a minor in law to abandon her guardian, and that, therefore, when the minor leaves the guardian of her own accord and when she comes into the custody of the accused person, it is not necessary that the latter should be shown to have committed an overt act before he could be convicted under [s. 498](#). The learned Judge has further observed :

"A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under [s. 498](#)."

Whatever may be the position with respect to an offence under that section and even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, for the reason which we have already stated, the accused person in whose company she is later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

18. Relying upon both these decisions and two other decisions, the law in England is stated thus in Halsbury's Laws of England, 3rd edition, Vol. 10, at p. 758 :

"The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to

*leave her father, and afterwards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her."*

*On behalf of the appellant reliance was placed before us upon the decisions in [Rajappan v. State of Kerala](#)(1) and [Chathu v. Govindan Kutty](#) (2). In both the cases the learned Judges have held that the expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian; or, in other words an act but for which the person would not have gone out of the keeping of the guardian as he or she did. In taking this view the learned Judge followed, amongst other decisions, the two English decisions to which we have adverted. More or less to the same effect is the decision in [Nura v. Rex](#)(3). We do not agree with everything that has been said in these decisions and would make it clear that the mere circumstance that the, act of the accused was not the immediate cause of the girl leaving her father's protection would not absolve him if he had at an earlier stage solicited her or induced her in any manner to take this step.*

5. Learned counsel for the revisionist emphasized the provisions of Section 8 of POCSO Act, which reads as under:-

*"Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."*

6. Sexual assault as such has been defined under Section 7 of POCSO Act, 2012 reads as under:-

*"Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."*

7. Learned counsel for the revisionist lastly submitted that in fact no offence is made out against the revisionist on the facts of the case and he has been wrongly put on trial. Learned trial court has failed to consider the legal and factual aspects of the case in proper perspective and has recorded a wrong finding that a case under Section 363 and 366 IPC and Section 8 of POCSO Act is made out against the revisionist. The

impugned order is liable to be set aside and the revisionist deserves to be discharged and the entire criminal proceeding, which is being initiated against him before trial court is liable to be set aside.

8. Learned counsel for the revisionist also placed reliance on a judgment of this Court in **Arjun Kumar vs. State of UP and others, Misc. Bench No.25403 of 2018**, in which an FIR lodged against the petitioner for charge under Section 363 and 366 IPC was quashed by this Court vide judgement dated 11.2.2019 placing reliance on statement of victim recorded under Section 164 Cr.P.C. In this judgement, this Court placed reliance on a judgement of Hon'ble Apex Court in **Alamelu and Another vs. State represented by Inspector of Police, (2011) 2 SCC 385**, wherein Hon'ble Apex court observed as under:-

*“39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5.*

*40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under [Section 35](#) of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.*

*42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of [Birad Mal Singhvi Vs. Anand Purohit1](#), observed as follows:-*

*"14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined ..... Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi*

was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of [Narbada Devi Gupta Vs. Birendra Kumar Jaiswal](#)<sup>2</sup>, where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an (2003) 8 SCC 745 individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. **This margin of error in age has been judicially recognized by this Court in the case of [Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors.](#)<sup>3</sup>.** In the aforesaid judgment, it is observed as follows:-

".....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."



9. This Court in **Arjun Kumar vs. State of UP and others (supra)**, observed in paragraph Nos.9, 12, 15 and 16 as under:-

*"9. We find that essentially the first information report was registered for committing offence under Sections 363 and 366 Indian Penal Code.*

*Section 363 Indian Penal Code is required to be read in conjunction with Section 359 Indian Penal Code and Section 361 Indian Penal Code. The said three provisions read as under :-*

*"359. Kidnapping.--Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.*

*361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

*Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.*

*Exception--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.*

*363. Punishment for kidnapping.--Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

*12. From the statement of victim of offence it becomes evident that she of her own left her parental home, went out of the keeping of her lawful guardian without inducement or coercion. Rather, going by the statement of the victim we find that it was on her asking, Arjun came to Huzurpur where the victim joined him and they went to live as husband and wife. It is, therefore, evident that ingredients of Section 363 Indian Penal Code read in conjunction with Section 361 Indian Penal Code are not satisfied. Section 361 Indian Penal Code inheres that offence would be committed if a minor is taken out of the keeping of the lawful guardian of such minor either by coercion or inducement.*

*15. So far as Section 366 Indian Penal Code is concerned, the said provision is required to be read in conjunction with Section 362 Indian Penal Code. The said two provisions read as under:-*

*"362. Abduction.--Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.*

*366. Kidnapping, abducting or inducing woman to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be*



*likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."*

*16. Statement of the victim 'A' recorded under Section 164 Cr.P.C., to which reference has been made in extenso hereinabove indicates that the said offence has not been committed. The victim of her own volition on account of her love affair called Arjun; she left her own house to join the company of Arjun and went with him to contract marriage and thereafter lived with him as his wife."*

9. Per contra, learned counsel for the opposite party No.2 as well as learned AGA submitted that according to the date of birth recorded in school records of the victim, she was minor on the date of incident and was merely of 15 years, 7 months old. She was enticed and taken away by the accused from lawful guardianship of her father. He also instigated her to marry him after enticing her away and this is trite law that minor's consent is no consent. It is accused revisionist who has been instrumental in taking the victim out of lawful guardianship of her father, the informant. Therefore, it cannot be held that the act of taking the victim with him without consent of the guardian and out of keeping of lawful guardianship is innocent act. The impugned order passed by the learned trial court is well reasoned and perfectly legal and no interference needs in impugned order in present criminal revision.

10. In instant case, by the impugned order learned trial court has given finding that on the basis of statement of victim under Section 161 and 164 Cr.P.C., recovery memo and other prosecution papers, a prima facie case is made out against the revisionist to the effect that he had kidnapped the victim, who is a minor girl by enticing away her from lawful guardianship of her parents. Therefore, the charges under Sections 363, 366 IPC and Section 8 of POCSO Act are liable to be framed against him. In FIR lodged at the instance of father of the victim, it is stated that the date of birth of his minor daughter is 25.11.2004. On 11.6.2020, she left the home to bring some grocery items from a grocery shop situated on side of main

road and when she did not come back, he went into search of her and then the people apprised him that they had seen her in company of Shintu Masih @ Ajay while moving towards main crossing from behind Ragaur Kirana Shop and then he believed that said Shintu Masih @ Ajay had enticed away his minor daughter. The victim was recovered by the police during course of investigation and her statement under Section 161 Cr.P.C. was recorded on 16.6.2020, in which she stated that she left her home on pretext of purchasing some household goods at around 4-5 PM on 11.6.2020. Julius Masih came there and both of them are known to each other from long time. She had gone with him with intention to solemnize marriage but police intercepted both of them. Her statement was recorded by the Judicial Magistrate thereafter under Section 164 Cr.P.C. on 15.6.2020, wherein she has stated that her age is 19 years, however, in High School Marksheet, her date of birth is mentioned as 25.11.2004. In Aadhar Card her date of birth is mentioned as 13.1.2001. On 11.6.2020, she left her home around 4-5 PM on pretext of buying some goods and she came to big crossing where she called Julius Masih. He came there. She solemnized marriage with him out of her own volition on 27.1.2020 and she called him on that day to live together. They went from home with intention to live together. He had not kidnapped her. She had gone one her sweet will. Her actual age is 19 years. She has studied up to class 11th. In the High School Marksheet, her age is recorded lesser. She want her medical examination to ascertain her age.

11. Learned counsel for the revisionist placed reliance on a Division Bench Judgement of this Court in **Habeas Corpus No.247 of 2015 (Smt. Ramsati @ Shyamsati Throu. Her Husband Jitendra vs. State of UP Throu. Prin. Secy. Home Deptt. Lko. And others)**. The facts of the case were that Smt. Ramsati @ Shyamsati through her husband Jitendra pleaded that she got married to Jitendra of her free will and accord. The petitioner was tormented because her father and brother had taken some money to get her marriage with an aged person. The petitioner registered

said matrimonial alliance, however, the father did not agree. It has been stated that the petitioner got marriage to Jitendra. She alongwith Jitendra flies earlier also for the same reason as marriage of the petitioner with Jitendra was not accepted by his father. He lodged an FIR against him under Section 364, 506 IPC at police station concerned. It was contended that the petitioner had neither being kidnapped nor abducted and therefore, the charges as levelled against Jitendra were false. The petitioner was housed in a Government Woman Protection Home after recovery during investigation of the case. This court allowed the Habeas Corpus Petition and a direction was issued to release her in the company of Jitendra. This court placed reliance on an earlier judgement given by Justice Ajay Lamba, reported in **2013 (31) LCD 1107, Sonu Paswan vs. State of UP and Another**, whereby this Court observed that even if the detinue is a minor, her marriage cannot be said to be void ab initio under the provisions of Hindu Marriage Act and thereby directed for release of the detinue. The Court observed that marriage of a minor would be voidable under Child Marriage Prevention Act, 2006. Section 3 of the Act, 2006, at the option of contracting party being a child i.e. below than 18 years of age, if a female and not below than 21 years, if the contracting party is a male. This Court in **Sonu Paswan vs. State of UP and Another** (supra) observed in paragraph Nos. 18, 22, 23, 24, 25 and 28 as under:-

*18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/ defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.*

*22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc*

*and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.*

*23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.*

*24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.*

*25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. ( The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).*

*28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get*

*married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.*

12. A birth certificate of the revisionist issued by Nagar Palika Parishad, Maudaha, Hamirpur with regard to the victim has been filed as Annexure No.2 to the affidavit, in which date of birth of victim is recorded as 13.1.2001 and this birth certificate has been registered on 21.9.2019 and the birth certificate was issued on 25.9.2019, prior to the date of birth pleaded by the revisionist and in her statement under Section 164 Cr.P.C., however, it appears that this birth certificate is not part of case diary. The revisionist has also filed marriage certificate and marriage photographs of the victim and revisionist, which are also not part of case diary. The earlier order of framing of charge dated 24.9.2020, under Section 363, 366, 376 IPC and Section 3/4 of POCSO Act has been set aside by this Court's order dated 15.9.2021 in Criminal Revision No.1539 of 2021 and matter was remanded to trial court to decide the question of framing of charge afresh. This Court placed reliance on statements of victim recorded under Sections 161 and 164 Cr.P.C. wherein she stated her age as 19 years and has levelled no allegations against the revisionists. The learned trial court heard the discharge application 25-kha in the light of order dated 24.9.2020 passed in said criminal revision and disposed of discharge application 25-Kha with finding that a prima facie case is made out against the applicant under Sections 363, 366 IPC and Section 8 of POCSO Act and the trial court fixed a date for framing of charge.

13. In instant case, there is no material in support of the charge of commission of Sexual assault by the revisionist against the victim as the victim has stated in her statement recorded under Section 164 Cr.P.C. that she herself solemnized marriage with him out of her free will and she had called him on date of incident in the present case to accompany her, so that they could live together. Therefore, in the absence of any supporting material charge under Section 8 of POCSO Act is not made out altogether.

14. Section 366 IPC may be reproduced as under:-

**S. 366 Kidnapping, abducting or inducing woman to compel her to marriage, etc.-** “Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

**And** whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.”

15. In present case, the victim has levelled no allegations against the revisionist that he kidnapped or abducted her with intent that she may be compelled or knowing it to be likely that she will be compelled to marry him against her will, or in order that they may be forced or suggest to illicit intercourse or knowing it to be likely that she will be forced to seduce to illicit intercourse. Therefore, for want of evidence or material in support of this charge, no prima facie case is made out for charge under Section 366 IPC against the revisionist.

16. Offence of kidnapping is defined under Section 359, 360 and 361 IPC. Section 361 IPC is relevant here, which defines kidnapping from lawful guardianship. The following are the essentials of this offence:- “1. Offence is committed by “taking or inducing of a minor person or a person of unsound mind 2. Person kidnapped must (a) under age of 16 years male (b) under age of 18 years, if female (c) or, a person of unsound mind; 3. Taking or inducing must also be without the consent of the guardian; 5. The consent of minor is immaterial. Hon’ble Supreme Court in **State of Haryana v. Raja Ram A.I.R. 1973 S.C. 819**, held that the consent of the minor is immaterial for charge under Section 363 IPC.

17. The motive or intention of the kidnapper is immaterial. If the kidnapped girl turns out to be under 18 years of age, the kidnapper must take the consequences. Even though, he bonafidely believed and had reasonable grounds for believing that she was over 18. The word “taking

or inducing” used in Section 361 IPC are relevant and both have different connotations. These two words are also used in section 498 IPC. In **State of Haryana v. Raja Ram (surpa)**, Hon’ble Supreme Court held that the object of Section 361 IPC is not only to protect the minor person or person of unsound mind from being seduced for immoral or illegal purpose but also to protect the guardians’ right to have custody or charge over their wards. For the purpose of taking or inducing the minor, it is not necessary to carry out actual physical removal of a person of a minor age, it is sufficient if the offender pursues a minor or a person of unsound mind, so as to create willingness to leave his/her house where he/she was in the custody of the guardian. If the prosecution did not adduce any evidence establishing their allegations that the accused performed some active role, which can be said to be the element of persuasion upon the minor or unsound person to leave her house, then the Court cannot take the presumption that the accused committed the offence of kidnapping only on the basis that such a minor or unsound person met the accused immediately after his/her coming out of the keeping of his/her guardian or just because the accused helped that person in that process of leaving her house.

18. The law is very settled that for the discharge of an accused, it is essential that upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, the judge considers that there is no sufficient grounds for proceeding against the accused. The law is well settled in **Union of India vs. Prafulla Kumar Samal and Another (1979) 3 SCC 4** that if the court comes to the conclusion of strong prima facie case or strong suspicion, the charges will be framed. At the stage of framing of charge the court has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case is made out against the accused. However, the court is not supposed to delve deeply into the materials of the matter. Thus, at the time of framing of



charge, the court is not supposed to look into the evidence of the case in detail and is only to consider whether there is strong suspicion against the accused.

19. On the basis of material available on record, it cannot be held that no case is made out against the accused for charge under Section 363 IPC as there is strong suspicion against him in respect of that offence and accused will have opportunity to prove his innocence by adducing evidence in defence as well as pointing out the infirmities in prosecution case by cross-examination of prosecution witnesses. Consequently, in my considered opinion, a prima facie case is made out for charge under Section 363 IPC against the revisionist. However, no prima facie case is made out to put the revisionist for trial for charge under Sections 366 IPC and 8 of POCSO Act.

20. Accordingly, present revision stands **allowed** and the impugned order is set aside.

21. The matter is remanded to learned court below to decide the application for discharge afresh in the light of observations made in this order, hereinabove, after giving opportunity of hearing to both sides and decide the same in accordance with law.

**Order Date :- 17.12.2024**

Kamarjahan