Before Jasgurpreet Singh Puri, J.

RANJEET KAUR—*Petitioner*

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

CRWP No.7785 of 2020

March 02, 2021

A) ***Constitution of India, 1950—Art. 226—Hindu Marriage Act, 1955—Ss. 5, 13 and 18—The Hindu Minority and Guardianship Act, 1956—Ss. 6, 8 and 13—The Prohibition of Child Marriage Act, 2006—Ss. 2, 3, 9, 10, 12 and 15—Habeas Corpus Petition filed by sister-in-law of husband of minor detenue dismissed—No inherent right vested in husband or his relatives to claim custody of minor girl by filing writ of habeas corpus—As per Section 13 of 1956 Act, welfare of minor to be paramount consideration—Husband of married minor girl being her natural guardian immaterial.***

Held that, although under Section 6, the husband of a married girl is a natural guardian of a Hindu minor but when the same provision is read along with Section 8 and Section 13, it would show that it is welfare of the minor which is of paramount consideration.

(Para 20)

B) ***Welfare of the minor—Paramount consideration—No person be entitled to guardianship by virtue of provisions of any law relating to guardianship in marriage among Hindus, if court opines that his or her guardianship will not be for welfare of minor.***

Held that, the upshot of the aforesaid legislative provisions would show that in case of Hindu marriage performed by a boy below the age of 21 years and a girl below the age of 18 years then the same is neither void nor voidable under the Hindu Marriage Act but it certainly attracts punishment of two years with a fine of one lakh rupees or with both under Section 18 of the Hindu Marriage Act. Furthermore, it is a ground under Section 13 (2) (iv) of the Hindu Marriage Act, for a minor wife to seek dissolution of marriage in case marriage was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. Under the Hindu Minority and Guardianship Act, 1956, although the husband is the natural guardian of a Hindu minor girl but the powers of natural guardian have also been defined under Section 8 of the Act to all acts which are necessary or reasonable and

proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant. Furthermore, under Section 13 of the Act, it has been specifically provided that it is the welfare of the minor which is of paramount consideration and no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor. The provisions of the Prohibition of Child Marriage Act, 2006, are more strict. Under Section 3 of the Act every child marriage shall be voidable at the option of the contracting party who was a child at the time of the marriage and such a petition can be filed at any time but before the child filing the petition completes two years of attaining majority i.e. before 20 years of age. Penal provisions have also been provided under Sections 9, 10 and 11 of the Act. Furthermore, under Section12, various circumstances have been provided where the marriage of a minor child is void and under Section 15, the offences have been made cognizable and non-bailable.

(Para 22)

C) ***Constitutional Courts—parens patriae—Doctrine can be invoked in exceptional circumstances—Minor girl eloping and expressing fear for life—Court to send such girl to shelter home.***

Held that, the exercise of parens patriae jurisdiction by the Constitutional Courts also requires due weightage while considering the issue involved in the present case. The doctrine of parens patriae was originated in the United Kingdom in the 13th Century. It implies that the King is the guardian of the nation and was under a duty to look after the interests of its subjects who are in fact not able to look after themselves. This doctrine was discussed in detail by the Hon'ble Supreme Court in Charan Lal Sahu Vs. Union of India (1990) 1 SCC 613. Thereafter, lately the Hon'ble Supreme Court in Shafin Jahan Vs. Asokan K.M. and others. 2018 AIR (SC) 1933, observed that the Constitutional Courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as a paramount concern although the same is required to be invoked in exceptional situation. The Hon'ble Court had quoted instances that where a person is mentally ill and is produced before the Court in a writ of habeas corpus, the said doctrine can be invoked and on certain other occasions when a girl is not a major and has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the Court should

send her to appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

(Para 37)

D) ***Child Marriage—Illegal—Consent irrelevant—Devastating consequences of child marriage—Element of consent sub-servient to overall welfare of a child.***

Held that, a social menace needs a solution and not another menace. A legislative intention cannot be given a go-bye by way of judicial intervention which would in turn defeat the very purpose and rationale of legislation because it would otherwise amount to waiver of an illegal act or an offence. It would be trite in law to acknowledge child marriage based on consent. The element of consent is always sub-servient to overall welfare of a child. Furthermore, the medical hazards in case of a child marriage cannot be overlooked. Fixing the age of marriage for females as 18 years by the Legislature is not without any reason as it is also based upon the evil effects of a child marriage in terms of medical, social, psychological, economic and other like factors. The consequences of girl child marriage are much more devastating. It exposes girls to increased health problems and violence, denies them access to social networks and support systems and perpetuates a cycle of poverty and gender inequality..... ..This Court is of considered view that there is no inherent right vested in the husband or his relatives to claim custody of minor girl by filing writ of habeas corpus. Keeping a minor girl child in such like circumstances either by an order of judicial Court or by the Child Welfare Committee by following proper procedure cannot be held to be an illegal detention.

(Para 40)

Arun Takhi, Advocate,
for the petitioner.

Harpreet Singh Multani, AAG, Punjab.

Harsh Chopra, Advocate,
for respondent No.6.

JASGURPREET SINGH PURI, J.

(1) The present petition has been filed under Article 226 of the Constitution of India, with a prayer for issuance of a writ, order or direction especially in the nature of habeas corpus for the release of alleged detenue namely Neha wife of Harpreet Singh, resident of

village Dhugga Kalan, Tehsil Garhiwala, District Hoshiarpur.

FACTS OF THE CASE

(2) The petitioner herein is the real sister-in-law (Bhabhi) of one Harpreet Singh, aged 28 years son of Late Sh.Lashkar, resident of village Dugga Kalan, Tehsil Garhdiwala, District Hoshiarpur and has filed the present writ petition seeking writ in the nature of habeas corpus for release of one Neha, aged 16 years and 6 months who despite being below the age of 18 years married with aforesaid Harpreet Singh on 18.8.2020 in Prachin Pashupati Nath Shiv Mandir, MDC, Panchkula, as per the Hindu rites and rituals against the wishes of parents of Neha. Harpreet Singh belongs to Ad-dharmi caste which falls under SC category whereas Neha belongs to Lohar caste which falls under the backward category. The date of birth of Harpreet Singh is stated to be 18.1.1991 and is now about 30 years of age whereas date of birth of Neha is stated to be 6.4.2004 and is now a little less than 17 years of age. Both of them are governed by the Hindu Law.

(3) Since the marriage was performed against the wishes of parents of the girl, she along with Harpreet Singh filed a criminal writ petition in this Court titled as "Neha and another Vs. State of Punjab and others" bearing CWP No.6587 of 2020 and the same was disposed of on 31.8.2020, vide Annexure P-4 with a direction to the police Authorities to decide the representation dated 19.8.2020 and to provide necessary protection in case the facts of the case is dictate. It was further made clear that the order was not a bar on initiation of any proceedings in accordance with law nor is it an expression of opinion regarding the validity or otherwise of the marriage.

(4) However, before the aforesaid directions had been issued by this Court, an FIR No.0174 dated 8.8.2020, already stood registered against Harpreet Singh under Section 363 IPC vide Annexure P-5. Said Harpreet Singh thereafter, filed an application for anticipatory bail before the learned Additional Sessions Judge, Hoshiarpur, but since the FIR was under Section 363 IPC only which is a bailable offence, he withdrew the said application on 11.9.2020 vide Annexure P-7. Thereafter, father of Neha namely Karnail Singh (respondent No.6), made a supplementary statement to the police that his daughter has been enticed away by Harpreet Singh and therefore, offence under Section 366-A IPC was added in the FIR on 19.9.2020 vide Annexure P-8. As stated by the petitioner in paras 9 to 13 of the petition, both Harpreet Singh and Neha appeared before respondent No.2 i.e. the Senior Superintendent of Police, Hoshiarpur on 14.9.2020 and

submitted a copy of aforesaid order dated 31.8.2020 passed by this Court and they were directed by respondentNo.2 to appear before the Deputy Superintendent of Police, Tanda, for protection. Thereafter, they appeared before the Deputy Superintendent of Police, Tanda, on 17.9.2020 but they were detained at the Police Station and on getting knowledge of the same, the petitioner went to the Police Station along with Sarpanch and thereafter, Neha was sent along with the petitioner and Panchayat and directed them to produce Neha on 18.9.2020 in the Police Station, Dasuya. Thereafter, the Panchayat produced Neha before respondent No.3 and Neha flatly refused for the medical examination but she agreed for her Corona test and thereafter, she was also produced before the Illaqua Magistrate for recording of her statement under Section 164 Cr.P.C. Thereafter, on 19.9.2020, Harpreet Singh was arrested as offence under Section 366-A IPC was added. On the same date, Neha was sent to Nari Niketan/Child Protection Home, Jalandhar, as she did not want to go with her father. Since then Neha is in Nari Niketan/Child Protection Home, Nakodar Road, Near Khalsa School, Bhargav Camp, Jalandhar (respondent No.5).

(5) On 15.1.2021, when this matter came up for hearing, the learned State counsel suggested that the alleged detenue can be made available for interaction through webex and had submitted that on the next date of hearing, she may be permitted to interact on the webex and therefore, it was directed that if the aforesaid interaction is feasible then the same may be done through webex and the same should be done with the help of a lady police official only.

(6) On 18.1.2021, when the matter was heard, the aforesaid girl Neha who is residing at Nari Niketan/Child Protection Home, Jalandhar, was produced through webex and this Court had the occasion to interact with her. She apprised the Court that she is duly married with Harpreet Singh and her age is about 16½ years. On being pointedly asked as to where she wants to reside, she stated that she wishes to go with her husband. When she was asked as to whether she was ready and willing to go with her father or not, she flatly refused to go along with her father. On being further asked as to whether she was facing any difficulty in the Nari Niketan/Child Protection Home, she stated that she is not facing any difficulty or problem while staying in the Nari Niketan/Child Protection Home.

CONTENTIONS

(7) Learned counsel for the petitioner has submitted that it was

a case of love marriage between Harpreet Singh and Neha and they had married voluntarily and without any force or coercion. He submitted that notwithstanding that girl was minor, she still had a legal right to live with her husband and therefore, she cannot be compelled to stay at Nari Niketan/Child Protection Home, Jalandhar. The learned counsel further submitted that the present petition has been filed by the real sister-in-law of Harpreet Singh in view of the fact that father of Harpreet Singh is since deceased and his mother is suffering from heart disease and the brother of Harpreet Singh is living abroad and today, there is no one else in the family except the present petitioner to file present petition. He further submitted that now Harpreet Singh has been released on bail. He further submitted that since the present petition is filed seeking a writ in the nature of habeas corpus and the same having being filed by sister-in-law of Harpreet Singh, the same would be maintainable in law. He has further submitted that there is no bar for releasing Neha from Nari Niketan/Child Protection Home, Jalandhar, in view of the stand taken by Neha herself that she had voluntarily married Harpreet Singh and she wanted to stay with him and not with her father and therefore, no useful purpose would be served in case Neha continues to remain in Nari Niketan/Child Protection Home, Jalandhar, till the age of majority.

(8) To support his contentions, learned counsel for the petitioner has relied upon various judgments and submitted that when marriage of a minor girl is solemnised with her own consent, she cannot be compelled to remain in Nari Niketan/Child Protection Home, Jalandhar, till the age of majority. Reliance has been placed on the following judgments:-

(1) ***Mrs. Kalyani Chaudhari*** versus ***The State of U.P. and others***[1];

(2) ***Neetu Singh*** versus ***State***[2]

(3) ***Latori Chamar*** versus ***State of M.P. and ors***.[3];

(4) ***Balwinder Singh @ Binder*** versus ***State of Punjab and***

[1] 1978 Cri.L.J. Page 1003 (Allahabad HC)
[2] 1999 (3) RCR (Crl.) 26 (Delhi HC)

[3] 2007 Crl. L.J. 1105 (Madhya Pradesh HC)

others[4]

(5) ***Shamsher*** versus ***U.T. Chandigarh and another***[5]

(6) ***Sh. Jitender Kumar Sharma*** versus ***State and another***[6]

(7) ***Court on its own motion (Lajja Devi)*** versus ***State W.P.(Crl.) No.338 of 2008*** decided on 27.7.2012, Full Bench (Delhi HC).

(8) ***T.Sivakumar*** versus ***The Inspector of Police, Thiruvallur Town Police station, Thiruvallur District and others, H.C.P. No.907 of 2011***, decided on 3.10.2011, Full Bench (Madras HC) and

(9) ***Preeti and another*** versus ***State of Haryana and others, CRWP No. 4181 of 2020***, decided on 16.10.2020 (PHHC).

(9) Per contra, learned Assistant Advocate General, Punjab, while referring to the reply by way of affidavit filed by the Deputy Superintendent of Police, Sub Division, Dasuya, has submitted that as per the Matriculation certificate, the date of birth of the girl is 6.4.2004. The order dated 31.8.2020, passed by this Court in CWP No.6587 of 2020, was received by the police on 14.9.2020 and during investigation, complainant Karnail Singh gave a supplementary statement on 19.9.2020 and therefore, offence under Section 366-A IPC, was added on 19.9.2020 itself and thereafter, statement of girl Neha was got recorded in the Court of learned Judicial Magistrate First Class, Dasuya but she refused to get herself medico legal examined in Civil Hospital Dasuya. Thereafter, the Chairperson of Child Welfare Committee, Hoshiarpur, sent her to Children Home, Gandhi Vaneet Aashram, Jalandhar on 19.9.2020. The leaned State counsel has further submitted that since girl is even less than 17 years of age, it was a case of child marriage and prohibited under law and therefore, even if she has consented to marriage, the same would not be of any significance as child marriage is prohibited under the law and therefore, it will be in the interest of Neha that she continues to remain in the Nari Niketan/Child Protection Home, Jalandhar, till she attains the age of majority.

(10) Sh.Harsh Chopra, Advocate, appearing on behalf of

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[4] 2008 (3) RCR (Crl.) 1 (PHHC)
[5] 2011 (5) RCR (Crl.), 677 (PHHC)
[6] 2010 (4) RCR (Crl.) 20 (Delhi HC)

complainant Karnail Singh – respondent No.6, who is the father of Neha, has raised a preliminary objection with regard to the maintainability of the present petition on the ground that the petitioner is sister-in-law of Harpreet Singh, who is stated to have married Neha and therefore, she has no locus standi to file the present petition. Learned counsel while referring to short reply filed by respondent No.6, has submitted that considering the facts and circumstances of the case, it will not be in the interest of Neha that her custody is given either to the petitioner or to Harpreet Singh. He submitted that considering the age difference of about 13 years between Neha and Harpreet Singh and the fact that Harpreet Singh is not only an accused in the present case under Sections 363 and 366-A IPC but he is also an accused in FIR No.46 of 2016, under Sections 454, 380, 511 and 34 IPC, registered at Police Station Gardhiwala, it will be in the interest of Neha that she remains at Nari Niketan/Child Protection Home, Jalandhar, because she has refused to come back to her father.

(11) Learned counsel for respondent No.6 has further relied upon the judgment of the Hon'ble Supreme Court in ***Independent Thought*** versus ***Union of India and anr.***[7], to contend that the Hon'ble Supreme Court while interpreting Exception 2 to Section 375 IPC, has held that the aforesaid exception shall be read as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape". He has submitted that it has been held by the Hon'ble Supreme Court that a girl child below the age of l8 years who is sought to be married is a child in need of care and protection and therefore, required to be produced before the Child Welfare Committee constituted under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, 2015, so that she could be cared for, protected and appropriately rehabilitated or restored to society. Furthermore, marriage of a girl below the age of 18 years is detrimental to her health in terms of her overall well being.

(12) Learned counsel has further relied upon a Full Bench judgment of the Hon'ble Patna High Court in ***Shikha Kumari*** versus ***The State of Bihar through Principal Secretary, Home (Police) Deptt., Govt. of Bihar, Patna and Ors.***[8], to contend that in such like situation where the minor girl has refused to go along with her parents, the only option left with the Court is to send her to Protection Home till time she is major or does not consent to go to her

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[7] 2017 (10) SCC 800
[8] 2020 (2) PLJR 15

family.

(13) The learned counsel further relied upon a judgment of this Court in ***CRWP No.727 of 2020 titled as "Parminder Kaur and another*** versus ***State of Punjab and others, decided on 30.1.2020 and CRWP No.6912 of 2020, titled as "Sukhwinder Singh and another*** versus ***State of Punjab and others, decided on 25.9.2020***, wherein this Court had denied protection to run away couple on the ground that child marriage was undertaken in violation of the provisions of the Child Marriage Act. In Sukhwinder Singh's case detailed directions were issued regarding monitoring of records by the priests who perform marriage and directing the SHO of the concerned area on receiving complaint, to take action under the Prohibition of Child Marriage Act.

(14) Learned counsel for respondent No.6 has submitted that it will be in the interest of her daughter in case she continues to stay at Nari Niketan/Child Protection Home, Jalandhar till she attains the age of majority or till such time, when she voluntarily agrees to accompany her father and therefore, has prayed for dismissal of the present petition.

ANALYSIS

(15) I have heard the learned counsel for the parties at length.

(16) The preliminary objection raised by the learned counsel for respondent No.6 with regard to the maintainability of the present petition cannot be sustained in view of the fact that the present petition is filed seeking a writ in the nature of habeas corpus and it is a settled law that locus standi for filing writ in the nature of habeas corpus is relaxed and it is not necessary that the petitioner who files the petition should be directly an affected party and therefore, the preliminary objection raised by the learned counsel for respondent No.6, is rejected.

(17) The question which is to be considered in the present petition is as to whether a girl who is less than 18 years of age gets married to a boy with her consent can be compelled to stay at Nari Niketan/Child Protection Home while she refuses to accompany her parents or not?

(18) Before adverting to various judicial pronouncements as referred by the learned counsel for the parties, it would be necessary to refer to the statutory provisions under different Statutes/Acts

pertaining to the validity of a child marriage under Hindu Law as well as penal provisions pertaining to child marriage.

Hindu Marriage Act, 1955

"5.Conditions for a Hindu Marriage: - A marriage may be solemnized between two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind ; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such as extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

(iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

Section 13. Divorce. -

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(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-

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(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation. - This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (Act no.68 of 1976).

18. Punishment for contravention of certain other conditions for a Hindu Marriage:- Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the condition specified in clauses (iii), (iv) and (v) of section 5 shall be punishable-

(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both."

(19) A perusal of the aforesaid provisions contained under the Hindu Marriage Act, thus makes it abundantly clear that it is one of the conditions of the Hindu marriage that the bridegroom has completed the age of twenty one years and the bride has completed the age of eighteen years at the time of the marriage but the violation of the same does not invalidate the marriage and it is neither a void marriage under Section 11 nor it can be a voidable marriage under Section 12. However, a wife can present a petition for the dissolution of her marriage by a decree of divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. Furthermore, punishment for contravention of condition contained in Section 5 clause (iii) has been provided under Section 18 of the Act wherein punishment of rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both has been provided.

The Hindu Minority and Guardianship Act, 1956

"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: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

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

(c) in the case of a married girl the husband:

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

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

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

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

8.Powers of natural guardian.

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

13.Welfare of minor to be paramount consideration.

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

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

(20) A perusal of aforesaid provisions would show that although under Section 6, the husband of a married girl is a natural guardian of a

Hindu minor but when the same provision is read along with Section 8 and Section 13, it would show that it is welfare of the minor which is of paramount consideration.

The Prohibition of Child Marriage Act, 2006.

2. Definitions.

In this Act, unless the context otherwise requires,--

(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party", in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnised;

(d) "Child Marriage Prohibition Officer" includes the Child Marriage Prohibition Officer appointed under sub-section (1) of section 16;

(e) "district court" means, in any area for which a Family Court established under section 3 of the Family Courts Act, 1984 (66 of 1984) exists, such Family Court, and in any area for which there is no Family Court but a city civil court exists, that court and in any other area, the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority.

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.

9. Punishment for male adult marrying a child. Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

10. Punishment for solemnising a child marriage. Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

12.Marriage of a minor child to be void in certain circumstances.

> Where a child, being a minor--
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> (a) is taken or enticed out of the keeping of the lawful guardian; or
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> (b) by force compelled, or by any deceitful means induced to go from any place; or
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> (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.
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> 15.Offences to be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under this *Act shall be cognizable and non-bailable.*

(21) A perusal of the aforesaid provisions would show that under Section 2, the expressions "child" and "minor" have been separately defined. "Child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. However, "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority. Section 3 provides that a child marriage would be voidable at the option of the contracting party being a child and a petition may be filed by a contracting party in this regard at any time but before the child filing the petition completes two years of attaining majority. In other words, a petition can be filed by a contracting party till attaining the age of twenty (20) years. Sections 9 and 10 provide for penal provisions wherein a male adult above eighteen years of age, contracts a child marriage shall be punishable with with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both and under Section 10 whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage. Section 12 provides that where a child being a minor is taken or enticed out of the keeping of the lawful guardian or by force compelled, or by any deceitful means induced to go from any place or is sold for the purpose of marriage or used for immoral purposes, then such marriage shall be

null and void and Section 15 makes the offences to be cognizable and non-bailable.

(22) The upshot of the aforesaid legislative provisions would show that in case of Hindu marriage performed by a boy below the age of 21 years and a girl below the age of 18 years then the same is neither void nor voidable under the Hindu Marriage Act but it certainly attracts punishment of two years with a fine of one lakh rupees or with both under Section 18 of the Hindu Marriage Act. Furthermore, it is a ground under Section 13 (2) (iv) of the Hindu Marriage Act, for a minor wife to seek dissolution of marriage in case marriage was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. Under the Hindu Minority and Guardianship Act, 1956, although the husband is the natural guardian of a Hindu minor girl but the powers of natural guardian have also been defined under Section 8 of the Act to all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant. Furthermore, under Section 13 of the Act, it has been specifically provided that it is the welfare of the minor which is of paramount consideration and no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor. The provisions of the Prohibition of Child Marriage Act, 2006, are more strict. Under section 3 of the Act every child marriage shall be voidable at the option of the contracting party who was a child at the time of the marriage and such a petition can be filed at any time but before the child filing the petition completes two years of attaining majority i.e. before 20 years of age. Penal provisions have also been provided under Sections 9, 10 and 11 of the Act. Furthermore, under Section 12, various circumstances have been provided where the marriage of a minor child is void and under Section 15, the offences have been made cognizable and non-bailable.

(23) The learned counsel for the petitioner has relied upon number of judgments. In Kalyani Chaudhari (supra), the Hon'ble Allahabad High Court was dealing with detention under the provisions of Immoral Traffic in Women and Girls Act, 1956 and therefore, the same is not applicable in the facts and circumstances of

the present case. In Neetu Singh (supra), the judgment was passed in the year 1999 in which reliance was placed on Kalyani Chaudhari's case and the same was passed before the amendment in Section 18 of the Hindu Marriage Act as well before the coming into force of the Prohibition of Child Marriage Act, 2006 which came into force on 1.11.2007 and therefore, the aforesaid judgment is not applicable to the present case.

(24) Similarly, in the case of Latori Chamar (supra), the Hon'ble Madhya Pradesh High Court, decided the same on 10.1.2007 which was prior to coming into force of the Prohibition of Child Marriage Act, 2006. In Balwinder Singh @ Binder (supra) although the girl was under detention in Nari Niketan but she was a major and her age was 20 years and therefore, the same would not be applicable to the facts of the present case. In the case of Shamsher (supra), which was decided by referring to the earlier judgments in Balwinder Singh @ Binder (supra), Neetu Singh (supra), Latori Chamar (supra), there was no FIR registered in this case.

(25) In Jitender Kumar Sharma (supra), the Hon'ble Delhi High Court passed a detailed judgment by referring to various statutory provisions and the Court had set free a minor girl on the ground that her husband was her natural guardian and the provision of Explanation 2 to Section 375 IPC, was also referred wherein the second explanation provides that "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." However, this judgment is of the year 2010, which is before the authoritative judgment passed by the Hon'ble Supreme Court in Independent thought (supra) in which second explanation to Section 375 IPC has been read down as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.".

(26) In a Full Bench judgment passed by the Hon'ble Delhi High Court i.e. Court on its own motion (Lajja Devi) (supra), two issues were considered. **Firstly,** what is the status of marriage under Hindu Marriage Act when one of the parties to the marriage is below the age of 18 years in contravention to Section 5 (iii) of the Hindu Marriage Act 1955 and Section 2 (a) of the Prohibition of Child Marriage Act, 2006 and **Secondly**, when the girl is minor but the boy has attained the age of marriage as prescribed, whether the husband can be regarded as lawful guardian of the minor wife and claim her custody inspite of differences by the parents of the girl and what is

the effect of the Prohibition of Child Marriage Act, 2006.

(27) It was held that so far as first issue is concerned, a marriage contracted with a female of less than 18 years of age or a male of less than 21 years of age would not be a void marriage but voidable one which could become valid if no steps are taken by such "child" within the meaning of Section 2 (a) of the Prohibition of Child Marriage Act, 2006 under Section 3 of the Act, seeking declaration of the marriage as void. So far as second issue is concerned, it was held that allowing the husband to consummate marriage may not be appropriate more so when the purpose and rationale behind the Prohibition of Child Marriage Act, 2006, is that there should not be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking to exercise her option to get the marriage declared as void till she attains the age of 20 years and how she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Therefore, no final answer to the second issue can be made and it will depend upon the circumstances which the Court will have to decide in an appropriate manner as to whom custody of the girl child should be given. The relevant portion of the aforesaid judgment reads as under:-

> "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.
>
> 46. In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the PCM Act, 2006 is that there should be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. There is another important aspect which is to be borne in mind. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking

> to exercise her option to get the marriage declared as void till she attains the age of 20 years. How she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Such marriages, if they are made legally enforceable will have deleterious effect and shall not prevent anyone from entering into such marriages. Consent of a girl or boy below the age of 16 years in most cases a figment of imagination is an anomaly and a mirage and, and will act as a cover up by those who are economically and/or socially powerful to pulverize the muted meek into submission. These are the considerations which are to be kept in mind while deciding as to whether custody is to be given to the husband or not. There would be many other factors which the Court will have to keep in mind, particularly in those cases where the girl, though minor, eloped with the boy (whether below or above 21 years of age) and she does not want to go back to her parents. Question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband would not be allowed to consummate the marriage. Thus, we are of the opinion that there cannot be a straight forward answer to the second part of this question and depending upon the circumstances the Court will have to decide in an appropriate manner as to whom the custody of the said girl child is to be given."

(28) A Full Bench of the Hon'ble Madras High Court in T.Sivakumar (supra) held that marriage of a female 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, 2006 and such a marriage is not a "valid marriage" stricto sensu but it is "not invalid" and 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. Furthermore, 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 and he shall not be entitled to seek custody of the female child even if the child expresses her desire

to go to his custody. Furthermore, if the girl expresses her desire not to go with her parents, provided in the opinion of the court she has the 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. The conclusions were summed up by the Full Bench of the Hon'ble Madras High Court in para 57 which is reproduced as under:-

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

and circumstances of each case.

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

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

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

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

(29) In Preeti and another (supra), this Court had yet another occasion to deal with a case where the girl was below 18 years of age but above 17 years. The petition was filed by mother- in-law of the girl and the girl was about ten months short of attaining the age of majority. This Court came to the conclusion that since the girl was to attain majority after ten months, she would not magically assume the mental maturity and wisdom upon clock striking 12 midnight on the eve of her 18th birthday and it would not be right and proper for this Court to brush aside her views on the ground that she is not 18 years of age as on date and is only 17+ and therefore, she was allowed to go along with the petitioner who was her mother-in-law. However, various directions were issued to the Child Welfare Committee, Sonipat, to monitor well being of the petitioner till she attains the age

of 18 years. The aforesaid judgment in Preeti and another (supra), would be distinguishable from the facts and circumstances of the present case. In the present case, the girl is below 17 years of age whereas in Preeti and another (supra), the girl was more than 17 years of age and was only ten months short of 18 years. Furthermore, the custody in Preeti and another (supra), was given to the petitioner of that case who was stated to be her mother-in-law whereas in the present case the petitioner is sister-in-law of Neha and furthermore, Harpreet Singh is facing one another FIR which has been mentioned in the short reply filed by respondent No.6.

(30) The Hon'ble Supreme Court in Independent Thought Vs. Union of India (supra) dealt with the explanation 2 to Section 375 IPC wherein the same was directed to be read down as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape". The Hon'ble Supreme Court dealt with the child marriage and also referred to the Full Bench judgments of the Hon'ble Delhi and Madras High Courts. It was observed that a girl child below 18 years of age and who is sought to be married is a child in need of care and protection and therefore, she is required to be produced before the Child Welfare Committee constituted under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, so that she should be cared for, protected and appropriately rehabilitated or restored to society. A child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. The age of consent for sexual intercourse is definitively 18 years and there is no dispute about this and therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. It was further observed that the age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, it must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Furthermore, Such child marriages certainly cannot be in the best interest of the girl child and the solemnization of a child marriage violates the provisions of the Prohibition of Child Marriage Act, 2006.

(31) While discussing exception 2 to Section 375 IPC, it was observed that the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations.

(32) Detrimental effects of an early marriage and sexual intercourse at an early age in terms of physical and mental health, nutrition, education and employability were also discussed. Furthermore, it was observed that Article 21 of the Constitution of India gives a fundamental right to a girl child to live a life of dignity. The Juvenile Justice (Care and Protection of Children) Act, has provided that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore, a child in need of care and protection and in case this provision is ignored, the girl child will be in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally, or psychologically ready and therefore, the intention of the Juvenile Justice Act is to benefit a child rather than place her in difficult circumstances.

(33) The relevant portions of the judgment are reproduced as under:-

> "51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15 (3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.
>
> 77. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted. Firstly, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our

country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet - so also with the status of a child, despite any prefix. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Thirdly, Exception 2 to Section 375 of the IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

78. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnization of a child marriage violates the provisions of the PCMA is well- known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 of the IPC encourages violation of the PCMA? Perhaps 'yes' and looked at from another point of view, perhaps 'no' for it cannot reasonably be argued that one statute (the IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains - what exactly is the

artificial distinction intended to achieve? Justification given by the Union of India

80. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 of the IPC. Besides, they completely side track the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 of the IPC all the more arbitrary and discriminatory.

87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child

lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

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

105. On a complete assessment of the law and the documentary material, it appears that there are really five

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

(34) There is yet another aspect to this matter. Besides various stringent provisions in the aforesaid legislations which have been discussed above, the evil effects of a female child marriage also deserve attention.

(35) As per medical science, child marriage has its own evil effects. As per World Health Organization (WHO), Regional Office for Europe, various ill effects of female child marriage have been discussed and the same are reproduced as under:-

> "The physical health of the female spouse in a child marriage faces several threats. These young girls are often the victims of domestic violence, and they lack the means to

advocate for themselves. Additionally, child brides often live with their husband's extended family, which may also be a source of violent abuse, in crowded conditions.

Their psychological well being and empowerment also suffer, as young girls in child marriages are denied an appropriate childhood and adolescence, and are subject to an increased incidence of psychological abuse as well as domestic violence; a curbing personal liberty; an incomplete education; and a lack of employment and career prospects – all of which contribute to the cyclical nature of poverty, gender inequality and child marriage.

The sexual and reproductive health of the female in a child marriage is likely to be jeopardized, as these young girls are often forced into sexual intercourse with an older male spouse with more sexual experience. The female spouse often lacks the status and the knowledge to negotiate for safe sex and contraceptive practices, increasing the risk of acquiring HIV or other sexually transmitted infections, as well as the probability of pregnancy at an early age.

Complications from pregnancy and child bearing are the leading causes of death among girls aged 15-19 years. Often, those in child marriages do not have access to adequate health and contraceptive services, owing to geographic location or the oppressive conditions of their lifestyle."

(36) As per abstract contained in Journal: "Child Marriage: A Silent Health and Human Rights Issue," by Nawal M. Nour M.D. MPH in Department of Maternal-Fetal Medicine, Brigham and Women's Hospital, African Women's Health Centre, Harvard Medical School, Boston, MA, the ill effects are stated as under:-

"Marriages in which a child under the age of 18 years is involved occur worldwide, but are mainly seen in South Asia, Africa and Latin America. A human rights violation, child marriage directly impacts girls' education, health, psychologic well being, and the health of their offspring. It increases the risk for depression, sexually transmitted infection, cervical cancer, malaria, obstetric fistulas, and maternal mortality. Their offspring are at an increased risk for premature birth and, subsequently, neo

> natal or infant death. The tradition, drive by poverty, is perpetuated to ensure girls' financial futures and to reinforce social ties. One of the most effective methods of reducing child marriage and its health consequences is mandating that girls stay in school."

(37) The exercise of *parens patriae* jurisdiction by the Constitutional Courts also requires due weightage while considering the issue involved in the present case. The doctrine of *parens patriae* was originated in the United Kingdom in the 13th Century. It implies that the King is the guardian of the nation and was under a duty to look after the interests of its subjects who are in fact not able to look after themselves. This doctrine was discussed in detail by the Hon'ble Supreme Court in ***Charan Lal Sahu*** versus ***Union of India***[9]. Thereafter, lately the Hon'ble Supreme Court in ***Shafin Jahan*** versus ***Asokan K.M. and others***[10], observed that the Constitutional Courts in this country exercise *parens patriae* jurisdiction in matters of child custody treating the welfare of the child as a paramount concern although the same is required to be invoked in exceptional situations. The Hon'ble Court had quoted instances that where a person is mentally ill and is produced before the Court in a writ of habeas corpus, the said doctrine can be invoked and on certain other occasions when a girl is not a major and has eloped with a person and she is produced at the behest of *habeas corpus* filed by her parents and she expresses fear of life in the custody of her parents, the Court should send her to appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

(38) Para 39 of the aforesaid judgment is reproduced as under:-

> "39. Constitutional Courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the parens patriae principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and

[9] (1990) 1 SCC 613
[10] 2018 AIR (SC) 1933

> she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major."

CONCLUSION

(39) While considering the statutory provisions under various legislations as well as the judgments passed by the Hon'ble Supreme Court and various other High Courts, as discussed above, the issue which has arisen in the present case can be safely answered. The alleged detenue Neha was directed to be sent to Nari Niketan/Child Protection Home by the Child Welfare Committee vide order dated 19.9.2020 while exercising powers under the Juvenile Justice (Care and Protection of Children) Act, 2015, as she was in need of care and protection. Neha being a minor and below the age of 17 years has refused to go along with her father and has insisted to go along with her husband and has also stated that she is not facing any problem in the Nari Niketan/Child Protection Home. The Hindu Marriage Act as well as the Prohibition of Child Marriage Act provide for penal provisions in case of a child marriage and performance of child marriage is also an offence. The plea taken by the learned counsel for the petitioner that the marriage was performed with consent of a minor girl would pale into insignificance in view of the fact that child marriage itself is an offence although it may not be illegal under the Hindu Marriage Act but certainly it is a voidable marriage under the Prohibition of Child Marriage Act. Furthermore, the welfare of a child is always of paramount consideration. Pleas which are usually taken that in case the girl does not marry with her choice then there is an apprehension that she may be forced to get married by her parents with some other person, would not carry any weight because steps which are required to be taken in that eventuality is to protect the girl child by keeping her in a safe custody rather than permitting her to marry before she attains the age of majority. A social menace needs a solution and not another menace. A legislative intention cannot be given a go-bye by way of judicial intervention which would in turn defeat the very purpose and rationale of legislation because it would otherwise amount to waiver of an illegal act or an offence. It would be trite in law to acknowledge child marriages based on consent. The element of consent is always

sub-servient to overall welfare of a child. Furthermore, the medical hazards in case of a child marriage cannot be overlooked. Fixing the age of marriage for females as 18 years by the Legislature is not without any reason as it is also based upon the evil effects of a child marriage in terms of medical, social, psychological, economic and other like factors. The consequences of girl child marriage are much more devastating. It exposes girls to increased health problems and violence, denies them access to social networks and support systems and perpetuates a cycle of poverty and gender inequality.

(40) Considering the observations made by the Hon'ble Supreme Court in Independent Thought (supra) that a girl child below the age of 18 years who is sought to be married is a child in need of care and protection and is required to be produced before the Child Welfare Committee under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, 2015 so that she can be cared for, protected and rehabilitated in a society and that under no circumstances can a child below 18 years of age gives consent express or implied for sexual intercourse and also observations made by the Hon'ble Supreme Court in Shafin Jahan (supra) that when a girl is not a major and expresses fear of life in the custody of her parents, the Court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women till she becomes a major, this Court is of considered view that there is no inherent right vested in the husband or his relatives to claim custody of minor girl by filing writ of *habeas corpus*. Keeping a minor girl child in such like circumstances either by an order of judicial Court or by the Child Welfare Committee by following proper procedure cannot be held to be an illegal detention.

(41) In the present case, the girl child has specifically refused to go along with her father and is not facing any difficulty or problem while staying at Nari Niketan/Child Protection Home and therefore, her stay at Nari Niketan/Child Protection Home, cannot be said to be detrimental to her well being. In the facts and circumstances of the present case, she cannot be directed to be released till she attains the age of majority by giving her custody either to her husband or his relatives including the petitioner who is stated to be her sister-in-law. However, the Child Welfare Committee constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015, shall monitor the well being of Neha by making periodical inspections of Nari Niketan/Child Protection Home and shall comply with all the statutory obligations cast upon the Child Welfare Committee under of

the Juvenile Justice (Care and Protection of Children) Act, 2015. It is made clear that if at any time Neha, even before attaining the age of 18 years, expresses her desire to go to her father/parents, then the Child Welfare Committee shall permit her to do so in the presence of her father/parents and by passing an appropriate order in this regard.

(42) In view of above, the present petition is hereby dismissed.

Shubreet Kaur