COMPENDIUM OF JUDGMENTS

RIGHT TO CHOICE IN RELATIONSHIPS

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Finally, we hope that this Compendium is useful for judges and practitioners; as well as those who continue to give meaning to human rights through their struggles, challenges and achievements,

We look forward to feedback and comments

AALI Team

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INTRODUCTION

A woman's rights to enter, not to enter, remain or exit from a relationship is secured by the provisions of a number of International Human Rights Instruments and national laws[1]. In the Indian Constitution the provisions under Chapter III i.e. right to equality, right to non-discrimination, right to form association, right to life and personal liberty; safeguard women's right to choose a relationship. The Writ of Habeas Corpus, which literally means to produce the body, has also been an essential legal tool in bringing together illegally separated couples.

The Protection of Women from Domestic Violence Act 2005 states that forcing a woman to marry or not to marry a person of her own choice is an act of domestic violence by the family, against which a woman can take legal recourse. In addition, the Supreme Court and High Courts through their various judicial pronouncements have upheld women's right to sexual autonomy and decision-making. However, despite the existing national and international legal framework this right has proven to be one of the most complex and difficult to put into practice in the socio-cultural contexts of India.

Protection and promotion of women's right to choose a relationship has been central to AALI's struggle for the establishment of human rights for women. While addressing the issue of women's sexual autonomy and the violation faced by them on account of exercising their choices and decision making agency, we have intervened in several cases of violence against such women and their partners as well as family members who dared to support particular choice made by their kin. Throughout this journey, law and human rights has remained the only framework for all our interventions to redress the violation be it through lawyering, social mediation, public or legal advocacy. While supporting women who have made a choice regarding their partners, AALI not only encountered opposition from communities and families of these women but also from the law enforcement agencies and lower judiciary.

Despite all the challenges and gaps in the substantive law, legal procedures and their usage execution, judgments viz. ***Lata Singh vs. State of U.P***[2] and ***Arvinder Singh Bagga V. State of U.P***[3] that have contributed towards upholding women's decision making agency and equality before law, have given us strength and reinvigorated our struggle. AALI's close and continuous engagement with law, legal precedence has tremendously strengthened our interventions and strategies for demanding justice for women. Case-law on issues related to choice, marriage, maintenance, dissolution, in addition to expanding the interpretation of legal statute; provisions, language and approaches of law, has also added to our understanding of the issues. The usage and contribution of case-law in ensuring the living nature of law itself led us to developing this compendium of cases relevant to choice in relationship.

In the present compendium we have tried to collate judgments from the Supreme Court and the various High Courts that set guiding principles for the women's struggle in the form of domestic violence, forced

[1] i.e. The Constitution of India, The Special Marriage Act 1954, The Hindu Marriage Act 1955, The Dissolution of Muslim Marriage Act 1939, The Protection of Women fro m Domestic Violence Act 2005 etc
[2] 2006 (5) SCC 475
[3] AIR 1995 SC 117

marriage, acid attack, kidnapping, abduction and rape, social ostracization (crimes committed by community), conversion for the purpose of marriage and, divorce. This compendium is an effort to reinforce a woman's right to decision making in her relationships, which the community as well as the state often want to disregard.

This compendium of judgments has been prepared to establish that women's decision making in matters related to sexual autonomy is a human rights issue and not a "soft issue". This collation of judgments reveal that a woman who exercises her right to choice not only faces unimaginable violence, but also has to put her life on hold while defending herself in different courts as is illustrated by the Lata Singh case in the compendium, which AALI is still dealing with. Since the time she got married in 2000 to this day, Lata Singh is involved in litigation against her brothers who had her husband's entire family including sisters incarcerated, made her undergo a medical examination to prove she was mentally sound and had her husbands' family declared absconders.

The compendium has been divided and categorized accordingly by the courts and the issues covered by them, so as to present an easy analysis of the trend adopted and the sensitivity of the Judiciary towards such cases. These cases have been referred to from the various case reporters and online databases[4]. This compendium could be used as an information and educational resource for lawyers, academics, and human rights activists working to promote the right to choice and individuals who dare to exercise their right to choice in a relationship.

[4] http://www.manupatra.com, http://www.judis.nic.in, http://www.indiankanoon.org, SCC Online, AIR, Cr.L.J and the official websites of the various High Courts.

INDICES

SUPREME COURT

Acid attacks as a tool of coercion/punishment in sexual relationships

When women reject a proposal for a relationship or exit a relationship, often acid is thrown on them by the man they have rejected. Acid Attacks is a means of disfiguring with the intention to teach women a lesson for saying no and making her "unavailable" for a relationship with another man.

1. ***Ravinder Singh vs. State of Haryana, AIR1975SC856…… .pg 34***

Acid was poured on a woman by her husband for refusing to grant him divorce. The husband was involved in an extra-marital affair. Due to the attack, the victim suffered multiple acid burns on her face and other parts of her body, leading to her death. The accused was charged and convicted under Section 302 of the Indian Penal Code.

Religious Conversion for Marriage

There were a spate of cases in which married men converted to Islam only to contract a second marriage, leading to confusion about the status of the first marriage solemnized before conversion and the validity of the second marriage.

2. ***Smt Sarla Mudgal, Presdent Kalyani and others vs UOI and Ors., (1995)3SCC635…….pg40***

Meena Mathur was married to Jitender Mathur and had 3 children. One day she learnt that her husband had converted to Islam and solemnized a second marriage with Sunita Narula @ Fatima. A number of such cases were occurring and there was confusion about the status of the first and second marriage solemnized by the man converting. A writ petition was filed by ano rganization working for women. The Suprem Court held that, a Hindu marriage solemnised under the Hindu Marriage Act, 1955 can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage. The second marriage by a convert would therefore be in violation of the H indu Marriage Act and as such void in terms of Section 494, IPC. Any act which is in violation of mandatory provisions of law is per-se void.

3. Lily Thomas, Etc. vs. Union of India & Ors., 2000(2) ALD Cri 686 …….pg44

The judgment in the Sarla Mudgal case was upheld. A review petition was filed against the Sarla Mudgal judgment on the grounds that it violated Article 20 of the Consitution on the grounds that it made the second marriage by a Hindu after conversion to Islam during subsistence of previous marriage an offence, with retrospective effect. The Court held that Sarla Mudgal case did not create new law, but merely interpreted the existing provisions of the Hindu Marriage Act. The Court, while upholding the judgment in the Sarla Mudgal case, held, that mere conversion does not bring to an end the marital ties unless a decree for divorce on that ground is obtained from the Court. Till a decree is passed, the marriage subsists. Any other marriage, during the subsistence of first marriage would constitute an offence under Section 494 read with Section 17 of the Hindu Marriage Act, 1955, and the person, in spite of his conversion to another religion, would be liable to be prosecuted for the offence of bigamy. Even under the Muslim Law, plurality of marriages is not unconditionally conferred upon the husband.

The court also clarified that any obersvation regarding desirability of enactment of the Uniform Civil Code made in the Sarla Mudgal judgmenet were incidental.

Charges of kidnapping and rape in cases of Right to Choice and the use of Haebas Corpus

Charges of kidnapping, rape and forced marriage are linked with a woman exercising her right to choice against the wishes of her family. The age of the girl and her ability to give consent to the relationship is contested and "both sides" use the provision of habeas corpus to locate the "missing woman".

4. Jinish Lal Sah vs. State Of Bihar, AIR 2003 SC 2081…….....pg53

Appellant was the prosecutrix's tutor. The appellant went to the prosecutrix's house to inform that he won't be giving tuitions that day. The girl left the house saying she was going to her grandfather's house and on the way was met by the appellant. On the pretext of taking her to a movie, he took her to Muzzaffarpur. According to the prosecution, the appellant forced her to marry him and sign certain papers. Evidence given by her father showed that her age was around 19 years whereas the doctor opined that she was 17 years old and the girl stated that she was 14 years old. Difficulty arose as to accepting her evidence.

Sequence of events clearly showed that she had accompanied the appellant willingly on a prior planning to elope and no protest was made to seek help or runaway. Evidence showed that she had planned her departure. No threat or inducement was given by the appellant to leave her house. Prosecution failed to establish that she was below age of 18 and no threat, coercion or inducement was given by the appellant. Appeal was allowed and appellant was ordered to be released forthwith.

5. Puran Singh and Anr. vs. State of Bihar, JT 2001 (8) SC647 ……..pg56

Kidnapping or abducting a woman to compel her for marriage under section 366 and 366 A of IPC was challenged in the court. Appellant was convicted and sentenced. Appellant allured the victim, aged below 16 years, to see his paintings in his house. Where a nother accused over-powered, kidnapped and forcibly married her. The accused also subjected her to rape on numerous occasions and at various places. Hence, the Appellant facilitated the accused to commit crimes. Complicity of appellant in offence was amply established beyond every reasonable doubt in the court. The court didn't call off its interference with his conviction under Section 366 and 366A, Indian Penal Code. However, the sentence was reduced. It was also observed that the sine qua non for attracting provisions of Section 368, Indian Penal Code is that a person who either wrongfully conceals or confines the victim, must have the knowledge that, the victim had been kidnapped or had been abducted and on proof of that, the accused can be punished in the same manner as if he had kidnapped or abducted the victim with the same intention or knowledge, or for the same purpose as that with which he concealed or detained the victim.

6. Idrish Mohd. vs. Memam and Anr. (2000)10SCC333……....pg58

The Appellant claimed to be the husband of Respondent No.1 and filed an application under Article 226 of the Constitution of India seeking directions for the production of the girl in Court and handing her over to him. High Court directed the Respondent to be kept in Nari Niketan as it did not find the Respondent to be a major and she was not willing to go with her parents. Order was challenged under appeal. It was held, as per evidence on record that respondent had attained majority and cannot be kept in detention against her wishes and that she wished to accompany the appeallant. Appeal was allowed.

7. Arvinder Singh Bagga vs. State of U.P. and Others ,1993(4)SCALE418……pg58

A habeas corpus petition was filed for production of Nidhi Bagga who was in the custody of the police. Nidhi hand married against the wishes of her family, who then registered a case of kidnapping and forced marriage u/s 363, 366, 506 IPC against her husband and his family. All the members of the husband"s family was taken into custody including girls 10 years of age. The female members were released but Nidhi Bagga was not. An enquiry by the District Judge, Bareilly was ordered.

8. Arvinder Singh Bagga vs. State of U.P. and Others, AIR1995SC117 ……..pg61

The report of the District Judge, Bareilly was perused. He confirmed the the allegations made in the Writ Petition alleging illegal detention of Nidhi Bagga, who was not an accused on the pretext of being a victim of abduction and forced marriage. She was tortured by threats of violence to her and to her husband and family. Direction was given to the State to take immediate steps to launch prosecution against all police officers involved in this sordid affair. The court also said that State shall pay compensation to all persons illegally detained and humiliated for no fault of theirs.

9. S. Varadarajan vs. State of Madras, AIR1965SC942 ……pg61

The case dealt with the meaning of 'take out of keeping of the lawful guardian' under Section 361 of the Indian Penal Code, 1860. According to the court the accused did not take away the minor girl from the custody of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. The girl was on the verge of attaining majority and the court felt that the girl had the capacity to know what shew as doing and had voluntarily joined the accused, then in such case it could not be said that the accused had taken her away from the protection of her lawful guardian within the meaning of Section 361 of the Code.

In this case the Court drew a fine distinction between taking and the girl going on her own even when she was a minor.

Denial of Right to Choice to protect "Family Honor"

Women's assertion of their sexual autonomy is seen as a dishonor to the family. Therefore the only way to restore Family Honor is by punishing the girl, either by harassing her or killing her. The family is dishonoured irrespective of caste or religion of the person she has chosen to be with. It hinges on the fact that a woman has had the courage to take a decision on her own. This is best reflected in the comment made by an official while dealing with a case of right to choice, "*aukat ke bahar kaam karange to yehi hoga*" (If one acts out of one's limits, this is bound to happen).

10. Harijana Hanumantharayappa vs. State of Andhra Padesh, 2003 (1) ALD Cri 94.....pg64

The accused - appellant has been held guilty of an offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo life imprisonment by the court of Additional Sessions' Judge, Hindupur. An appeal preferred by the accused before the High Court of Andhra Pradesh had been dismissed upholding the conviction and sentence. The accused -appellant preferred this appeal by special leave. The deceased was the sister of the accused. She had a love affair and got married, which the accused and his family did not approve. The court upheld the decision of the trial court and the appeal was dismissed.

11. ***Lata Singh vs*** **State** ***of UP, AIR2 006SC2522 ……..…….pg66***

The petitioner filed a Writ Petition to quash the criminal case u/s 363 & 368 IPC against her in-laws. Petitioner is a 27 year old woman who is a graduate. She entered into an inter-caste marriage with B. N. Gupta. Her brothers filed a missing persons report and the petition's husband's sisters and their husbands were arrested. The brothers also went to the petitioner's marital home and beat up her mother in law and locked the house with their own lock, they even locked the brother of the petitioner's husband for4 -5 days without food. Statement of the petitioner was recorded by C.J.M. under Section 164; Cr. P.C. Petitioner stated that she married B. N. Gupta of her own free will. Despite this statement, C.J.M. passed committal orders. The Supreme Court held that the petitioner is a major and at all relevant time was a major. Hence, she is free to marry anyone she likes. There is no bar on inter-caste marriage in Hindu Marriage Act or any other law. Hence, no offence was sought to be committed by petitioner, her husband, or her husband's relatives. The whole criminal case in question is abuse of process of court as well as of administrative machinery at instance of petitioner's brothers. Necessary directions were issued and criminal proceedings quashed. In view of the allegations in petition, criminal proceedings were instituted forthwith by concerned authorities against petitioner's brothers and others involved in accordance with law.

12. Ashok Kumar Todi vs. Kishwar Jahan and ors, AIR2011SC1254 …….pg69

Rizannur and Priyanka Todi both adults married under the Special Marriage Act. Fearing harassment by Priyanka Todi's father they informed the police about their marriage and sent a copy of their marriage certificate. Despite which the police harassed them continuously. Priyanka went with her family on the condition that she will return, but she did notcome back to live with Rizannur. A few days later Rizannur's body was found near the railway tracks. A sing le bench of the Calcutta High Court directed CBI to investigate the case and file a chargesheet. A divisi on bench overturned the order. The Supreme Court upheld the order of the single bench and agreed with the observation of the single bench that the police officers in respect of the conduct of the officers in interfering with the conjugal affairs of the couple even without any formal complaint against any one of them. The Court held that any action to be taken against the police officers will be done so by their departments. The order of the single judge of the Calcutta High Court been given in this compendium.

13. Arumugam Servai vs. State of Tamil Nadu, 2011 STPL (Web) 403 SC……pg79

This was a case of caste based discrimination. The Lata Singh judgment was referred to, in relation to 'honour' related crimes. The court directed the administration and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against t hose responsible for such atrocities, the State Government has been directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and chargesheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.

14. ***Bhagwan Dass vs. State (NCT) of Delhi, 2011(5) SCALE498……pg82***

Appellant was infuriated with his daughter, for having 'dishonored' his family, since sh e had left her husband and was living in an incestuous relationship with her uncle. Hence he strangulated her to death. He was convicted by the trial court, judgment upheld by the High Court. All circumstantial evidence pointed to the guilt of the appellant. Statement of his mother was admitted as extrajudicial confession. Court found no reason to go against the decisions of the lower courts, hence appeal was dismissed.

15. Mayakaur Baldevsingh Sardar and Anr. vs. State of Maharashtra, [2007]10SCR752.....pg85

Rajvinder Kaur while studying in school fell in love with Ravinder Singh and secretly married him. When her parents were arranging her marriage with someone else she informed them of her marriage and went away to live with her husband and his family. Her parents were angry as Ravinder belonged to a lower caste. On the pretext of taking back jewelry from her relatives came to her in-laws house and killed 4 persons including her husband.

The Appellants were convicted for offence under Section 302/120B and 307/120B for alleged murder of four persons and sentenced to life imprisonment. Hence, present appeal. Appellant contended that common intention on part of accused did not exist. Evidence showed that the attack on the family had been pre-planned and duly executed with the clear common intention of all the accused. Held, death sentence should be awarded if murder was committed in circumstances which aroused societal wrath or when the crime was enormous in proportion such

as in a case of multiple murders of all or almost all the members of a family or a large number of persons of a particular caste, community or locality or pre-meditated, pre-planned and diabolically executed and the helpless state of the victims were aggravating circumstances. Thus convictions and life sentences awarded by High Court were justified. Appeal dismissed.

Registration of Marriage

16. Smt. Seema v s. Ashwani Kumar, Transfer Petition (civil) 291 of 2005, Decided on 14.02.2006……pg89

The court dealt with the desirability of a law on registration of marriage. If the marriage is registered it provides evidence of the marriage having taken place. The procedure for registration should be notified by respective States within three months from today (day of order). This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force. The Court also held that non –registration will not affect the validity of marriage. Deem a marriage.

HIGH COURTS

Acid attacks as a tool of coercion/punishment in sexual relationships

Allahabad

17. Sandeep and Anr. vs. State of U.P, 2009(3) ACR 3281……..pg93

Accusation against appellant under Section 302/34 of I.P.C. Accused and deceased were in a relationship and she became pregnant with the accused's child. He wanted the deceased to abort the child and she did not agree. So, on the pretext of planning marriage he asked her to meet him and then poured acid on her face and murdered her. The Court decided that, taking into consideration the brutal, diabolical and gruesome manner of the attack, the age and infirmity of the victim and a strong motive ascribable to the accused and his act of perversity, there may be a great threat to the other persons of the society, if such a person is allowed to continue to live in the present society. By all reckoning, it is a fit case falling within the category of the rarest of rare case in which accused should be awarded capital punishment under Section 302/34, I.P.C.

Andhara Pradesh

18. Marepally Venkata Sree Nagesh vs. State of A.P., 2002(1) ALD (Cri) 905… pg96

The accused was suspicious about the character of his wife and inserted mercuric chloride into her vagina; she died due to renal failure. The accused was charged and convicted under Section 302 and 307 IPC.

Jharkhand

19. Awadhesh Ray @ Babua Pathak vs. State of Jharkhand, Cr. Appeal No. 38/2001, decided on12.06.2006,MANU/JH/0558/2006…….….pg101

The victim was standing with her friend at a Bus Stop in Dhanbad. The Appellant came and poured acid over her head and face. The appellant had a photograph of the victim and was blackmailing her but she refused to accede to his demands. The victim suffered burn injuries over the left side of her eye, neck and chest and had to be hospitalized. A case was registered under Sections 324, 326, 307 IPC. The police investigated the case and finally submitted a chargesheet against the appellant under the aforesaid sections. The learned 2nd Additional Sessions Judge, Dhanbad held the appellant guilty under Section 324 IPC and convicted and sentenced him to

undergo Rigorous Imprisonment for three years. The appellant's conviction was upheld by the Hon'ble High Court.

Madras

20. Balu vs. State represented by Inspector of Police, Cr. Appeal No. 1078/2004, Decided on 26.10.2006,MANU/TN/9699/2006 ……pg102

A person suspected that his wife had developed an illicit relationship with one of his acquaintances. In such fit of anger he threw acid on her resulting in severe burns and death of the victim. The husband was convicted under Sec 302 IPC and 313 IPC (causing miscarriage of a woman without her consent) with life imprisonment and a fine of Rs. 2000. The fine was thus again a meager amount.

Religious Conversion for Marriage

Delhi

21. Faheem Ahmed vs. Maviya @ Luxmi, 178(2011)DLT671……....pg105

The parties were friends since college days and were also subsequently classmates. As per the case of the Respondent, she wanted to get membership of the library at Jama Masjid and on the assurance of the Appellant in helping her with the same, he persuaded her to convert to Islam. The Respondent signed and executed certain documents which the Appellant claimed to be the registration of marriage and conversion certificate and by virtue of those the Respondent became his wife. The court held that there was no conversion of the girl into Islam as she didn't practice the religion and was a worshipper of Lord Shiva. There was no proper solemnization of the marriage between the parties and the registration of marriage has been obtained by fraud.

Charges of kidnapping, rape in cases of Right to Choice and use of habeas corpus.

Allahabad

22. Khusboo vs. State of U.P. and Ors. 2009(2) ACR1204…….pg109

The Petitioner filed for quashing orders passed by SDM of giving petitioner's custody to a safe home and for producing her before the court. The petitioner alleged she was a major on the basis of a primary school certificate and had got married. Age of petitioner was in dispute. Contradictory documents were produced, hence third document, report of CMO, was given priority. The petitioner was held to be a major, hence it was decided that she was at liberty to go wherever she liked and could not be detained at safe home.

23. Aneeta Rana vs. Mool Chandra Rana, 2008 6 AWC5960…….....pg110

Petition filed by fiancée of the girl, both majors, alleging that marriage with another person was being forced upon her, by her family, against her wishes. The said marriage was stayed and the girl was asked to be produced by her father in Court.

24. Asrey vs. State of U.P., 2008(1) ACR91, Allahabad……....pg111

Accused was charged under Sections 363, 366 and 376 of IPC and the issue before the court was whether his sentence is sustainable? It was held, "no" as the real age of prosecutrix was 18 years at time of alleged incident. She was a consenting party. After her statement was recorded under Section 164, Cr. P.C., she refused to go with her parents; rather she expressed her desire to go with the Appellant to marry him. Kidnapping was not proved. Prosecution failed to prove both charges under Sections 363 and 366. She also denied the charges of her being raped in her statement under Section 164, Cr. P.C. Her resiling from said statement in Court after 10 years when she had already married another person did not inspire confidence. Doctor's findings were not suggestive of rape or intercourse. Charge under Section 376, against appellant was also not established. Conviction and sentence was set aside.

25. Kumari Shabnoor (Minor) D/o Mohammad Tahseen vs. State of U.P. through Chief Secretary (Home) and Ors., 2007 2 AWC171…….....pg117

A habeas corpus petition was filed by the Father of Shabnor who had gone away with the respondents and married one of them. The father was able to prove to the court that Shabnor was a minor at the time of her marriage to the respondent, hence her marriage was held to be irregular.

26. Manoj Kumar Gupta S/o Sri Vijay Kumar Gupta vs. State of U.P. through Principal Secretary, Ministry of Home, U.P. Government and Ors., 2007 2 AWC1780…pg121

Petitioner alleged himself to be the lawfully wedded husband of a Smt. Asha Gupta, both majors. He also alleged of her being illegally detained by her family-respondent, who had been pressuring her to abort her pregnancy. Respondents proved his previous marriage, which had not been dissolved, declaring his alleged marriage to Smt. Asa Gupta as void, also other criminal allegations. Smt. Asha Gupta admitted to the marriage but expressed willingness to live with her family. Petition was held not maintainable and dismissed at payment of costs.

27. Rahul alias Chunmun vs. State of U.P. and Ors. 2007(2) ACR2164…….pg125

Date of birth of girl as per High School certificate is 23.3.1987 and that of boy is 1.11.1985. They claimed to have voluntarily married, but if High School certificate at any stage found to be forged, then action can always be taken. Court observed that girl appears to be over 18 years in age. It was also stated that she is pregnant. No offence of kidnapping under Section 363/366, I.P.C. was disclosed irrespective of marital or non-marital status. F.I.R. and all consequential proceedings were quashed.

28. Vinod Kumar J, Smt. Alam Kaur W/o Shri Dharamvir Singh and Dharamvir Singh son of Late Ram Chandra Singh vs. State of U.P. and Ram Naresh Chaudhry S/o Sri Sher Singh, Decided on 26.04.2007, MANU/UP/0547/2007……pg126

Girl and boy (accused revisionist) married at own accord, both being adults at the time and also of same caste. Girl's family was against her choice, hence filed FIR with false allegations. Criminal revisions were allowed and the impugned order of summoning inS tate v. Monu @ Kuldeep and Ors under Sections 363/366/120B, IPC was quashed.

29. Smt. Pooja Arya @ Tabassum Bano wife of Santosh Kumar Daughter of Sri Amanat Ali and Santosh Kumar son of Sri Narhey Lal vs. State of U.P. through Home Secretary, Superintendent of Police and Station House Officer, Police Station Kotwali Dehat, AIR2006All60 ……..pg130

A Hindu boy, one of the petitioners, got married to a Muslim girl (the other petitioner), which created a furor in the local communities. The court said that the real role of the law enforcement agencies is to protect and preserve the rights of individuals guaranteed by our paramount parchment, and, to deal with an iron hand all those persons, who want to decimate and demolish those privileges. The police was directed, not to interfere in the matrimonial life of the petitioners, and to provide an appropriate protection to them, as and when necessary.

30. Syed Sadab Hasan son of Syed Mahmood Hasan and Smt. Beena Mishra alias Zeenat Parveen wife of Syed Sadab Hasan vs. State of U.P. through its Secretary, Home Department, Station House Office and Smt. Bindu Mishra wife of Dinesh Mishra, W.P.No. 7 99/2006, Decided on 06.03.2006,MANU/UP/0585/2006……pg130

Issue was of the custody of major girl. Offences were committed under Sections 363 and 366, I.P.C. Ossification test disclosed the age of girl as 18 years. Girl categorically stated to go with her husband. The court directed the investigating Officer to complete investigation within three months and petitioners have to co-operate with investigation in all possible manners and not to be arrested till submission of charge-sheet, if any.

31. Madhu Priya Singh vs. State Of Uttar Pradesh, II (2003) DMC 294…..pg131

A Thakur girl aged about 22 years and Brahmin boy aged about 24 years married each other according to Arya Samaj rites and were living together. Being majors, they have the right to do so under law. This right is a part of right to liberty under Article 21. The court said that if parents are unhappy, they cannot threaten, beat or confine them under law. Authorities seldom take any action when reported with such incidents of violations, and thereby they abdicate their duty to uphold law. Direction was issued to authorities to see that nobody harasses or interferes with petitioner's lives in any manner and if anyone does so, strong action has to be taken against that person.

32. Jyoti Alias Jannat and Anr. V s. State of U.P. and Ors. 2003 (4) AWC 2844 ..pg133

Petitioner No. 1 was a major as was evident from her High School Certificate and the law deems that a major understands his/her welfare. Hence a major can go wherever he/she likes and live with anybody. This is a free, democratic, and secular country. Hence, if a person is major even parents cannot interfere with that individual. A mandamus was issued to the respondents not to harass or threaten the petitioners and allow them to live peacefully with each other.

33. ***Smt. Shahana alias Shanti vs. State of U.P. and Ors., 2003CriLJ3438…..pg133***

Petitioner married to Hindu boy and had changed her name and was living with her husband and was pregnant. She was threatened and beaten by her family and they tried to force her to return and severe ties with her husband. She filed a complaint against them in court. Her father lodged F.I.R. against her husband under Sections 363, 366 and 376, I.P.C. The police detained the petitioner and she was sent to the Nari Niketan. The court held that assuming that her age then was 17 years; she could not be detained against her will. Provisions of Sections 97 and 171, Cr. P.C. did not justify her detention. Detention of petitioner in Nari Niketan was illegal. The order detaining her was quashed and the Petitioner was released forthwith to go to place of her choice.

34. Bobby & Anr. vs. State of UP & Ors. 2002 Cri.LJ 2227……pg135

In a case under Sections 363 and 366 I.P.C., determination of age of the victim girl is one of the main factors to bring home the charge to the accused. It is, therefore, the duty of the investigating officer to get the victim girl examined by the doctor by way of ossification test and in that process no one can complain the identity of the girl.

The court issued directions to be followed before issuing age certificate of a girl, if asked for. The court also held that the girl and boy cannot ask for a medical examination to issue a certificate it is the duty of the IO to do so. The directions are:

(i) That as and when an application is filed by a girl or anybody else on her behalf for issue of age certificate, the Chief Medical Officer/Superintendent concerned shall ask for an affidavit of the applicant indicating the necessity of such certificate and whether any report has been made to the police alleging kidnapping/abduction;

(ii) That the police station under which the girl usually resides with her parents shall be notified to inform as to whether any case has been registered alleging kidnapping/abduction of the girl;

(iii) That the parents and in their absence near relations of the girl shall be served notices at the expense of the petitioner to appear at the time of medical examination. If it is reported by the police that on the basis of a complaint, first information report has been registered under Sections 363 and 366, I.P.C. or for any other offence, the Medical Officer shall refuse to examine the girl and issue certificate of age.

35. Shamsher Alam vs. State of U. P, 2002 Cri.LJ. 3588…….. …….....pg136

F.I.R. was lodged by the father that his daughter was enticed and kidnapped by petitioners and others. She and petitioner No. 1 had fallen in love with each other. They had performed nikah and were living as husband and wife. The court held that a perusal of Article 21 shows that life and liberty of petitioner No. 1 and the girl both stand guaranteed except according to the procedure established by law. They have a right to live with dignity and "honor" and make their life meaningful.

36. Smt. Kamlesh and another, Petitioners vs. State of U.P., 2002 Cri.L.J.3680.…pg138

F.I.R. under Sections 363/366 for kidnapping a girl was lodged by the respondents. Doctor of another place certified that the girl is 19 years of age. Brother of girl filing school leaving certificate showed age of girl as 15 years. The court held that the opinion of doctor only expert opinion and not conclusive. It is the duty of the Investigating Officer to get the girl examined by way of ossification test to ascertain her age. Besides, he is also required to collect other evidence, such as horoscope, school leaving certificate and ocular version of the parents and other near relatives. Hence the FIR was not quashed.

37. Smt. Takabul Jahan and Ors. vs. State of U.P. and Ors., 2002(2) ACR11 .....pg139

The Petitioners have come up with a prayer to quash the FIR lodged by the informant; father of Petitioner No.1 under Sections 363 and 366, Indian Penal Code, against Petitioner Nos. 2 to 4 asserting, that Petitioner No.1 is major and has married Petitioner No. 2 and were in love. The court said that there can be a margin of error of two years on either side in ascertainment of age on the basis of radiological examination. It was not possible for the court to place reliance on the

affidavit of Petitioner No. 1 which did not provide any other documentary proof in support of her date of birth except this affidavit.

38. Payal Sharma alias Kamla Sharma vs. Superintendent, Nari Niketan, Agra and others, AIR2001All …….……pg140

The Petitioner was a major, directed by court to be set at liberty and can go anywhere and can live with anyone as desired. Petitioner further stated that her life was in danger. The police was further directed to ensure her security. Hence petition allowed.

Andhra Pradesh

39. *Kokkula Suresh S/o Sri Narayana vs. State of Andhra Pradesh rep. by its Secretary, Home Department, The State Home for Girls rep. by its Director and Gaddam Gangaram S/o Sri Yellaiah* **,AIR2009AP52**.……***pg141***

Complaint was lodged by the family of the girl X for kidnapping her against Y. X married Y against the wishes of the appellant (family of the girl X). Learned Magistrate sent X to the State Home for Girls as she was a minor. Order in this petition was challenged on the ground that the Appellant was a natural guardian. The issue was whether the Appellant should be entitled to the custody as a natural guardian. It was held that since the marriage between the Petitioner and the 3rd Respondent's daughter was not a void marriage or voidable marriage under the provisions of the Hindu Marriage Act, 1955, and since the writ Petitioner being the husband was her natural guardian under the provisions of the Hindu Minority and Guardianship Act, 1956. The Petitioner was entitled to have the custody of the 3rd Respondent's daughter. Hence, the impugned order of sending the minor girl to the State Home for Girls was erroneous and cannot be sustained.

40. S. Mahaboob Sharif vs. Jareena Banu and Ors. 2008(5) ALD519 …….pg142

The boy and girl who filed the Writ petition were present in court. Petitioner No. 1 accepted that she had voluntarily gone earlier with writ Petitioner No. 2 and had stayed with him for a period of three months, but she denied that any registered marriage had taken place between the two and she also stated that she had gone with writ petitioner No. 2 with her own free will and he had not used any force, coercion or undue influence on her and had not kidnapped her. Since writ Petitioner No. 1 is a major and her date of birth according to school certificate was 26th June 1988, therefore, she was free to choose place where she wants to live.

41. Makemaila Saloo vs. Superintendent of Police and Ors, 2006(2) ALD290… .pg143

Petitioner was the father of minor girl who was kidnapped and got married with accused. Complaint was filed but police could not trace out girl. Hence, this petition was filed that whether, a minor girl claiming to be married could be allowed to join her husband. It was held that marriage contracted by minor was not void and nullity under Hindu Marriage Act and Child Marriage Restraint Act. Marriage which took place between alleged detenue and accused was valid in the eyes of law though it was offence under various statutes. According to Section 6 of Hindu Minority and Guardianship Act if a minor girl was married, her guardian was her husband. Therefore, Accused becomes Natural Guardian of detenue. The Court directed that minor girl should be handed over to Accused. Petition was disposed of.

Delhi

42. Sh. Jitender Kumar Sharma vs. State and Anr, 171(2010) DLT543, I(2011)DMC401.....pg146

Jitender is a little less than 18 years old and Poonam is 16 years old and they both ran away and got married. Poonam informed the police station in writing that she had gone willingly with Jitender. They were apprehended, Jitender sent to a Children's home and Poonam was sent with her parents. Af ew days later she ran away again to Jitender's home while he was still at the Children's Home. Poonam refused to go with her parents, so was sent to a girl's home. Present writ petition was filed for directing the respondents to produce the wife of the petitioner before the Court and to save her life and then to hand her guardianship over to petitioner. Police protection was also sought for the safety of petitioner, his wife and other members of his family. Poonam's custody was given to the Petitioner. Reality must be accepted and State must take measures to educatey outh that getting married early places huge burden on their development. When such marriages to occur, they may require different treatment. FIR against petitioner was quashed.

43. Mohd. Nihal vs. State, W.P. (Cri) No. 591/2008, Decided on 08.07.2008, MANU/DE/0980/2008……..…..pg150

Petition was filed by Muslim husband for custody of his Muslim wife who was in the custody of her family. Held, petitioner failed to establish that his wife had obtained puberty at time of marriage, that she has reached age of 15 years. Since her father was alive, only he was competent to act has her Wali/guardian for purposes of her marriage as prima facie she was a minor at that time. Therefore, purported marriage was declared void. Since valid marriage was not performed between petitioner and his wife, he had no right to claim her custody. Wife desired to reside with her mother. It appeared that these habeas corpus proceedings had accelerated her maturity or precociousness. Although she has attained majority as per her personal laws by last date of hearing, thereby rendering ineffectual and irrelevant her mother's decision as to her custody. Therefore the petition was dismissed, leaving wife free to decide her own future.

44. Ms. Neha Bhasin vs. Sanjeev Kumar @ Monu, MAT APP 10/2005, Decided on 23.01.2007, MANU/DE/7061/2007…….....pg151

Appeal seeking the declaration that marriage of appellant with respondent was void. Sufficient oral and documentary evidence to show that respondent had kidnapped appellant, exerted undue influence used drugs and sought to induce artificial mental states to keep appellant under his control. Respondent was involved in other criminal cases. As such marriage was not performed with free consent of appellant, petition claiming the nullity of marriage allowed. “Absence of free consent is a valid ground for dissolution of marriage.”

45. Tahira Begum vs. State of Delhi and Ors., MANU/DE/2154/2012, Decided on 09.05.2012 ……pg154

A habeas corpus petition was filed by the mother of Shumaila, Tahira Begum. The petitioner contended that Mehtab had kidnapped their daughter Shumaila and stolen Rs. 1.5 lakhs. Shumaila appeared before the Court and stated that she voluntarily went away with Mehtab and was married to him and living with him as his wife. Shumaila said that she did not wish to go back to her parents. Shumaila was sent to Nirmal Chhaya and produced before the Child Welfare Committee. CWC statedt hat Shumaila's age was was 15 years 10 months and some days. The issue to be decided by the court was whether Shumaila should be directed to return to her parental home. The court observed that Mahomedan law allows a girl to marry without the Consent of her parents after she attains puberty**.** Shumaila, clearly expressed her choice of residing with her

husband, the Court held that she ought to be allowed to exercise her option. This Court has today recorded her statement in that regard. The Court directed the presence of Mehtab, Shumaila and either of her in-laws once in six months, in order to ascertain her well being, till she attained the age of majority before the Child Welfare Committee. The writ petition was disposed of in terms of the above directions.

Gauhati

46. Shri Sandeep Kumar Patel Son of Shri Lalan Patel vs. Shri Pulinder Singh Son of Late Baidhnath Singh and Ors. W.P. (Cri) No. 7/2011, Decided on 01.03.2011, MANU/GH/0050/2011……..…..pg157

Petitioner had prayed through this application o direct the respondents-parents of his wife, to produce her before the court by liberating her from forceful custody. The wife had gone to the respondents' house at her will and was still in communication with the petitioner. Until one day the communications ended and he feared that this was the respondents doing. He had initiated legal proceedings in parallel courts. The writ was accordingly refused. Other remedies available to the petitioner were still maintainable.

Gujarat

47. Pavan Kumar Sharma vs. State of Gujarat and Ors., 1(2011)DMC124… ….pg159

The Petitioner prayed to issue a writ of habeas corpus directing the Respondent No. 1 to take custody of his legally wedded wife who was in illegal detention of Respondent No. 2, her father and to reunite her with the Petitioner. It was found that she was above 18 years of age. She has in unequivocal terms stated that her marriage with the Petitioner was solemnized under duress and coercion and against the willingness of her family members; she wanted to take divorce from the Petitioner. Thus, the petition was dismissed.

48. ***Jayeshkumar Ramanlal Patel vs. State of Gujarat and 2 Ors, Spl. Cri. App No. 2446/2010, Decided on 21.12.2010, MANU/GJ/1174/2010…….pg161***

Petitioner-father alleged kidnapping and illegal detention of his daughter by the respondent. He alleged that the Respondent was a known gangster and was trying to illegally marry his daughter by putting her in fear of life. The daughter was produced in court. She came to court from the house of the respondent and expressly admitted of her marriage by choice to the respondent and her desire to live with him and also denied all charges on him. Since girl was major, the writ petition was rejected.

49. Kapilkumar Bharatbhai Thakkar vs. State of Gujarat and 2 Ors. Spl. Cri. App. No. 2435/2010, Decided on 20.12.2010, MANU/GJ/1285/2010…….….pg162

Petitioner alleged that his wife was in illegal detention of her father- respondent. Both were of same caste and community and had solemnized lawful marriage. They were both also majors at the time. Wife appeared before court, did not oppose the marriage, but expressed her willingness to stay with the respondent. Petition disposed as it was withdrawn. Court fee was ordered to be returned to petitioner.

Jammu and Kashmir

50. Nusrat Jan and Anr. vs. State of J and K and Ors., 2007(2)JKJ509….pg164

Petitioners have sought for quashing of the FIR lodged by Respondent No.4 against Petitioner No.2 for abducting Petitioner No.1 on the ground that Petitioner No.1 being a major has out of her free will married Petitioner No.2. Since the marriage is an inter caste marriage, relatives of Petitioner No.1 are harassing them with the aid of the local police. Held, while exercising the inherent powers under Section 482 of the Code of Criminal Procedure, to quash a First Information Report duly registered by the Police the Court was required to see whether on the alleged facts in the F.I.R., any offence was made out or a case was made out against the accused. Police has a statutory right to investigate into the circumstances of alleged cognizable offence and this power can be interfered with by the Court only when the allegations made in the Report, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. In the present case the police has registered a case and initiated investigation in the matter. Perusal of the report lodged by Respondent No. 4 shows a prima facie cognizable offence was made out. This Court cannot interfere with the process of investigation at this stage. Petition dismissed.

Jharkhand

51. Ranjana Verma vs. State of Jharkhand and Ors., 2007CriLJ663……..pg165

The petitioner alleges that she is an adult and got married on her free will. The marriage was registered at the Marriage office, Dhanabad. The father of the petitioner filed a case against the husband and the petitioner was sent to Nari Niketan. The father alleged that the petitioner was a minor, asked for her tob e released to him. The SDJM held her to be a minor and directed her

release in favour of her father was challenged. The s chool certificate showed her as a major, whereas the father produces a birth certificate as per which she was a minor. This order of the SDJM was challenged. It was held that the petitioner was a major and as per the constitutional right of liberty given to her, she is at liberty to live with her husband. Impugned order and entire criminal proceedings initiated against her husband were quashed.

Kerela

52. Sasidharan Nair, aged 50 years, s/o Vs. The Superintendent of Police, and others, WP (Crl.).No. 337 of 2010(S), Decided on 06.12.2010……..pg168

Grievance of the petitioner was that the alleged detenue, his daughter, who had returned along with him as per a prior judgment to a petition of a similar nature, was missing again and was in illegal detention of the third respondent. The alleged detenue was a major and an advocate, and she expressed her willingness in court to leave the petitioners house. She also expressly stated that she was not in any illegal detention. The petitioner –father raised objections stating that his daughter was living with one of the respondents who is already married. In such a writ of habeas corpus, the question before the court is of illegal detention or confinement and not that of morality. The alleged detenue is a major and free to live with whoever she wants. The court did not feel persuaded to pass any order.

53. Sreedevi Amma, w/o. Late Gangadharan vs. Sub-Inspector of Police, Nooranad, and another, WP (Crl.).No. 282 of 2010(S), Decided on 21.07.2011……pg169

Petition was forwarded by the mother of the alleged detenue. The alleged daughter, an educated woman aged 26 years, was allegedly found to be missing and could not be traced by the police. She appeared before court and stated that she was not under any confinement and was in fact married to the second respondent. The family reconciled. Court was satisfied that no further directions were necessary. Petition dismissed.

54. Vasumathy and Baburaj vs. Deputy Superintendent of Police and Ors. W.P. (Cri.) No. 425/2010, Decided on 11.11.2010, MANU/KE/1637/2010.....pg171

Petition filed for search and production of an adult woman. The Missing adult woman was found and on inquiry it was found she was not under illegal detention but was with the co-respondent at will as they were in love. Petitioner-husband agreed to mutual divorce but refused visiting rights, until the children wished to meet her. The petition was ultimately dismissed.

55. Biju.V.J. vs. District Superintendent of Police and others, WP (Crl.) No. 303of2009(S), Decided on 05.08.2009……pg173

The petitioner, young man aged 36 years, applied for the issue of writ of habeas corpus to search for, trace and produce the alleged detenue, his wife, aged 35 years, with whom he allegedly had 2 children. It was claimed that she and the 2 children were being illegally confined and tortured by the respondents- her family. The facts of the case have many intricacies, like the class difference between the petitioner and the alleged detenue, the lack of consent from the respondents, a legally sustaining marriage of the detenue (not with the petitioner) . On interaction with the court, she stated that she was being illegally held by the respondents, and was also being physically abused. She unambiguously expressed her desire not to return to respondents or her legally wedded husband. The court therefore, on the merits of the case, allowed the writ petition and set at liberty the detenue along with her children and permitted her to exercise her choice.

56. Rajmohan, M.S. vs. State of Kerala and Ors. W.P. (Cri) No. 373/2009, Decided on 15.10.2009, MANU/KE/1290/2009……pg176

It was the case of the Petitioner that he and the detenu were majors and they got married in a temple, of which they had given notice before the Marriage Officer to get it registered/solemnized under the Special Marriage Act, as they were from different religions. According to the Petitioner, the alleged detenu and the Petitioner were living together at his family house along with his parents when one of the Respondents- father of the detenu along with some others under the cover of darkness allegedly took away the detenu by use of force from the house of the Petitioner. The father of the detenu raised a contention that the petition for issue of a writ of habeas corpus is not maintainable, since the Petitioner had no locus standii to file the writ petition as the Petitioner could not have entered into a valid marriage with the detenu in a temple and that the detenu was in parental custody and not detained against her wishes. The Division Bench of the High Court rejected the contention and held the writ petition to be maintainable.

57. *K.J.Vijayan, aged 57vVs. Sub Inspector of Police, Panangad and Another*, *WP (Crl) No. 26 of 2008 (S), Decided on 30.01.2008.....pg 179*

Petitioner is the father of an admittedly major girl, who was reported missing. On further inquiry it was alleged that the girl was in illegal detention of the respondent. Investigations revealed the major girl had married the said respondent under the Special Marriages Act. Writ was closed. Petitioner had other remedies.

Madhya Pradesh

58. Latori Chamar vs. State of M.P. and Ors. 2007(1) MPLJ405…… .pg180

Petitioner, father of minor girl, filed the present writ petition of habeas corpus alleging that girl was abducted by the respondents and other co-accused. But as no action had been taken by police on the complaint filed by him, petitioner approached present court by filing present petition. Directions issued by court to find minor girl. Girl found in possession of one of the respondents and produced before court. On investigation it was found that minor girl was married to the same respondent and she expressed her opinion in unequivocal manner that she did not want to go with her parents. Girl further stated that her marriage had been solemnized and out of wedlock one female child was born. She also expressed her intention to stay with the parents of her husband. Accordingly, minor girl was allowed to go with parents of respondent. Writ petition accordingly disposed.

Madras

59. Bala @ Balasubramaniam vs. State represented by the Sub Inspector of Police, HC Petition (MD) No. 912/2008, Decided on 22.12.2008 MANU/TN/1720/2008…..pg183

Petitioner, claiming him to be the husband of the detenue, preferred habeas corpus petition. Age of girl/detenue under question, hence ossification test conducted. Detenue found to be in advanced stage of pregnancy. On production before the Court she expressed her willingness to stay with her mother, along with visitation rights to the petitioner. Thus, the court allowed the petition.

60. Muthumani vs. The Inspector of Police and Sundar, HC Petition No. 65/2006, Decided on 20.02.2006,MANU/TN/8354/2006…..pg184

Petition was forwarded by the mother of the detenue, for production of her daughter in court. The detenue is a major and is married, at her will. Court held that she is was not under illegal detention and was free to decide her future. Petition closed.

Patna

61. Md. Idris vs. State of Bihar and Ors., 1980CriLJ764, Decided on 09.01.1980…….pg185

The petitioner filed a petition against her daughter's husband for kidnapping under section 366 of IPC. The daughter was below 18 years of age and married without the consent of her parents. She intended to be allowed to live with her husband. The Patna High court observed that under the Mahomedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection, the court made reference to Artcle 251 of Mulla's Principles of Mahomedan Law which says that every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.The court also referred to Tyabji's Muslim Law which under Artcle 27 is mentions that a girl reaching the age of puberty can marry without the consent of her guardian. The Court held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian. Hence, the writ petition was dismissed.

Punjab and Haryana

62. Kuldeep Kaur and Anr. vs. State of Punjab and Ors. Crl. Misc. No. M-3674 of 2011 (O & M), Decided on 16.03.2011,MANU/PH/1468/2011…….….pg187

Petition under Section 482 of the Code of Criminal Procedure was for issuance of direction to the official Respondents not to harass or interfere in the peaceful married life of the Petitioners. As per the instructions issued by the Department of Home Affairs and Justice dated 10.8.2010, the Court issued the guidelines as to how to deal with the cases of "honor" killing. In the State of Punjab the runaway couples can approach the authorities directly for protection and retention in the Protection Homes which have been identified in all the districts.

63. ***Amnider Kaur and Anr. vs. State of Punjab and Ors., 2010 Cri LJ1154, II(2010)DMC542….…….pg189***

In this case, the petitioners, of different castes, got married at choice. The girl was proven to be a minor. Issues raised and discussed in this petition; whether in case of runaway marriage where the girl is admittedly minor, who has been enticed away from the lawful keeping of a guardian by her alleged husband, is such a marriage void; whether persons party to such marriages are liable for punishment; whether such persons who entice/take away are entitled for protection in name of life and liberty. Marriage held to be void and protection was not granted. Petition dismissed due to lack of merit.

64. Jyoti & Anr. vs. State of Haryana & Ors., Crl. Misc. No. M - 38039 of 2010 (O&M), Decided on 23.12.2010,MANU/PH/3465/2010……pg191

In such cases of inter-caste or inter religion marriage the Court has only to be satisfied about two things:- (1) That the girl is above 18 years of age, in which case, the law regards her as a major vide Section 3 of the Indian Majority Act, 1875. A major is deemed by the law to know what is in his or her welfare.

(2) The wish of the girl.

65. ***Kammu vs. State of Haryana and other, Crl. W.P. No. 623 of 2009 (O&M), Decided on 10.02.2010……pg192***

Respondents' solemnized marriage against the wishes of their parents, hence requested was protection as there was threat to their lives. Protection granted. Petitioners alleged that girl was under aged, hence marriage is void and lawful guardianship is with petitioners. Issue of age discussed and held that Muslim personal law prevails over any other law to the contrary. Girl of required age at the time was marriage, hence petition dismissed with liberty to the girl to decide her own fate.

66. Dinesh vs. State of Haryana and another, Crl. W.P. No. 98 1 of 2009, Decided on 14.12.2009.....pg194

Major girl, wanted to solemnize marriage with person of her choice but her family was against it, hence they illegally detaining her. Girl made clear her wishes in court, hence it was ordered that she was free to go wherever and with whomever she liked.

67. Balwinder Singh @ Binder vs. State of Punjab and Ors., (2008)151PLR534……..pg195

Petitioner alleged that his wife and son were illegally detained in the Nari Niketan in Jullundur on a false complaint filed by his wife's mother against petitioner under Sections 363, 366 and 376 of IPC, while he and his family were arrested. His wife refused to go to her mother and was

therefore sent to the Nari Niketan. His wife is an adult and had got their marriage registered in Korba, Chattisgarh. After his release, petitioner met with his wife at the Nari Niketan and she stated that she doesn't want to go with her mother. Hence, present petition filed by petitioner for release of his wife and son. The court held that in view of the stated fact and law laid by various courts, detention of the petitioner's wife and son in the Nari Niketan was illegal. Thus, petition allowed and respondents directed to release them.

Rajasthan

68. Suresh Kumar vs. State and Ors., 2010(1) WLN635…… ...pg196

This was held to be a frivolous petition, as when the corpus was produced before Court, she denied marriage with Petitioner and expressed desire to go with her parents. No certificate of marriage was produced along with writ petition. Petition was dismissed with costs.

69. Dwarka Prasad vs. State of Rajasthan and Ors., 2002CriLJ1278…… ..pg197

The habeas corpus petition was filed by one Dwarka Prasad who came up with a case that her daughter Vedwati Kumari Sharma whose age is stated to be 13 years, has been missing for which an FIR was registered under Section 363 and 379 of the IPC. The statement of the alleged detenu Vedwati Kumari Sharma was recorded which the court perused, and was satisfied that it was not a case of illegal detention since the detenu has stated her age as 19 years who had voluntarily married Rajesh Sharma and out of the wedlock she has given birth to a child who is three months old. Since the alleged detenu is stated to be a major, she is at liberty to go anywhere she wants including Rajesh Sharma.

Denial of the Right to choice to protect Family Honor

Allahabad

70. Sujit Kumar and Ors. vs. State of U.P. and Ors., 2002 2 AWC1758 …pg198

The police in the State are directed that they must prevent any such 'honor killings' or harassment of people who love each other and want to get married, as such practice is a blot on our society.

The police must also see that the persons entering into inter-caste or inter-community marriages are not harassed by their relatives or any others and are free to live at any place and with whomever they like. There is no prohibition of inter-caste or inter-community marriage in the law. If a person who is a major wants to get married to a person of another caste or community, the parents cannot legally stop him/her. That being so, the Administration must ensure that nobody harasses or ill-treats or kills such people for marrying outside his or her caste, community or class.

71. ***Raghvendra Singh @ Babua vs. State of U.P, 2011(1) ADJ824…… pg199***

It is a revision petition where the allegations against accused were of kidnapping and rape of the prosecutrix. But the prosecutrix submitted before the court that she was not kidnapped by any person nor raped against her own will. She was pressurized to give a false statement under section 164 of Cr.P.C. it was found th at the prosecutor has shown her willingness to depose true facts before the Court and there is no reason that why her statement cannot be recorded by the Court. The court held that it is duty of the trial Court to bring true facts before the Court so that justice should not be denied on the ground of mere technicalities.

Delhi

72. ***Abdus Sadur Khan vs. Union of India, 176(2011) DLT630…… ...pg201***

Single Judge upheld order passed by Competent Authority wherein Respondent was exempted from deportation proceedings. Hence, this appeal was instituted to get answer to whether order of exemption from deportation was justified. Held, Single Judge recorded status report filed by investigating officer and request made by her to Government. However, it was manifested that Respondent was living happily with her husband in India and if she was deported to Bangladesh, her parents could cause harm to child in her womb. Thus, apprehension of Appellant that Respondent involved in any kind of trafficking could not be accepted. Therefore, Respondent was allowed to stay in India on humanitarian basis, exempting deportation. Hence, finding recorded by Court while dealing with Petition was justified. Appeal dismissed. "Honor" killing shall not be countenanced in civilized society and more so in body polity governed by rule of law, for right to life is sacred and sacrosanct."

Kolkata

73. ***Kishwar Jahan and Anr. vs. State of West Bengal and Ors. 2008(3) CHN857… pg204***

The deceased was married to Priyanka Todi under the Special Marriage Act. They were both adult and had sent information to the police about their marriage along with a copy of the marriage certificate and apprehension that Priyanka Todi's father who was a well placed businessman may create troublt for them. Death occurred under suspicious circumstances. Role of the state police agencies in investigating the cause of his death and conduct of certain police officers, both before and after his death was under question. Involvement of his father-in-law and uncle-in-law in connection with his unnatural death was alleged. Hence present writ petition for fair and proper investigation was filed. The question of whether a writ petition would be maintainable in court if an alternative remedy is for provided by law. Held, no Magistrate has power to direct investigation of any particular offence by the CBI, Only the Court of Writ can direct investigation by the CBI if the circumstances of the case so warrant. Issue as to whether police official acted ultra vires or not by invading. Rizwanur's right to life is one which can only be determined by the Court of Writ, not by any magisterial adjudication. Petition allowed. Applications dismissed.

Gujarat

74. ***Diwan Nurmahammadsha Mahemadsha vs. State of Gujarat & Ors., Decided On: 28 April, 2011…… ……....pg211***

Both the petitioners were major when they got married and the marriage was as per their own desire. Threats were administered to them by the family of the girl. The Court held that the police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioner's husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law, by the authorities concerned.

75. ***Asari Manishaben Jivabhai vs. State of Gujarat & Ors. SPECIAL CRIMINAL APPLICATION No. 585 of 2011, Decided On: 15 March, 2011….……pg212***

The petitioner and her husband were major when they got married and they got married as per their own desire. This petition is filed by the petitioner for providing necessary protection to the petitioner as well as her in-laws as the present petitioner had married against the will of her parents. The Court upheld the Lata Singh v. State of U.P.

Punjab and Haryana

76. *Gurdev Singh vs State of Haryana, 2011(2) RCR (Criminal) 950 ….pg213*

Accusation against appellants under Sections 120B, 302 and 364 of I.P.C. 5 of the 7 accused who were relatives of the deceased girl. They abducted and murdered the two deceased, killing the girl by poisoning while the boy by strangulation. On examining various evidences the court held this one to be a case of gruesome "honour" killing of Manoj and Babli by family members of the girl. The crime took place right after recording of the statement of Babli of her own free will and volition and being ordered to be directed to safety by Addl CJM. The hon. Court held that "Even in the 21st century such a shameful act of hollow "honour" killing is perpetrated in our society. We feel that it is really a slur on the fine fabric of the Indian society. Abduction is really cruel and that too murder of the abductees is barbaric". The court also took note of callousness of the police in such matters and directed deptartmental action. In this case the court found 5 accused to be guilty of murder u/s 302 and abduction u/s 364 and awarded life imprisonment to them. Death sentence was not confirmed due to lack of direct evidence.

77. *Geeta Sabharwal and Anr. vs. State of Haryana and Ors. Criminal Miscellaneous No. M27548 of 2008, Decided on 22 October,2008.....….pg215*

The petitioners being of legally marriageablea ge got married as per their wishes. The marriage, however, was solemnized against the desires of respondent. The court upheld the Lata Singh v. State of UP and ordered that in case the perception of threat of the petitioners is found reasonable, appropriate steps would be taken to ensure protection of their life and liberty.

Decriminalising same sex relationships

Delhi

78. *Naz Foundation vs. Government of NCT of Delhi, 2010 CrLJ 94… ..pg217*

Constitutional validity of Section 377 was challenged. It was alleged that Section 377 insofar it criminalizes consensual sexual acts of adults in private, is in violation of Articles 21, 14 and 15 of the Constitution. Provisions continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors - Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and nondiscrimination. A person below 18 would be presumed not to be able to consent to a sexual act. Clarification will hold till

Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report. Judgment will not result in the re-opening of criminal cases that have already attained finality.

Section 377 was held to be in violation of Article 15 & 14 of the Constitution of India because sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. It was held to be in violation of Article 21 as right to life also includes right to health. This right to health includes various entitlements, such as an equal opportunity to access a functioning healthcare system. Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21.

The Court said that homosexuality is no longer treated as a disease or disorder and near unanimous medical and psychiatric expert opinion treats it as just another expression of human sexuality.

The Special Marriage Act, 1954

Delhi

79. ***Pranav Kuma Mishra & Anr vs. Govt of NCT of Delhi & Anr., W.P. © No. 748/2009, Decided on 08.04.2009.....pg222***

Petitioners challenged the alleged practice of posting the notice of intended marriage at the residential addresses o f both parties to the marriage. Petitioner contended that Section 5 of the Special Marriages Act, 1954 did not require pasting of notice for verification of address and it amounted to breach of privacy. Held, it was clear from textual reading of the relevant provisions of the Act and the information procured from the website of the State government that no requirement of posting of notice to applicants' addresses or service through the SHO, or visit by him is prescribed in either the Act or the website. Petitioner's concerns and apprehensions are justified and in terms of Section 4 and 5, it amounts to breach of the Right to Privacy. Hence, all marriage officials were thereby directed to follow the above procedure and not dispatch notices to the residence of the applicants. Writ Petition was allowed.

JUDGMENTS

SUPREME COURT

Acid attacks as a tool of coercion/punishment in sexual relationships

1. ***Ravinder Singh vs. State of Haryana, AIR1975SC856.***

P.K. Goswami, R.S. Sarkaria and V.R. Krishna Iyer, JJ.

1. On July 30, 1968, Bimla, a hale and hearty young girl. (19), indeed, by her right, legitimate wife of the accused,Ravinder Singh (23), accompanied on a rail journey her husband, who after enjoying two months' furlough at home, returned to his Air force Station at Sirsa without her and without the least concern. She was found next morning nearby a wayside distant railway station with acid burns on her face and on other parts of the body with multiple injuries, incapacitated by the shock and affliction, to tell her gruesome story to the few persons who came by her. The only unchallenged thing was that she was pronounced dead in a hospital on July 31, 1968, at 8.45 PM.

2. Did the husband because the murder of his wife, is for a final judicial solution before us. The accused husband being charged under Section 302/24, I.P.C., along with some others obtained an acquittal from the Trial Judge. Government's conscience was roused and the High Court on the State's appeal entered his conviction under Section 302 I.P.C., Shrinking, however, from administering the extreme penalty under the law. That is how the liter is before us in this appeal as a matter of right under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970.

3. The entire story as given below is revealed by a friend of the accused, approver Jasbir Inder Singh (21) (PW 5), who was arrested along with the accused on August 13, 1968. Accused Ravinder Singh and the approver were employed in the Air Force Department at Sirsa and were good friends. Bhanu Parkash Singh, since acquitted, is the cousin of the accused. Satinder Kumar (11) is thea ccused's brother. During his stay at Sirsa, when his wife Bimla was not there, the accused developed intimacy with a girl, Balbir Kaur, who was insisting on marriage which, however, the accused posing to be a bachelor was putting off holding out hopes to her. Both the accused and the approver took two months' leave, the former to construct his house at village Komri. The accused and the approver with Satinder Kumar reached Komri on June 3, 1968, when Bimla was in her parents' 'house. On June 12 or 13, the accused and the approver went to bring her back from her father's house, but on account of a son being -born to her brother's wife, a few days earlier, the father-in-law said that he would send her after some days. This led to some exchange of hot words. However, after 7 or 8 days, Bimla returned to her husband's home with her father and brother, Lekh Raj Singh (PW 18). The accused went in early

July to see Bhanu Parkash Singh, his-cousin, who was employed as Health Visitor at Arnod Dispensary and returned after 8 or 10 days. The approver was in the accused's house during the period. The accused asked his wife that she should agree to a divorce, but she would not. The accused used to say that he would finish his wife one day. On July 29, 1968, Bhanu Parkash Singh came to the accused's house. On the same day the approver also returned from Lucknow where he had gone 7 or 8 days back. On July 30, the accused told the approver in the presence of Bhanu Parkash Singh that he would kill his wife that day. Bhanu Parkash Singh replied that he had brought acid with him and it would help in expediting her death. On July 30, 1968, the accused, his wife Bimla, the approver, Bhanu Parkash Singh and Satinder Kumar left for Sirsa by train from Sasni Railway Station which is at a distance of four or five miles from Komri. The father of the accused came to see them off at the Railway Station. The accused booked a cycle at Sasni Railway Station and purchased two tickets for his wife and Bhanu Parkash Singh, but did not purchase any ticket for Satinder Kumar. Both the accused and the approver had Military Railway Warrants for travel.

4. After leaving Sasni at 12 Noon, they arrived at Delhi Railway Station at 6.30 P.M. and changed for Bhatinda Railway Station. They reached Rewari Railway Station at about 10.30 P.M. At Rewari their bogie was attached to the train bound for Sirsa-Bhatinda.When the train left Rewari at 2.15 A-M. on July 31, 1968, there was no other passenger in the compartment except the above five persons. The train stopped for some time at the next Railway Station. When it again started, the accused threw his wife Bimla on the floor of the compartment by catching hold of her by the neck. When she fell down in the compartment the approver caught hold of her by the feet and Bhanu Parkash Singh "threw acid in her mouth". Satinder Kumar did not take and part. The accused removed the pazebs from her feet and gold jhumkas from her ears. The accused threw Bimla from the running train in between the first and the second railway stations beyond Rewari. Some acid drops fell on the Hands of the accused and Bhanu Parkash Singh and on their pants and on the accused's shirt. When the train reached Bhiwani the accused got down for purchasing two tickets for Bhanu Parkash Singh and Satinder Kumar, but the Ticket Collector, Raghbir Singh (PW 29) detained him and he missed the train. Three of the aforesaid company reached Sirsa at 9.00 A.M. on July 31, 1968. When asked about the accused, the approver told Bansi Lal (PW 25) and Yudhishter Kumar (PW 26) that the accused had missed the train at Bhiwani and would be coming by the next train. The accused arrived at Sirsa at 1.30 P.M. on July 31. Bhanu Parkash Singh left for Aligarh in the evening of August 1. The accused and the approver resumed their duties at the Air Force Station on August 2, 1968.

5. On August 3, 1968, the mother of the accused and her nephew, Malkhan Singh, came to Sirsa and she told that Bimla had been admitted in the Civil Hospital, Rewari, and suggested that they should register their presence in the Air Force Station at Sirsa in order to save themselves. On August 4, the accused and the approver went to the Medical Assistant at the Air Force Station and the accused showed the burns on his hands and the Medical Assistant (PW 50) made a note in his register. They decided to leave their house at New Mandi and again started living in the barracks of the Air Force from August 8. Both of them were arrested from the Air Force barracks on August 13, 1968. This is as disclosed by the approver (PW 5).

6. Let us now turn to the fate of Bimla thrown from the running tram. She was picked up, semi conscious, by Udmi (PW 10) and another person from a railway track between Jatusana and Kosli Railway Stations, and taken to Railway Hospital, Rewari, where Doctor (Miss) K. Dass (PW 3) and Miss V. K. Sharma, Nurse (PW 2) attended upon her. She could speak out a little before Miss Sharma, gave her name as Bimla, wife of the accused and daughter of Narain Singh, and indicated that she was travelling with her husband by train. She was later sent to the Civil Hospital, Rewari, where she was received by Dr. Manocha (PW 1). She was not in a position to make a statement at the Civil Hospital and she expired at 8.45 P.M. on July 31, 1968.

7. Postmorteme xamination of Bimla disclosed lacerated wounds on the head and multiple abrasions on different parts of the body. Face was disfigured by acid burns caused by sulphuric acid. There were other stains on the body which, according to the Doctor, were of sulphuric acid. Cause of death, in his opinion, was due to shock on account of burning caused by sulphuric acid. Sulphuric acid was also found by the Chemical Examiner on jumper, dopatta, and petticoat in the wearing of the deceased.

8. The Additional SessionsJ udge disbelieved the approver and also held that his statement was not corroborated in material particulars. He held that motive was not established nor was the dying declaration proved. The High Court, however, found that the approver, who was admittedly a friend of the accused, was a reliable witness and his statement did not suffer from any defect whatsoever. The High Court further held that the approver's statement was corroborated in material particulars by other evidence connecting the accused with the crime.

9. Since the accused has come in appeal against the judgment of the High Court as a matter of right, we have heard his learned Counsel at length and also examined the evidence with care. We are unable to hold that the High Court committed any error or injustice in interfering with the acquittal in this case,

10. The most important material aspect in the case is with regard to the accused accompanying the deceased in the train on July 30, 1968. This is not only disclosed by the statement of the approver but is corroborated by evidence aliunde. The very fact that she was found away from her home at a distant place by a wayside railway track is consistent with her travelling in the train on the fateful day. The defence of the accused that he left for Delhi on July 29, 1968 and "my wife followed me with large gold and silver ornaments on Her person and she was robbed and killed on the way is most unnatural and improbable and can safely be characterize as false, the accused was anxious to bring his wifeh ome from her father's house. He was returning to a distant place by train after enjoying his leave and there was no earthy reason to leave the young wife behind to travel alone in the train with 'gold and silver ornaments' with attendant risks. Then again there is the evidence of Miss V. K. Sharma (PW 2) to the effect that she "also understood from her (deceased's) talks that she was proceding to Sirsa with her husband". She is an absolutely independent witness and there is no reason to disbelieve her statement. She has no animus against the accused nor can it be accepted that she had been tutored by the police to give evidence in this case against the accused. The fact that this information was not recorded in the note Ext. PA/2 would not affect the veracity of the witness since her comprehension of the deceased's talk was

not otherwise challenged. Nothing has been pointed out to show that this witness either had not mentioned about this fact to the Investigating Officer earlier or had stated something inconsistent with the same- Then we have the evidence of Raghbir Singh (PW 29). Ticket Collector, Bhiwani. It appears from his evidence that the accused was detained on July 31, 1968, by him at the Station when he returned from the Booking Office after purchasing 31/2 tickets which according to the accused were necessary for some passengers travelling in the train. From his evidence it also appears that the accused had return-journey Railway Warrant. Besides, when money was demanded from the accused for travelling without tickets of those 31/2 persons from Sasni to Bhiwani, he gave a writing, Ext. PL dated 31-7-68 to him. This witness is also an independent witness and has no enmity against the accused. We have no reason to think that he will falsely implicate the accused after being tutored by the police, as suggested. Further we have the evidence of Yudhishter Kumar (PW 26) who states about the approver, Satinder Kumar and Bhanu Parkash Singh coming to him at Sirsa on July 31 at about 10.30 A.M. without the accused- He also stated that the accused came there at about 1.30 P.M. the same day. His evidence, which is not even challenged, establishes the story about the three persons arriving at Sirsa without the accused who had already missed the train at Bhiwani. The evidence of Shakti Parshad Ghosh (PW 17), A.S.M., Sasni Railway Station, proves that the accused booked his cycle No. RK-162872 Make Road King from Sasni to Sirsa on July 30, 1968, as per the forwarding note. Ext PW 16/A (original Ext. 17/A) which facti s also proved by PW 16, Surinder Kumar, A.S.M. PW 17 categorically states that the accused came to him for booking the cycle and filled in the forwarding note. It is pointed out that PW 17 did not see the accused at the Railway Station at the arrival of the train as he went to the brake-van direct. It was not at all natural for the witness to follow the movements of the accused after he had booked the cycle there is therefore, nothing unusual in his not noticing the accused later on the arrival of the train.

11. We also find from the approver's evidence that the accused went to the Doctor of the Air Force on August 4 to show the burns on his hands. This fact is deposed to by PW 50, Sergeant R. N. Singh, who worked as a Medical Assistant in the Unit of the First Aid Post at the Air Force Unit According to him the accused came to him on August 4. 1968, at about 7.00 A.M. and reported that both his hands had acid burns. He also proved the endorsement to that effect in the register ("Ext. PT") maintained in the First Aid Post. This fact neither is nor denied by the accused and according to him, he had these burns as he being a storeman, had to deal with batteries and some acid fell OB his hands, and that is why he went to PW 50 for treatment. In his statement in the court recorded on April 25, 1969, after admitting the above facts the accused also asserted that "there are no marks of acid burns on my hands now". In cross-examination of Dr. Manocha (PW1) it was elicited that "the sulphuric acid burns if superficial and not infected and treated immediately in due course may not leave a mark, otherwise it should leave a mark". In view of this medical evidence there is no significance attached to the accused not having marks of the injuries on his hands after about nine months. The injuries due to a few accidental drops may even be superficial. It is significant that PW 50 was not even cross-examined with regard to the burns being caused by acid from batteries. The accused's explanation that the acid from the battery caused these burns on his hands is absolutely an after-thought.

12. The approver here was a constant companion of the accused. He was arrested along with the accused on August 13. He was in police custody till August 11 when he was sent to the jail thereafter. He wrote through the Jail Superintendent to the Magistrate on August 29 expressing willingness to give evidence as "sultani gawa" originally (King's witness). He was then granted conditional pardon on September 6 and was examined thereafter as a prosecution witness. Every approver comes to give evidence in some such manner seeking to purchase his immunity and that is why to start with he is an unreliable person and the rule of caution calling for material corroboration is constantly kept in mind by the court by time-worn judicial practice.

13. Ignoring for a moment that PW 5 is an approver, there is nothing in his evidence to show that his statement otherwise is unreliable, unnatural or improbable. There is nothing to show that he had on any earlier occasion made any contradictory statement on any material point. It is true that an approver is a person of low morals for the reason that he being a co-participator in the crime has let down his companion. As pointed out above it is for this reason that a rule of caution has grown whereby the court has to see if his evidence is corroborated in material particulars connecting the accused with the crime.

14. Judged by the principles mention above, the evidence of the approver, as already set out, while revealing the story stands amply corroborated by the facts deposed to by the above independent witnesses in certain material and clinching aspects connecting the accused with the crime.

15. To mention a few, the fact that the accused was accompanied by the deceased wife is proved by the statement of PW 2, Miss Sharma. That the accused got down at Bhiwani Railway Station, missed the train and therefore, had to arrive Sirsa later in the afternoon is corroborated by PW 26. That the accused came by train on July 30, 1968 and not on July 29, 1968, is also established by the evidence of PWs 16 and 17. The accused booked his cycle at Sasni Railway Station on July 30, 1968 (vide PWs 16 and 17) and took delivery of the same at Sirsa Railway Station of August 1st (vide PW 20). Then again the accused reported to PW 50 about his acid burns on both the-hands on August 4, 1968. These are some material aspects in the case having great relevance to the crime committed by the accused and are disclosed by independent and reliable witnesses. It was not possible for the approver if he had not actually accompanied the accused to make such a detailed statement as he has done, some material parts of which find support from the evidence of the aforesaid witnesses. We are, therefore, clearly of opinion that the approver's evidence is not only reliable but the same stands corroborated in several material parts, by other reliable evidence from an independent source. We are also prepared to believe that the motive for the crime was the illegitimate intimacy with Balbir Kaur.

16. The learned Counsel for the appellant relied upon the decision of this Court in Lata and Ors. v. State of Uttar Pradesh MANU/SC/0287/1968; 1970 CriLJ1270 to support his submission that on the principle of issue-estoppel conviction of the appellant cannot be sustained because of the acquittal of Bhanu Parkash Singh, a co-accused, although in a separate trial. The crux of the principle of issue-estoppel may be stated in the words of Dixon, J. in The King v. Wilkes, (2) 77 C.L.R. 511 as follows:

Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner.... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner.

17. In order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial.

18. The Trial Court's reasons for disbelieving the approver did not find favour with the High Court and rightly so. If the incident described by the approver had taken place, as stated, there is nothing improbable, or impossible about it, if, judged by the standard of a cool person, the crime could not have been perpetrated in the manner disclosed. It is evident there was some hatching for the crime and that the opportunity to perpetrate it was availed of in the manner done, cannot be dismissed as a fib. The Trial Court disbelieved the evidence of Sampat (PW 8) with regard to the dying, declaration of Bimla implicating her husband. The Trial Court also observed that "there is no doubt in my mind that the story of dying declaration is not genuine". Even so the Trial Court relying upon the statement of Sampat (PW 8) with regard to the dying declaration observed that "the statement of the approver, in my opinion, does not seem to be true". Once the evidence of Sampat has been rejected by the court it should not be made a basis for judging the veracity of other evidence by the yardstick of that unreliable evidence. The Trial Court fell into that error. Again the reason given by the Trial Court for the rejection of the evidence of the Ticket Collector is also tenuous. There is no reason why the Ticket Collector would spin a story of his own if not given by the accused, particularly so who.., even according to the Trial Court, it does not fit in with the number of tickets actually needed for the journey. This absence of any attempt at padding of the evidence goes rather to establish the truth of the testimony of the Ticket Collector. The Ticket Collector only established the presence of the accused at Bhiwani Railway station coming by the connecting train for Sirsa-Bhatinda. Because of these patent infirmities in the approach of the case and appreciation of the evidence, the High Court was right in interfering with the order of acquittal passed by the Trial Court.

19. It is true that in an appeal against acquittal the High Court will be slow in interfering with the findings of the Trial Court which has the opportunity to watch the witnesses while giving evidence before it. That may be largely true where the Trial Court records remarks about the demeanour of the witnesses. Where, however, the prima facie appreciation of the recorded evidence is opposed to even a reasonable appraisement of the same bearing in mind the relevant point or points sought to be established by the evidence, there will be no option to the High Court in the interest of justice to step in to do justice in the case. This is exactly what the High Court has done in the appeal.

20. We have considered the case from both the stand-points-whether the High Court was right in interfering with the acquittal and also whether we would be justified to take the same view as the

High Court after examination of the evidence afresh. In addition to what we have found above if the accused came in the train with his wife on the date in question, about which we have not the slightest doubt, his subsequent conduct is a true tell-tale of his guilty mind. We are absolutely satisfied that the accused has been rightly convicted by the High Court. In the result the appeal fails and is dismissed.

Religious Conversion for Marriage

2. ***Smt Sarla Mudgal , Presdent Kalyani and others vs. UOI and others***, (1995)3SCC635

Kuldip Singh Singh and R.M. Sahai, JJ.

1. The questions for consideration are whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continue to be Hindu? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)?

2. These are four petitions under Article 32 of the Constitution of India. There are two petitioners in Writ Petition 1079/89. Petitioner 1 is the President of "KALYANI" - a registered society - which is an organisation working for the welfare of needy- families and women in distress. Petitioner 2, Meena Mathur was married to Jitender Mathur on February 27, 1978. Three children (two sons and a daughter) were born out of the wed-lock. In early 1988, the petitioner was shocked to1 earn that her husband had solemnised second marriage with one Sunita Narula @ Fathima. The marriage was solemnised after they converted themselves to Islam and adopted Muslim religion. According to the petitioner, conversion of her husband to Islam was only for the purpose of marrying Sunita and circumventing the provisions of Section 494, IPC. Jitender Mathur asserts that having embraced Islam, he can have four wives irrespective of the fact that his first wife continues to be Hindu.

3. Rather interestingly Sunita alias Fathima is the petitioner in Writ Petition 347 of 1990. She contends that she along with Jitender Mathur who was earlier married to Meena Mathur embraced Islam and thereafter got married. A son was born to her. She further states that after marrying her, Jitender Prasad, under the influence of her first Hindu-wife, gave an undertaking on April 28, 1988 that he had reverted back to Hinduism and had agreed to maintain his first wife and three children. Her grievance is that she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.

4. Geeta Rani, petitioner in Writ Petition 424 of 1992 was married to Pradeep Kumar according to Hindu rites on November 13, 1988. It is alleged in the petition that her husband used to maltreat her and on one occasion gave her so much beating that her jaw bone was broken. In December 1991, the petitioner learnt that Pradeep Kumar ran away with one Deepa and after conversion to Islam married her. It is stated that the conversion to Islam was only for the purpose of facilitating the second marriage.

5. Sushmita Ghosh is another unfortunate lady who is petitioner in Civil Writ Petition 509 of 1992. She was married to G.C. Ghosh according to Hindu rites on May 10, 1984. On April 20, 1992, the husband told her that he no longer wanted to live with her and as such she should agree to divorce by mutual consent. The petitioner was shocked and prayed that she was her legally wedded wife and wanted to live with him and as such the question of divorce did not arise. The husband finally told the petitioner that he had embraced Islam and would soon marry one Vinita Gupta. He had obtained a certificate dated June 17, 1992 from the Qazi indicating that he had embraced Islam. In the writ petition, the petitioner has further prayed that her husband be restrained from entering into second marriage with Vinita Gupta.

6. It is, thus, obvious form the catena of case-law that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouse converts and the other refuses to do so. Where a marriage take place under Hindu Law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu Marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu. We, therefore, hold that under the Hindu Personal Law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

7. The position has not changed after coming into force of the Hindu Marriage Act, 1955 (the Act) rather it has become worse for the apostate. The Act applies to Hindus by religion in any of its forms or developments. It also applied to Buddhists, Jains and Sikhs. It has no application to Muslims, Christians and Parsees. Section 4 of the Act is as under:
Overriding Effect of Act. - Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

8. A marriage solemnised, whether before or after the commencement of the Act, can only be dissolved by a decree of divorce on any of the grounds enumerated in Section 13 of the Act. One of the grounds under Section 13(1)(ii) is that "the other party has ceased to be a Hindu by conversion to another religion". Section 11 and 15 of the Act is as under:-

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

Divorced persons when may marry again- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, of there is such a right of appeal the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

9. It is obvious from the various provisions of the Act that the modern Hindu Law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds available under Section 13 of the Act. In that situation parties who have solemnised the marriage under the Act remain married even when the husband embraces Islam in pursuit of other wife. A second marriage by an apostate under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the Act by which he would be continuing to be governed so far as his first marriage under the Act is concerned despite his conversion to Islam. The second marriage of an apostate would, therefore, be illegal marriage qua his wife who married him under the Act and continues to be Hindu. Between the apostate and his Hindu wife the second marriage is in violation of the provisions of the Act and as such would be nonest. Section 494 Indian Penal Code is as under:-

Marrying again during lifetime of husband or wife- Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
The necessary ingredients of the section are: (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void; (4) by reason of its taking place during the life of such husband or wife.

10. It is no doubt correct that the marriage solemnised by a Hindu husband after embracing Islam may not be strictly a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy.

11. The expression "void" for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the Section. On the other hand the same expression has a different purpose under Section 494, IPC and has to be given meaningful interpretation.

12. The expression "void" under Section 494, IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494 IPC.

13. A Hindu marriage solemnised under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494, IPC. Any act which is in violation of mandatory provisions of law is per-se void.

14. The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-bye to the substance of the matter and acting against the spirit of the Statute if the second marriage of the convert is held to be legal.

15. We also agree with the law laid down by Chagla, J. in Robasa Khanum v. Khodadad Irani's case (supra) wherein the learned Judge has held that the conduct of a spouse who converts to Islam has to be judged on the basiso f the rule of justice and right or equity and good conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, IPC.

16. Looked from another angle, the second marriage of an apostate-husband would be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his earlier marriage under the Act dissolved. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void.

17. The interpretation we have given to Section 494 IPC would advance the interest of justice. It is necessary that there should be harmony between the two systems of law just as there should be harmony between the two communities. Result of the interpretation, we have given to Section 494 IPC, would be that the Hindu Law on the one hand and the Muslim Law on the other hand would operate within their respective ambits without trespassing on the personal laws of each other. Since it is not the object of Islam nor is the intention of the enlighten Muslim community that the Hindu husbands should be encouraged

to become Muslims merely for the purpose of evading their own personal laws by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law.

18. All the four ingredients of Section 494 IPC are satisfied in the case of a Hindu husband who marries for the second time after conversion to Islam. He has a wife living, he marries again. The said marriage is void by reason of its taking place during the life of the first wife.

19. We, therefore, hold that the second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of Section 494 IPC.

20. Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu-husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC.

21. The question of law having been answered we dispose of the writ petitions. The petitioners may seek any relief by invoking any remedy which may be available to them as a result of this judgment or otherwise. No costs.

3. *Lily Thomas, Etc. vs. Union of India & Ors, (2000)6SCC224*

R. Sethi, S. Saghir Ahmad, J.J

1. Smt. Sushmita Ghosh, the wife of Shri G.C. Ghosh (Mohd. Karim Ghazi) filed a Writ Petition in this Court stating that she was married to Shri G.C. Ghosh in accordance with the Hindu rites on 10th May, 1984 and since then both of them were happily living in Delhi. The following paragraphs of the Writ Petition, which are relevant for this case, are quoted below.

2. That around the 1st of April, 1992, the Respondent No. 3 told the petitioner that she should in her own interest agree to her divorce by mutual consent as he had any way taken up Islam so that he may remarry and in fact he had already fixed to marry one Miss Vanita Gupta resident of D-152 Preet Vihar, Delhi, a divorcee with two children in the second week of July 1992. The Respondent No. 3 also showed a Certificate issued by office of the Maulana Qari Mohammad Idris, Shahi Qazi dated 17th June, 1992 certifying that the Respondent No. 3 had embraced Islam.

3. That the petitioner contacted her father and aunt and told them about her husband's conversion and intention to remarry. They all tried to convince the Respondent No. 3 and talk him out of the marriage but of no avail and he insisted that Sushmita must agree to her divorce otherwise she will have to put up with second wife.

4. That it may be stated that the Respondent No. 3 has converted to Islam solely for the purpose of re-marrying and has no real faith in Islam. He does not practice the Muslim rites as prescribed nor has he changed his name or religion and other official documents.

5. That the petitioner asserts her fundamental rights guaranteed by Article 15(1) not to be discriminated against on the ground of religion and sex alone. She avers that she has been discriminated against by that part of Muslim Personal Law which is enforced by the State Action by issue of the Muslim Personal Law (Shariat) Act, 1937. It is submitted that such action is contrary to Article 13(1) and is unconstitutional.

6. That the truth of the matter is that Respondent No. 3 has adopted the Muslim religion and converted to that religion for the sole purpose of having a second wife which is forbidden strictly under the Hindu Law. It need hardly be said that the said conversion was not a matter of Respondent No. 3 having faith in the Muslim religion.

7. The petitioner is undergoing great mental trauma. She is 34 years of age and is not employed anywhere.

8. That in the past several years, it has become very common amongst the Hindu males who cannot get a divorce from their first wife, they convert to Muslim religion solely for the purpose of marriage. This practice is invariably adopted by those erring husband who embrace Islam for the purpose of second marriage but again reconvert so as to retain their rights in the properties etc. and continue their service and all other business in their old name and religion.

9. That a Woman's Organisation "Kalyani" terribly perturbed over this growing menace and increase in number of desertions of the lawfully married wives under the Hindu Law and splitting up and ruining of the families even where there are children and when no grounds of obtaining a divorce successfully on any of the grounds enumerated in Section 13 of the Hindu Marriage Act is available to resort to conversion as a method to get rid of such lawful marriages, has filed a petition in this Hon'ble Court, being Civil Writ Petition No. 1079 of 1989 in which this Hon'ble Court has been pleased to admit the same. True copy of the order dated 23.4.90 and the order admitting the petition is annexed to the present petitionm

10. She ultimately prayed for the following reliefs:

(a) By an appropriate writ, order or direction, declare polygamy marriages by Hindus and non-Hindus after conversion to Islam religion are illegal and void;

(b) Issue appropriate directions to Respondent Nos. 1 and 2 to carry out suitable amendments in the Hindu Marriage Act so as to curtail and forbid the practice of polygamy;

(c) Issue appropriate direction to declare that where a non-Muslim male gets converted to faith without any real change of belief and merely with a view to avoid an earlier

marriage or enter into a second marriage, any marriage entered into by him after conversion would be void;

(d) Issue appropriate direction to Respondent No. 3 restraining him from entering into any marriage with Miss" Vanita Gupta or any other woman during the subsistence of his marriage with the petitioner; and

(e) Pass such order and further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

11. This Petition was filed during the summer vacation in 1992. Mr. Justice M.N. Venkatachaliah (as he then was), sitting as Vacation Judge, passed the following order on 9th July, 1992:

…learned Counsel said that the respondent who was a Hindu by religion and who has been duly and legally married to the petitioner purports to have changed his religion and embraced Islam and that he has done only with a view to take another wife, which would otherwise be an illegal bigamy. Petitioner prays that there should be interdiction of the proposed second marriage which is scheduled to take place tomorrow i.e. 10th July, 1992. All that needs to be said at this stage is that if during the pendency of this writ petition, the respondent proceeds to contract a second marriage and if it is ultimately held that respondent did not have the legal capacity for the second marriage, the purported marriage would be void.

12. On 17th July, 1992, when this case was taken up, the following order was passed:

Counter affidavit shall be filed in four weeks. Place this matter before a Bench of which Hon'ble Pandian, J. is a member.

Shri Mahajan submitted that since the apprehended second marriage has not yet taken place, it is appropriate that we stop the happening of that event till disposal of this petition. Learned Counsel for the respondent-husband says that he would file a counter affidavit within four weeks. He assures that his client would not enter into a marriage in hurry before the counter-affidavit is filed.

13. On 30th November, 1992, this Writ Petition was directed to be tagged with Writ Petition, Smt. Sarla Mudgal, President, "Kalyani" and Ors. v. Union of India and Ors. And Sunita @ Fatima v. Union of India and Ors.

14. Thus, in view of the pleadings in Smt. Sushmita Ghosh's case and in view of the order passed by this Court in the Writ Petitions filed separately by Smt. Sarla Mudgal and Ms. Lily Thomas, the principal question which was required to be answered by this Court was that where a non-Muslim gets converted to the 'Muslim' faith without any real change or belief and merely with a view to avoid an earlier marriage or to enter into a second marriage, whether the marriage entered into by him after conversion would be void?

15. Smt. Sushmita Ghosh, in her Writ Petition, had clearly spelt out that her husband, Shri G.C. Ghosh, had not really converted to 'Muslim' faith, but had only feigned conversion to solemnise a second marriage. She also stated that though freedom of religion is a matter of faith, the said freedom cannot be used as a garb for evading other laws where the spouse becomes a convert to 'Islam' for the purpose of avoiding the first marriage. She pleaded in clear terms that IT MAY BE STATED THAT THE RESPONDENT NO. 3 HAS CONVERTED TO ISLAM SOLELY FOR THE PURPOSE OF RE-MARRYING AND HAS NO REAL FAITH IN ISLAM. HE DOES NOT PRACTICE THE MUSLIM RITES AS PRESCRIBE NOR HAS HE CHANGED HIS NAME OR RELIGION AND OTHER OFFICIAL DOCUMENTS.

16. It, therefore, appears that conversion to 'Islam' was not the result of exercise of the right to freedom of conscience, subject to what is ultimately held by the trial court where G.C. Ghosh is facing the criminal trial, to get rid of his first wife, Smt. Sushmita Ghosh and to marry a second wife. In order to avoid the clutches of Section 17 of the Act (Hindu Marriage Act), if a person renounces his "Hindu" religion and converts to another religion and marries a second time, what would be the effect on his criminal liability is the question which may not be considered.

16. It is in this background that the answer to the real question involved in the case has to be found.

17. Section 5 of the Hindu Marriage Act prescribes the conditions for a valid Hindu marriage. A portion of this Section, relevant for our purposes, is quoted below:

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

(i) Neither party has a spouse living at the time of marriage,

18. Thus, Section 5(i) read with Section 11 indicates that any marriage with a person, whose previous marriage was subsisting on the date of marriage, would be void ab initio.

19. The voidness of the marriage is further indicated in Section 17 of the Act in which the punishment for bigamy is also provided. This Section lies down as under:

> **Punishment of Bigamy.** - Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly.

20. We are not in this case concerned with the exception of Section 494 and it is the main part of Section494 which is involved in the present case. A perusal of Section 494 indicates that in order to constitute an offence under this Section, the following ingredients must be found to be existing:

(i) First marriage of the accused,

(ii) Second marriage of the accused,

(iii) The first wife or husband, as the case may be, should be alive at the time of the second marriage.

(iv) Under law, such marriage should be void by reason of its taking place during the life-time of such husband or wife.

21. We have already seen above that under the Hindu Marriage Act, one of the essential ingredients of the valid Hindu marriage is that neither party should have a spouse living at the time of marriage. If the marriage takes place in spite of the fact that a party to that marriage had a spouse living, such marriage would be void under Section 11 of the Hindu Marriage Act. Such a marriage is also described as void under Section 17 of the Hindu Marriage Act under which an offence of bigamy has been created. This offence has been created by reference. By providing in Section 17 those provisions of Section 494 and 495 would be applicable to such a marriage, the Legislature has bodily lifted the provisions of Section 494 and 495 IPC and placed it in Section 17 of the Hindu Marriage Act. This is a well-known legislative device. The important words used in Section 494 are "MARRIAGE IN ANY CASE IN WHICH SUCH MARRIAGE IS VOID BY REASON OF ITS TAKING PLACE DURING THE LIFE-TIME OF SUCH HUSBAND OR WIFE".

22. It would thus be seen that the Court would take cognizance of an offence punishable under Chapter XX of the Code only upon a complaint made by any of the persons specified in this Section. According to Clause (c) of the Proviso to Sub-section (1), a complaint for the offence under Section 494 or 495 can be made by the wife or on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister. Such complaint may also be filed, with the leave of the Court, by any other person related to the wife by blood, marriage, or adoption. If a Hindu wife files a complaint for the offence under Section 494 on the ground that during the subsistence of the marriage, her husband had married a second wife under some other religion after converting to that religion, the offence of bigamy pleaded by her would have to be investigated and tried in accordance with the provisions of the Hindu Marriage Act. Since taking of cognizance of the offence under Section 494 is limited to the complaints made by the persons specified in Section 198 of the Cr.P.C., it is obvious that the person making the complaint would have to be decided in terms of the personal law applicable to the complainant and the respondent (accused) as mere conversion does not dissolve the marriage automatically and they continue to be "husband and wife".

23. In view of the above, if a person marries a second time during the lifetime of his wife, such marriage apart from being void under Section 11 & 17 of the Hindu Marriage Act would also constitute an offence and that person could be liable to be prosecuted under Section 494 IPC. While Section 17 speaks of marriage between two "Hindus", Section 494 does not refer to any religious denomination.

24. Now, conversion or apostasy does not automatically dissolve a marriage already solemnized under the Hindu Marriage Act. It only provides a ground for divorce under Section 18…

25. Under Section 10 which provides for judicial separation, conversion to another religion is now a ground for a decree for judicial separation after the Act was amended by Marriage Laws (Amendment) Act, 1976. The first marriage, therefore, is not affected and it continues to subsist. If the 'marital' status is not affected on account of the marriage still subsisting, his second marriage qua the existing marriage would be void and in spite of conversion he would be liable to be prosecuted for the offence of bigamy under Section 494.

26. Change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not bring to an end the civil obligations or the matrimonial bond, but apostasy is a ground for divorce under Section 13 as also a ground for judicial separation under Section 10 of the Hindu Marriage Act. Hindu Law does not recognize bigamy. As we have seen above, the Hindu Marriage Act, 1955 provides for "Monogamy". A second marriage, during the life-time of the spouse, would be void under Sections 11 and 17, besides being an offence.

27. The position under the Mahommedan Law would be different as in spite of the first marriage, a second marriage can be contracted by the husband, subject to such religious restrictions as have been spelled out by Sethi, J. in his separate judgment, with which the court concurs on this point also. This is the vital difference between Mahommedan Law and other personal laws. Prosecution under Section 494 in respect of a second marriage under Mahommedan Law can be avoided only if the first marriage was also under the Mahommedan Law and not if the first marriage was under any other personal law where there was a prohibition on contracting a second marriage in the life-time of the spouse.

28. In any case, as pointed out earlier in the instant case, the conversion is only feigned, subject to what may be found out at the trial.

29. I respectfully agreed with Brother Sethi, J. that in the present case, the court was not concerned with the status of the second wife or the children born out of that wedlock as in the instant case the court was considering the effect of the second marriage qua the first subsisting marriage in spite of the husband having converted to 'Islam'.

30. It may also the pointed out that in the counter affidavit filed on 30th August, 1996 and in the supplementary affidavit filed on 5th December, 1996 on behalf of Govt. of India in the case of Sarla Mudgal, it has been stated that the Govt. would take steps to make a uniform code only if the communities which desire such a code approach the Govt. and take the initiative themselves in the matter.

31. Moreover, as pointed out by Sethi. J. learned ASG appearing for the respondent has stated before the Court that the Govt. of India did not intend to take any action in this regard on the basis of that judgment alone.

32. The Review Petition and the Writ Petition were disposed of finally with the clarifications set out above.

33. IA No. 2 of 1995 in Writ Petition (c) No. 588 of 1995 was allowed.

34. Interpreting the scope and extent of Section 494 of the Indian Penal Code this Court in ***Sarla Mudgal (Smt.) President Kalyani and Ors. v. Union of India and Ors*** held:

...that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC.

The findings were returned answering the questions formulated by the Court in para 2 of its judgment.

35. The judgment in Sarla Mudgal's case is sought to be reviewed, set aside, modified and quashed by way of the present Review and Writ Petitions filed by various persons and Jamiat-Ulema Hind and Anr. It was contended that the aforesaid judgment is contrary to the fundamental rights as enshrined in Articles 20, 21, 25, and 26 of the Constitution of India.

36. In the light of the legal position for the review of the judgment, the court examined the grievances of the petitioners in the instant case. In review petition the notice issued was limited to the question of Article 20(1) of the Constitution. It was contended that the judgment of the Court entailed a convert to Islam the liability of prosecution for the offence of bigamy under Section 494 of the Indian Penal Code which would, otherwise not be an offence under the law applicable to him. Section 494 forms part of a substantive law and are applicable to all unless specifically excluded. As no notice has been issued for review of the main judgment which interpreted Section 494 IPC in the manner as narrated hereinabove, if cannot be said that any person was likely to be convicted for an offence except for violation of law in force at the time of commission of the act charged as offence.

Therefore, it can safely be held that the petitioners have hot made out any case within the meaning of Article 137 read with Order XL of the Supreme Court Rules and Order XLVII Rule 1 of the CPC for reviewing thej udgment in Sarla Mudgal's case. The petition is misconceived and bereft of any substance.

37. We are not impressed by the arguments to accept the contention that the law declared in Sarla Mudgal's case cannot be applied to persons who have solemnized marriages in violation of the mandate of law prior to the date of judgment. This Court had not laid down any new law but only interpreted the existing law which was in force. It is settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the Court does not legislate but only give an interpretation to an existing law. “We do not agree with the arguments that the second marriage by a convert male

Muslim has been made an offence only by judicial pronouncement. The judgment has only interpreted the existing law after taking into consideration various aspects argued at length before the Bench which pronounced the judgment. The review petition alleging violation of Article 20(1) of the Constitution is without any substance and is liable to be dismissed on this ground alone."

38. Even otherwise there was no substance in the submissions made on behalf of the petitioners regarding the judgment being in violation of any of the fundamental rights guaranteed to the citizens of this country. The mere possibility of taking a different view has not persuaded the court to accept any of the petitions as it does not find the violation of any of the fundamental rights to be real or prima facie substantiated.

39. The alleged violation of Article 21 is misconceived. What is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to the procedure established by law. It is conceded before us that actually and factually none of the petitioners has been deprived of any right of his life and personal liberty so far. The aggrieved persons are apprehended to be prosecuted for the commission of offence punishable under Section 494 IPC. It is premature at this stage, to canvass that they would be deprived of their life and liberty without following the procedure established by law. The procedure established by law, as mentioned in Article 21 of the Constitution, means the law prescribed by the Legislature. The judgment in Sarla Mudgal's case has neither changed the procedure nor created any law for the prosecution of the persons sought to be proceeded with for the alleged commission of the offence under Section 494 of the IPC.

40. The grievance that the judgment of the Court amounts to violation of the freedom of conscience and free profession, practice and propagation of religion also far-fetched and apparently artificially carved out by such persons who are alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under Article 25 of the Constitution. No person, by the judgment impugned, has been denied the freedom of conscience and propagation of religion. The rule of monogamous marriage amongst Hindus was introduced with the proclamation of Hindu Marriage Act. Section 17 of the said Act provided that any marriage between two Hindus solemnised after the commencement of the Act shall be void if at the date of such marriage either party had a husband or wife living, and the provisions of Sections 494 and 495 of the Indian Penal Code, shall apply accordingly. The second marriage solemnised by a Hindu during the subsistence of first marriage is an offence punishable under the Penal law. Freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit his belief and ideas in a manner which does not infringe the religious right and personal freedom of others. It was contended in Sarla Mudgal's case that making a convert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion. Such a plea raised demonstrates the ignorance of the petitioners about the tenets of Islam and its teachings. The word "Islam" means "peace and submission". In its religious connotation it is understood as "submission to the Will of god". According to Fyzee (Outlines of

Mohammadan Law, II Edition) in its secular sense the establishment of peace. The word 'Muslim' in Arabic is the active principle of Islam, which means acceptance of faith, the noun of which is Islam. Muslim Law is admittedly to be based upon a well recognised system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived by the other systems of Law in force at the time of its inception. Sir Ameer Ali in his book Mohammedan Law, Tagore Law Lectures IV Edition, Volume I has observed that the Islamic system, from a historical point of view was the most interesting phenomenon of growth. The small beginnings from where it grew up and the comparatively short space of time within which it attained its wonderful development marked its position as one of the most important judicial system of the civilised world. The concept of Muslim Law is based upon the edifice of Shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law is condition precedent. Even under the Muslim Law plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic Law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject matter of prosecution under the general Penal Law prevalent in the country. The progressive outlook and wider approach of Islamic Law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody's case that any such convert has been deprived of practising any other religious right for the attainment of spiritual goals. The Islam which is pious, progressive and respected religion with rational outlook cannot be given a narrow concept as has been tried to be done by the alleged violators of law.

41. Besides deciding the question of law regarding the interpretation of Section 494 IPC, one of the Hon'ble Judges (Kuldeep Singh, J) after referring to the observations made by this Court in ***Mohd. Ahmed Khan vs. Shah Bano Begum and Ors.***, requested the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavor to secure for the citizens a uniform civil code throughout the territory of India". In that behalf direction was issued to the Government of India, Secretary, Ministry of Law & Justice to file affidavit of a responsible officer indicating there in the steps taken and efforts made towards securing a uniform Civil Code for the citizens of India. On the question of uniform Civil Code R.M. Sahai, J. the other Hon'ble Judge constituting the Bench suggested some measures which could be undertaken by the Government to check the abuse of religion by unscrupulous persons, who under the cloak of conversion were found to be otherwise guilty of polygamy. It was observed that:

Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre.

It was further remarked that:

"The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation in keeping with modern day concept of human rights for women."

42. In ***Ahmedabad Women Action Group (AWAG) and Ors.v s. Union of India*** this Court had referred to the judgment in Sarla Mudgal's case and held:

We may further point out that the question regarding the desirability of enacting a Uniform Civil Code did not directly arise in that case. The questions which were formulated for decision by Kuldip Singh, J. in his judgment were these: (SCC p. 639, para 2)

Whether a Hindu husband, married under Hindu Law, by embracing Islam, can solemnise a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be a Hindu? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)?

Sahai, J. in his separate but concurring judgment referred to the necessity for a Uniform Civil Code and said. (SCC p. 652, para 44)

...The desirability of uniform code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.' Sahai, J. was of the opinion that while it was desirable to have a Uniform Civil Code, the time was yet not ripe and the issue should be entrusted to the Law Commission which may examine the same in consultation with the Minorities Commission. That is why when the Court drew up the final order signed by both the learned judges it said "the writ petitions are allowed in terms of the answer to the questions posed/in the opinion of Kuldip Singh, J". These questions we have extracted earlier and the decision was confined to conclusions reached thereon whereas the observations on the desirability of enacting the Uniform Civil Code were incidentally made.

Learned Counsel appearing on behalf of the Jamiat-Ulema Hind and learned, counsel appearing on behalf of Muslim Personal Law Board has rightly argued that this Court has no power to give directions for the enforcement of the Directive Principles of the State Policy as detailed in Chapter IV of the Constitution which includes Article 44. This Court has time and again reiterated the position that Directives, as detailed in Part IV of the Constitution are not enforceable in Courts as they do not create any justiciable rights in favour of any person.

43. In the circumstances the review petition as also the writ petitions having no substance are hereby disposed of finally with a clarification regarding the applicability of Article 44 of the Constitution. All interim orders passed in these proceedings including the stay of Criminal Cases in subordinate courts, shall stand vacated. No costs.

44. In view of the concurring, but separate judgments the Review Petition and the Writ Petitions were disposed of finally with the clarifications and interpretation set out therein. All interim orders passed in these petitions shall stand vacated.

Charges of kidnapping and rape in cases of right to choice and the use of Haebas Corpus

4. Jinish Lal Sah vs. State Of Bihar, AIR 2003 SC 2081

N S Hegde, B Singh, J.J.

1. The appellant herein was convicted by the Sessions Judge, Sitamarhi in Sessions Trial No. 182/89 for offencesp unishable under Section 366A and 376 of the IPC and was sentenced to rigorous imprisonment for five years on each of those counts but the sentences were directed to run concurrently. On appeal, the High Court of Patna has confirmed the said sentence. It is against that judgment and conviction the appellant is before us in this Criminal Appeal.

2. Briefly stating the prosecution case is that the appellant was giving tuition to the prosecutrix Geeta Kumari and her sister at their residence. It is stated that on 30th April, 1989 at about 7 PM the appellant came to their house and in the presence of the family members told Geeta Kumari P.W.1 that he won't be giving tuition on that day and went away. Immediately, thereafter, it is stated that PW-1 left the house telling the members of the family that she was going to grand-father's house to watch television. It is further stated that on the way she met the appellant and he on the pretext of taking her to a movie took her in his motor cycle towards Muzaffarpur. From Muzaffarpur, he took her in a train to Jasidih from where he took her to Devghar. The prosecution further states that there he forced PW-1 to marry him and made her sign certain papers. From Jasidih it is stated that the appellant and PW-1 left for Babadham on 8.5.89 and from there to Bajitpur on 9.5.89. During this stay, it is stated that appellant committed rape on PW-1. On 10.5.89, PW-1 was recovered from the house of the appellant by the police. After investigation, a case was registered against the appellant and he was charged as stated above and having been found guilty by the two courts below the appellant has filed this appeal.

3. The factum of the recovery of PW-1from the house of the appellant is not in dispute. While it is the case of prosecution that it is the appellant who either by inducement or threat took away PW-1from her house, the defence case is that PW-1had eloped with somebody and her love affair having failed with the person with whom she eloped and she being scared to get back to the house had come to the house of the appellant who the had informed PW-6, the father of the girl about PW-1coming to his house. The defence further states that after being annoyed and having found none else to blame her father has foisted a false case against the appellant. As noticed above, one of the charges of which the appellant has been found guilty is under Section 366A which refers to procreations of a minor girl. To establish this charge, the prosecution has to prove that PW-1was a minor on the date when she was

taken away from her house. In regard to this fact, the prosecution relies on the evidence of PW-1the girl herself, PW-6, her father and PW-10 the Doctor who examined her. So far as PW-1's evidence is concerned it is prima facie not acceptable when she says that she was only 14 years on the date when she was taken way from her father's house. This evidence runs counter to all other material on record to which we shall refer presently

4. PW-6 the father of the girl in his evidence has stated that he was married in the year 1952 and he had two daughters. The firs daughter Reeta was born 12 years after his marriage which would be in the year 1964. He states that his second daughter was born six years after Reeta was born that would be 18 years after his marriage which will be 1970. If that be the year of birth of PW-1 then the incidence in question being in the year 1989, PW1 ought to be 19 years on that day. This witness further says that PW1 had appeared for her Board examination in the year 1988 and had failed. This also gives an indication that it is likely that the age of PW-1 on the date of incidence was around 19 years.

5. PW-10 the doctor in his evidence has stated that PW1's X-ray photograph showed partial epiphyte seal fusion of iliac crest. In her opinion, PW1 appeared to be 17 years old which opinion of the Dr. is from the very language used by her shows it to be approximate. The physique of PW-1 as explained by PW-10 also indicates the probability of PW-1 being above the age of 18 years. In this background if we examine the evidence of PWs. 6 and 10 it is clear that evidence of PW-1 is wholly unreliable when she states that she was only about 14 years old. Even though PW-10 Dr. stated that PW-1 appeared to be 17 years old cannot be held that this evidence is conclusive enough to come to the conclusion that PW-1 was really below 18 years on the date of incidence, in view of positive statements made by PW-6 the father. We have already referred to the evidence of the father, according to whose evidence PW-1 was 19 years of age when she left the house of thefather. In such situation, we think it not safe to come the conclusion that PW-1 was less than 18 years of ageon the date when she left the house of her father…….. The learned counsel for the State, however, contended that if the charge under Section 366A should fail then, the appellant is liable to be convicted under Section 366 for kidnapping, abducting or inducing a woman to compel her to marry. He has referred to the evidence of PW-1 in this regard and contends that even though there is no specific charge under Section 366 still on the material available on record a conviction under Section 366 could be based and no prejudice would be caused to the appellant. But then, we will have to notice that even to establish the charge under Section 366 IPC, there should be acceptable evidence to show that either PW-1 was compelled to marry the appellant against her will and/or was forced to or induced to intercourse against her will. This would therefore, require the prosecution to prove that there was some such undue force on the PW-1 either to marry the appellant or to have intercourse with him. Therefore, it becomes necessary for us to examine the prosecution case whether there was a threat or whether there was consent as contended by the defence. While we consider this question of existence of consent or absence of it we may also consider the charge under Section 376 IPC of which the appellant is found guilty by the courts below because one of the ingredients necessary for establishing such a charge in regard to a girl over the age of 16 is the presence or otherwise of consent. Therefore, both for the purpose of 366 and for the purpose of Section 376 IPC, there should be material to establish that either the alleged marriage or the intercourse has taken place without the consent of PW-1 if she is above the age of 18 years or 16 years as the case may be.

6. … In our opinion, iti s extremely difficult to accept her evidence when she states that she was taken by the appellant without her consent. If we see sequence of events starting from 30th April 1989 to 10 of May 1989 it is clear that she has accompanied the appellant willingly. The evidence of PW-1 indicates that there was a prior planning by her with the appellant together to elope, and it is because of that, the appellant came to PW's house on 30.04.1989 and told her that he will not be taking tuition on that day and immediately thereafter PW-1 left her house on the pretext of going to her grand father's house to see Television. It is not her case that when she was accosted by the appellant on his motorcycle, she went with him under a threat. On the contrary, the evidence shows that she willingly went with him on his motorcycle to see a movie at Sitamarhi. She says she was threatened only when she protested as against she being taken to Muzaffarpur. On the contrary, we notice she was with him from 30th of April to 10th of May, d uring which period she had travelled by train, temp and stayed with the appellant without there being any evidence of her having protested or having made any effort to seek help from others or even trying to run away. Apart from that from the record, it is seen that PW-6 in the FIR had stated that "I got information from my wife in the house that Geeta went away by taking clothes and a gold chain and she took Rs. 500/- in cash in total amounting to Rs. 8500/-. This evidence though subsequently resiled by PW-6 indicates that PW-1 had planned her departure from the house in advance and had willingly gone away with the appellant which also indicates that there was no threat or inducement either in regard to her leaving the house or in regard to accompanying the appellant. In such situation in the absence of any other material to show to the contrary it will be difficult to accept the prosecution case that either there was a forcible marriage or rape as contended by the prosecution to find the appellant guilty under Section 366 or 376 IPC. Since the courts below proceeded on the basis that PW-1was a girl below the age of 18 on the date she left the house they have not properly appreciated the evidence in regard to her consent which is a mandatory requirement before finding a person guilty under Section 366 or 376 IPC7. There was no doubt that the appellant who was a tuition teacher of PW-1 has misused the trust reposed in him by the PW-1's family but then since the prosecution has failed to establish the fact that PW-1 was below the age of 18 and the evidence on record indicates that PW-1 had willingly gone away with the appellant and in the absence of any threat, coercion or inducement, having been established by the prosecution we think it not possible to rely on the prosecution case to come to the conclusion that the appellant is guilty of the charges framed against him under Section 366A and 376 IPC or even 366 as contended by the learned counsel for the State.

8. For the reasonss tated above, this appeal succeeds. The judgments and convictions of the courts below are set aside and the appellant shall be released forthwith if he is not required in any other case.

5. Puran Singh and Anr. vs. State of Bihar, JT 2001 (8) SC647

Dr. A. S. Anand , C.J.I,R. C. Lahoti and Ashok Bhan, JJ.

1.In short thep rosecution case is that on 8.2.1989 informant P.W. 8 th en aged about 15 years and studying in matriculation class had gone to the house of her brother to watch a marriage ceremony taking place in the neighborhood of her brother. After watching the marriage ceremony, while she

was returning home, Appellant Kamlesh Puryank invited her to have a look at his paintings. On being so allured, she went to his house to see the paintings and while she was in the process of seeing the paintings, one Narendra Singh appeared there with a mask and caught hold of her. If is urther the case of the prosecution that the informant was confined to a room and made to swallow a tablet by said Narendra Singh, who was identified by her when his mask fell off during scuffle. She was also administered an injection where after she became unconscious. On regaining consciousness, she found herself at a different place. The mother, sister and a daughter of the sister of Narendra Singh were present at that place. The informant remained there for about 10-12 days. According to her, Narendra Singh forcibly smeared vermilion on scalp and pronounced that he had married her. She was then taken in a white car to Haidargarh in Uttar Pradesh. It is also the prosecution case that the house where she was taken in Haidargarh, Sardar Puran Singh and his wife (Appellants in Crl. Appeal No. 622 of 2000) were living. The room in which the informant was confined at the house of Puran Singh had its windows covered with plastic sheets by Puran Singh. She stayed for about 5 months in that room; where according to the informant P.W. 8 Narendra Singh committed rape on her on several occasions. From Haidargarh, the informant was taken to Jagrawan in district Ludhiana to the house of an advocate where again she was confined to a room and Narendra Singh had sexual intercourse with her against her wishes. It was at Jagrawan that her brother Sahendra Singh (P.W. 7) along with his two friends arrived followed by Kamlesh Puryank (Appellant in Crl. Appeal No. 976 of 2000), on 27th September, 1989. They took her back to her house reaching there on 28th September, 1989. Her statement was recorded on 4th October, 1989 on the basis of which a first information report was registered at Dehri police station. After completion of investigation, the Appellants as well as Narendra Singh were charged for commission of offences under Sections 366, 366A, 376 and 368, Indian Penal Code Narendra Singh, however, absconded and was not put up for trial. At the trial, the prosecution examined 11 witnesses besides the informant P.W. 8, her brother and mother. After recording evidence, the trial court convicted the Appellants for various offences as already noticed. Their appeal against conviction and sentence in the High Court failed. Hence, these appeals by special leave.

2. We shall first take up the case of Appellants Puran Singh and his wife Lakhbir Kaur (Appellants in Crl. Appeal No. 622 of 2000). The entire evidence against them revolves around the statement made by the informant P.W. 8. According to her, shew as taken to Haidargarh in a car by Narendra Singh who was accompanied by his mother and sister as also daughter of his sister. There she was confined in a room in the house of Puran Singh where the windows had been covered by plastic sheets. She stayed in that room for almost 5 months.

3. The sine qua non for attracting provisions of Section 368, Indian Penal Code is that a person who either wrongfully conceals or confines the victim, must have the knowledge that, the victim had been kidnapped or had been abducted and on proof of that, the accused can be punished in the same manner as if he had kidnapped or abducted the victim with the same intention or knowledge, or for the same purpose as that with which he concealed or detained the victim. In vain have the court searched through the record for any allegation, leaving alone the proof that either of the Appellants knew that P.W. 8 had been kidnapped or abducted by Narendra Singh. It is n ot the case of P.W. 8, the informant that she had told so at any point of time to either Puran Singh or his wife. The prosecution has also, while recording the statement of these two Appellants under Section 313, Criminal

Procedure Code, not put to them that either of them had knowledge that P.W. 8 had been kidnapped or abducted, and with that knowledge, they had wrongfully concealed or confined P.W. 8 in their room. There is no material at all on the record which can bring home the guilt of the Appellants Puran Singh and Lakhbir Kaur for on offence under Section 368, Indian Penal Code Even if it be assumed for the sake of arguments, that P.W. 8 was taken to the house of Puran Singh and confined there in a room by Narendra Singh, the possibility that Puran Singh and his wife thought that P.W. 8 was in fact the wife of Narendra Singh cannot be ruled out. According to the prosecutrix herself, she had gone to the house of Puran Singh with sindoor in the parting of her hair. He, therefore, could have no reason even to suspect that P.W. 8 had either been kidnapped or abducted. In the absence of any evidence to connect these two Appellants with the requisite knowledge, their conviction and sentence for an offence under Section 368, Indian Penal Code cannot be sustained. Both the Appellants are, therefore, entitled to be given benefit of doubt, which we do hereby give them. Consequently, their appeal succeeds. Their conviction and sentence are set aside. Their bail bonds shall stand discharged. Fine, if any, paid by them shall be refunded to them.

4. Coming now to the case of Appellant Kamlesh Puryank (Crl. Appeal No. 976 of 2000). According to the prosecution case, this Appellant is the one who lured informant P.W. 8 to his house where she was over-powered by Narendra Singh who then kidnapped or abducted her. We have already noticed that it was Narendra Singh who according to the prosecution case forcibly married her and had sexual intercourse with her without her consent at different places during the period of almost 8 months. That the prosecutrix was below the age of 16 years is not in doubt in view of the evidence provided by an extract from the admission egister (exhibits 4, 4A and 4B), which disclosed that her date of birth was 10.12.1975. However, Narendra Singh has absconded and has not been tried. According to the prosecution case, he is the main culprit who not only forcibly married a minor but also subjected her to rape on numerous occasions. So far as the Appellant Kamlesh Puryank is concerned, the statement of the informant is clear as regards role played by him in facilitating Narendra Singh to elope with her, marry her and commit rape on her. P.W. 8 has stood the test of cross -examination well insofar as the role of this Appellant is concerned. As per material on record, the court is satisfied that so far as Appellant Kamlesh Puryank is concerned, his complicity in the commission of offence has been amply established beyond every reasonable doubt. The conviction of the Appellant thus for offences under Sections 366 and 366A, Indian Penal Code is clearly borne out from the record and well merited. However, so far as sentence is concerned, looking to the role ascribed to him by the prosecution, in our opinion, the sentence awarded to him appears to be excessive. We, accordingly, reduce the sentence of imprisonment to a period of two years R.I. on each of the two counts. Both the sentences shall, however, run concurrently. The sentence of fine as imposed by the High Court is, however, maintained. In default of payment of fine, the Appellant shall undergo R.I. for a further period of six months. To this limited extent, the appeal of Appellant Kamlesh Puryank was allowed.

6. Idrish Mohd. Vs Memam and Anr. *(2000)10SCC333*

M.K. Mukherjee and Syed Shah Mohammed Quadri, JJ.

1. Heard the learned counsel for the appellant. 2. Claiming himself to be the husband of Respondent 1 and alleging that she was wrongfully confined by her parents, the appellant filed an application under Article 226 of the Constitution of India in the High Court of Punjab and Haryana seeking directions for her production in court and handing her over to him.

2. The High Court observed that it was not established that she was a major and that she was not willing to go to her parents. Accordingly, the High Court directed that Respondent 1 be kept in Nari Niketan, Karnal till any order is passed by any court of competent jurisdiction regarding her custody.

3. The documents filed by the appellant before us, the genuineness of which has not been disputed by the State by filing any counter-affidavit; we find that she has attained majority by now. She cannot, therefore, be kept detained against her wishes. The impugned order of the High Court also indicates that she is willing to go only with the appellant. We accordingly allow this appeal and direct the Authorities of Nari Niketan, Karnal to release Respondent 1 forthwith.

7. Arvinder Singh Bagga Vs State of U.P. and Others; 1994Supp (1) SCC500

M. N. Venkatachaliah, C.J. and S. Mohan, J

1. By this petition under Article 32 of the Constitution of India, the petitioner sought a writ in the nature of Habeas Corpus to produce Smt. Nidhi Bagga @ Nidhi Khandelwal w/o Charanjit Singh Bagga.

2. Nidhi Khandelwal and Charanjit Singh Bagga got married on 16.7.1993 by performing Hindu rites at Arya Samaj Mandir, Arya Nagar, Bhoor Distt., Bareilly, Uttar Pradesh. That marriage was not acceptable to the family of Nidhi Khandelwal. Therefore, on 17.7.1993, an F.I.R. was lodged with Police Station Prem Nagar, Bareilly. The case was registered as Case No. 635/93 under Sections 363/366/506 I.P.C. After the registration of case, the entire family of the husband was taken into custody including minor girls aged 10 and 15 1/2 years. While the female members were released, the male members continued to be in detention. Smt. Nidhi Bagga continued to be held by the police and illegally detained.

3. Though a writ petition was filed before the High Court of Allahabad under Article 226 of the Constitution of India, on account of the lawyers strike, the Allahabad High Court did not function. This necessitated the cousin of Charanjit Singh Bagga to move this Court under Article 32 of the Constitution of India.

4. On 3.8.1993, the following order was passed by this Court:

We have heard learned Counsel on both sides. At the time the petition was moved, the girl was in police custody. She has since been released. But, we are afraid; this cannot be the end of the matter. The writ petition shall continue as one for qualified Habeas Corpus for examining the legality of the detention for determining whether the petitioner is entitled to be compensated for the illegal detention as a public law remedy for violation of her Fundamental Rights under Article 21 of the Constitution, quite apart from criminal or civil liability which may be pursued in the ordinary course.

5. Having regard to these-allegations and counter-allegations, we think before we arrive at a conclusion, it is highly desirable to call for a report from the District Judge, Bareilly who will make a thorough enquiry of all the persons. Accordingly, we direct that he shall submit a report within eight weeks from the date of the receipt of this order.

8. Arvinder Singh Bagga vs. State of U.P. and Others, *AIR1995SC117*

S. Mohan J.

1. Pursuant to our order dated November 16, 1993, the District Judge of Bareilly has submitted his report. Mr. R.S. Sodhi, learned Counsel for the petitioner and Mr. A.S. Pundir, learned Counsel for the State of Uttar Pradesh perused the reports. Mr. R.S. Sodhi would submit that the erring Police Officers should be prosecuted and compensation should be given to such of those who have been illegally detained and suffered humiliation at the hands of the police

2. The report in no uncertain terms indicts the police. It *inter alia* states:

On a careful consideration of all the evidence on record in the light of the surrounding circumstances I accept the claim of Nidhi that she was tortured by the police officers on 24th, 25th, and 26th July, 1993. On 24.7.93 she was pressurised by J.C. Upadhyaya S.H.O., Sukhpal Singh, S.S.I, and Narendrapal Singh S.I. and threatened and commanded to implicate her husband and his family in a case of abduction and forcible marriage thereafter. She was threatened with physical violence to her husband and to herself in case of her default and when she refused, her family members were brought in to pressurize her into implicating them. On 25th July 1993 she was jolted out of sleep by Sukhpal Singh S.S.I. and made to remain standing for a long time. She was abused and jostled and threatened by J.C. Upadhyay, Sukhpal Singh and Narendrapal Singh with injury to her body if she did not write down the dictated note. Sukhpal Singh SSI even assaulted her on her leg with Danda and poked it in her stomach. Then, on 26.7.1993 she was given filthy abuses and threatened by the same for writing a dictated note. She was pushed and jostled by them both. Sukhpal Singh S.S.I. hit her with a danda on her leg and made threatening gestures aiming his Danda on her head. Ultimately they both succeeded in making her write a note dictated by them whose contents were those which were incorporated by the investigating officer in his case diary as her statement under Section 161 Cr.P.C. Thereafter on 27th July she was purported to be taken by K.C. Tyagi to the Court for the recording of her statement under Section 164 Cr. P.C. but was taken by J.C. Upadhyay, S.H.O. to Chauki Chauraha Police outpost and kept there and brought to the police station and kept there. She was dispatched from there to Nari Niketan only at 5 P.M. When A.C.J.M. II had passed orders for Nidhi being kept at Nari

Niketan Bareilly K.C. Tyagi I.O. was under obligation to take her from court to Nari Niketan straightway without any delay whatsoever but she was brought back to the police station and lodged there and only afterwards she was dispatched from there for Nari Niketan. Then on 29.7.93 while being taken to the court for the recording of her statement under Section164 Cr.P.C. Nidhi was brought from Nari Niketan to the police station and there J.C. Upadhyay S.H.O. commanded her to speak that which he had asked her to speak and if she did not make her statement accordingly and went with Charanjit Singh then she would not be spared by him and he would ensure that she underwent miserable life time. He further told her that if she cultivated enmity with the police its consequences were only too obvious. Torture is not merely physical; there may be mental torture and psychological torture calculated to create fright and submission to the demands or commands. When the threats proceed from a person in Authority and that too by a police officer the mental torture caused by it is even graver.

3. The report clearly holds Narendrapal Singh S.I. of indulging in illegal arrest and detention in arresting Charanjit Singh Bagga and Rajinder Singh Bagga. Further, both of them were tortured as they were given Danda blows at police station on 23rd July, 1993. The report blames J.C. Upadhyay, S.H.O. and K.C. Tyagi, I.O. for the wrongful detention of Nidhi. It concluded:

The detention of a married woman in custody who is not an accused on the pretext of her being a victim of abduction and rape which never was to her knowledge and to the knowledge of the police officers concerned aforesaid is itself a great mental torture for her which cannot be compensated later but here we have found that she was tortured otherwise also by threats of violence to her and to her husband and his family and was given physical violence calculated to instill fear in her mind and compel her to yield and to abandon her marriage with Charanjit Singh Bagga which had been duly performed in Arya Samaj Bhoor and which had been duly registered in the office of Registrar of Hindu Marriages under the U.P. Hindu Marriage Registration Rules, 1973 framed by the Governor in exercise of the powers conferred by Section 8 of the Hindu Marriage Act, 1955. She was made to write a statement as commanded by J.C. Upadhyay S.H.O. and Sukhpal Singh SSI on 26.7.93 which was reproduced by the I.O. in the case diary as her statement under Section 161 Cr. P.C. The physical and mental torture was given to Nidhi on 24th July, 1993 and 25th July, 1993 by J.C. Upadhyay S.H.O., Sukhpal Singh and SSI and Narendrapal Singh S.I. but on 26.7.93 it was done by only J.C. Upadhyay S.H.O. and Sukhpal Singh S.S.I. and there was no participation of K.C. Tyagi I.O. in the torture and harassment dated 24.7.93, 25.7.93 and 26.7.93.

4. On a perusal of all the above, we are really pained to note that such things should happen in a country which is still governed by the rule of law. We cannot but express our strong displeasure and disapproval of the conduct of the concerned police officers. Therefore, we issue the following directions:

1. The State of Uttar Pradesh will take immediate steps to launch prosecution against all the police officers involved in this sordid affair.

2. The state shall pay a compensation of Rs. 10,000 to Nidhi, Rs. 10,000 to Charanjit Singh Bagga and Rs. 5,000 to each of the other persons who were illegally detained and humiliated for

no fault of theirs. Time for making payment will be three months from the date of this judgment. Upon such payment it will be open to the state to recover personally the amount of compensation from the concerned police officers.

6. Writ Petition shall stand disposed of in view of the above terms.

9. S. Varadarajan vs. State of Madras, AIR1965SC942, 1965CriLJ33

J. R. Madholkar, K. Subba Rao and M. Hidayatullah, JJ.

1. Savitri, P.W. 4, was the third daughter of S. Natarajan, P.W. 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. At the relevant time, he was living on 6th Street, Lake Area, Nungumbakkam, along with his wife and two daughters, Rama, P.W. 2 and Savitri, P.W. 4. The former is older than the latter and was studying in the Madras Medical College while the latter was a student of the second year B.Sc. class in Ethiraj College.

2. A few months before September 30, 1960 Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S. Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 A.M. and also her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that the she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11.00 A.M. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his K. Natarajan, P.W. 6, the idea being that she should be kept as far away from the appellant as possible for some time.

3. On the next day, i.e., on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 A.M. and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them then went to the house of P. T. Sami at Mylapore with a view to take that person along with them to the Registrar's office to witness their marriage. After picking up Sami they went to the shop Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and appellant purchased two gundus and Tirumangalyam which were selected by Savitri and then preceded to the Registrar's office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, got registered. Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P. K. Mar, who was a co-accused before the Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore whereby they were found by the

police who were investigating into a complaint of kidnapping made by S. Natarajan, and were then brought to Madras on November 3rd.

4. It was not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. A two-fold contention was, however, raised and that was that in the first place Savitri had abandoned the guardianship of her father and in the second place that appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

5. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary to answer either of them upon the view which the court takes on the other question raised and that is that "taking" of Savitri out of the keeping of her father was not established.

6. It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, the Court was not concerned with enticement but whether the part played by the appellant amounts to "taking", out of the keeping of the lawful guardian, of Savitri. The court had no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she admitted that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishment or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances the court found nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender age who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing form a rural area.

7. The learned Judge also referred to a decision in ***R. V. Kumarasami 2 M.H C.R. 331*** which was a case under s. 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, and it would be a taking from the husband within the meaning of the section.

8. 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.

9. While, therefore, it may perhaps be argued on the basis of the two Madras decisions 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.

10. The last case relied upon by the High Court was ***Ramaswami Udayar v. Raju Udayar (1952) M.W.N.*** which was also a case under s. 498, I.P.C. In that case 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."

11. 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 was later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

12. In this case there was no evidence of any solicitation by the accused at any time and the jury returned a verdict of 'not guilty. Further, there was no suggestion that the girl was incapable of thinking for herself and making up her own mind.

13. After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded

by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept at his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

14. We are satisfied, upon the material on record, that no offence under **s**. 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly we allow the appeal and set aside the conviction and sentence passed upon him.

Denial of Right to Choice to protect Family "Honor"

10. Harijana Hanumantharayappa vs. State of Andhra Padesh, 2003 (1) ALD Cri 94

R Lahoti, B Kumar J.J.

1. The accused - appellant has been held guilty of an offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo life imprisonment by the court of Additional Sessions Judge, Hindupur. An appeal preferred by him before the High Court of Andhra Pradesh has been dismissed upholding the conviction and sentence. The accused -appellant has preferred this appeal by special leave.

2. Shorn of details, briefly stated the prosecution case is that deceased-Harijana Rangamma was the sister of the accused. She had love affair with Harijana Obulesu (PW 2) and they married each other which were not to the liking of the accused and his family members. This led to the holding of a village panchayat on the next day of the marriage. At the village panchayat relatives of both the sides and the aldermen of the village were present and participated. The panchayat resolved in favour of the marriage and allowed the same to be registered. At the end of the panchayat the accused expressed his desire of talking to the deceased and saying so took her away at a distance of about 30-50 feet from the place where the panchayat was being held. There, below a tamarind tree the accused had some talk with the deceased and then he took out a knife and dealt multiple blows, fourteen in number on the body of the deceased. These multiple blows resulted in several incised wounds spread over different parts of the body of the victim. One of the injuries was an incised wound of 2"x1" muscle deep over the back over the spinal cord at the level of T-10 vertically. This injury, as the post-mortem report reveals, caused fracture on 5th rib and laceration of **1**" x **1**/4" over the-left ventricle of the heart and proved fatal. The deceased succumbed to the injuries and soon died.

3. The village people who were holding the village panchayat, on hearing the shouts of the deceased, chased the accused and caught hold of him along with the blood stained knife. The accused was tied to the tamarind tree with the help of a rope. The incident was reported to the police. An offence under Section 302 of the Indian Penal Code was registered and investigation commenced. The body of the deceased was sent for postmortem examination where fourteen injuries including the internal injury,

as already stated hereinabove were found by Dr. B. Rajasekhara Babu, C.I.S. (PW 6). In the opinion of the doctor all the injuries could have been caused by the knife which was seized from the accused. Injury No. 13 was sufficient in the ordinary course of nature to cause death.

4. There is overwhelming ocular evidence coming from PWs 1 to 5 who were all panch persons and were participating in the village panchayat.

5. The accused was armed with a deadly weapon like a knife. He inflicted multiple injuries on the body of the deceased one of which was sufficient in the ordinary course of nature to cause death and has, infact, proved fatalT he intention of the accused could not have been anything else except causing such bodily injury as was likely to cause the death. It cannot be said that the accused committed the crime in a sudden fight in the heat of passion upon a sudden quarrelt within he meaning of exception 4 or due to deprivation of the power of self-control by grave and sudden provocation within the meaning of exception 1 to Section 300 of the Indian Penal Code. Learned sessions judge and the High Court have not erred in holding the act of the accused amounting to murder within the meaning of Section 300 of the Indian Penal Code and hence punishable under Section 302 of the Indian Penal Code.

6. No fault can be found with the findings arrived at by the learned sessions judge and upheld by the High Court. The conviction of the accused under Section 302 of the Indian Penal Code and the sentence of life imprisonment are maintained and the appeal is dismissed

11. Lata Singh vs. State of UP, *AIR2006SC2522*,

Markandey Katju, J.

1. This writ petition under Article 32 of the Constitution of India had been filed with a prayer for issuing a writ of certiorari and /or mandamus for quashing the Sessions Trial No. 1201 of 2001 under sections 366 and 368 of the Indian Penal Code arising out of FIR registered at Police Station Sarojini Nagar, Lucknow and pending in the Fast Track Court V, Lucknow.

2. The facts of the case are as under:

The petitioner, a young woman now aged about 27 years, who is a graduate and at the elevant time was pursuing her Masters course in Hindi in the Lucknow University. Due to the sudden death of her parents she started living with her brother Ajay Pratap Singh at LDA Colony, Kanpur Road, Lucknow, where she did her intermediate in 1997, and graduation in 2000. It was alleged by the petitioner that on 2.11.2000 she left her brother's house of her own free will and got married at Arya Samaj Mandir, Delhi to one Bramha Nand Gupta who has business in Delhi and other places and they have a child out of this wedlock.

3. Thereafter on 4.11.2000, the petitioner's brother lodged a missing person report at Sarojini Nagar Police Station, Lucknow and consequently the police arrested two sisters of the petitioner's husband along with the husband of one of the sisters and the cousin of the petitioner's husband...

4. It is further alleged that the petitioner's brothers Ajay Pratap Singh, Shashi Pratap Singh and Anand Pratap Singh were furious because the petitioner underwent an inter-caste marriage, and hence they went to the petitioner's husband's paternal residence and vehemently beat up her husband's mother and uncle, threw the luggage, furniture, utensils, etc. from the house and locked it with their lock. One brother of the petitioner's husband was allegedly locked in a room by the petitioner's brothers for four or five days without meals and water. The petitioner's brothers also allegedly cut away the harvest crops of the agricultural field of the petitioner's husband and sold it, and they also took forcible possession of the field. They also lodged a false police report alleging kidnapping of the petitioner against her husband and his relatives at Police Station Sarojini Nagar, Lucknow, due to which the sisters of the petitioner's husband, and the husband of one of the sisters, were arrested and detained in Lucknow jail. The petitioner's brothers also illegally took possession of the shop of the petitioner's husband. The petitioner's husband has a shop at Badan Singh Market, Rangpuri in the name of Gupta Helmet Shop whose possession was forcibly taken over by her brothers.

It is further alleged that the petitioner's brothers are threatening to kill the petitioner's husband and his relatives, and kidnap and kill her also. The Gupta family members are afraid of going to Lucknow out of fear of violence by the petitioner's brothers, who are of a criminal bent.

5. It is alleged that the petitioner's husband and relatives have been falsely framed by her brothers Shashi Pratap Singh, Ajay Pratap Singh and Anand Pratap Singh who were furious because of the inter-caste marriage of the petitioner with Bramha Nand Gupta. Mamta Gupta, Rakesh Gupta and Sangita Gupta were arrested on 17.12.2000, whereas Kallu Gupta was arrested on 02.12.2000. It is alleged that the three relatives of the petitioner's husband were not granted bail for a long time and their lives got ruined though there was no case against them that they instigated the petitioner to get married to Bramha Nand Gupta. It is also alleged that the petitioner ran from pillar to post to save her husband and relatives from harassment and she then approached the Rajasthan Women Commission, Jaipur, as she was staying in Jaipur almost in hiding apprehending danger to her and her husband's life. The Commission recorded her statement on 13.3.2001 and the same was forwarded to the Superintendent of Police (City), Lucknow for necessary action. The President of the Rajasthan State Women Commission also wrote a letter to the National Human Rights Commission on 13.3.2001 requesting the Commission and the Chief Secretary, Government of Uttar Pradesh, to intervene in the matter.

6. A final report was submitted by the SHO, Police Station Sarojini Nagar, Lucknow before the learned Judicial Magistrate inter-alia mentioning that no offence was committed by any of the accused persons and consequently the learned Sessions Judge, Lucknow enlarged the accused on bail on furnishing a personal bond on 16.5.2001 by observing that neither was there any offence nor were the accused involved in any offence. The Superintendent of Police, Lucknow informed the National Human Rights Commission that all the accused persons have been released on bail on 17.5.2001.

7. Thereafter the Investigating Officer recorded the statement of the petitioner Lata Gupta @ Lata Singh on 28.5.2001 and for this purpose armed security was provided to her. The learned Chief Judicial Magistrate, Lucknow recorded the statement of the petitioner under Section 164 Cr.P.C. on 29.5.2001. In that statement the petitioner stated that she married Bramha Nand Gupta of her own free will. Despite this statement, the learned Chief Judicial Magistrate, Lucknow passed the committal order on 5.10.2001 ignoring the fact that the Police had already filed a final report in the matter. It appears that a protest petition was filed against the final report of the Police alleging that the petitioner was not mentally fit. However, the petitioner was medically examined by the Board of Doctors of Psychiatric center, Jaipur, who have stated that the petitioner was not suffering from any type of mental illness.

8. The petitioner alleged that she cannot visit Lucknow as she apprehends danger to her life and the lives of her husband and small child. She has further alleged that her brothers have assaulted, humiliated and irreparably harmed the entire family members of her husband Bramha Nand Gupta and their properties, and even the remote relatives were not spared and were threatened to be killed. Their properties including the house and agricultural lands and shops were forcibly taken over by the brothers of the petitioner and the lives of the petitioner and her husband are in constant danger as her brothers have been threatening them.

9. We have considered the above facts and have heard learned Counsel for the petitioner and the learned Counsel for the State Government. This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. Hence, we cannot see what offence was committed by the petitioner, her husband or her husband's relatives.

10. We are of the opinion that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above) the police has instead proceeded against the petitioner's husband and his relatives. Since several such instances are coming to our knowledge of harassment, threats and violence against young men and women who marry outside their caste, we feel it necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matters of great public concern, such as the present one.

11. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and

democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

We sometimes hear of `honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

12. In the circumstances, the writ petition is allowed. The proceedings in Sessions Trial No. 1201/2001 titled State of U.P.v. Sangita Gupta and Ors. arising out of FIR No. 336/2000 registered at Police Station Sarojini Nagar, Lucknow and pending in the Fast Track Court V, Lucknow are quashed. The warrants against the accused are also quashed. The police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioner's husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law, by the authorities concerned.

We further direct that in view of the allegations in the petition (set out above) criminal proceedings shall be instituted forthwith by the concerned authorities against the petitioner's brothers and others involved in accordance with law. Petition allowed.

12. Ashok Kumar Todi vs. Kishwar Jahan and ors. *AIR2011SC1254*

1. These appeals are directed against the common judgment and final order dated 18.05.2010 passed by the Division Bench of the High Court of Calcutta in M.A.T. Nos. 703, 895, 704, 713, 714 and 744 of 2008 whereby the CBI was directed to start investigation afresh in accordance with law treating the complaint dated 21.09.2007 filed by Rukbanur Rahman, brother of Rizwanur Rahman - the deceased, as F.I.R. and to register a case of murder.

2. **Brief facts:**

(a) One Rizwanur Rahman-the deceased, a Computer Graphics Engineer fell in love with a girl, namely, Priyanka Todi, daughter of Ashok Kumar Todi. On 18.08.2007, Rizwanur Rahman married Priyanka Todi under the Special Marriage Act, 1954 in the marriage registration office. On 31.08.2007,P riyanka Todi left her father's house and started living in her husband's home at Tiljala within the jurisdiction of Karaya Police Station, Kolkata. The

couple informed the Police Commissioner, Deputy Commissioner of Police(South), the Superintendent of Police, 24 Parganas (S), the Officer-in-charge, Karaya Police Station and the Officer-in-charge, Bidhan Nagar Police Station about their marriage by a letter dated 31.08.2007 along with a copy of the Marriage Registration Certificate. On the same day, Priyanka Todi informed her father about her marriage with the deceased and also of the fact of her residing with her husband in her in-law's house. On the very same day, in the evening, around 6.30 p.m., Ashok Kumar Todi -Priyanka Todi's father, Anil Saraogi -maternal uncle of Priyanka Todi and Pradip Todi -brother of Ashok Kumar Todi went to the house of the deceased and persuaded him and his family members to send Priyanka Todi back to their house but Priyanka Todi did not agree to their request. On the same night, Ashok Kumar Todi lodged a complaint at Karaya Police Station and consequently two police officers went to the residence of the deceased to create mental pressure on him. On 01.09.2007, early in the morning, Ashok Kumar Todi and Anil Saraogi threatened the deceased that if Priyanka Todi did not return back to her parents' house, they would face the dire consequences. On the same day, Pradip Todi lodged a complaint with Deputy Commissioner of Police (Detective Department) alleging that Priyanka Todi has been taken away by the deceased by deceitful means with intent to marry her. On various dates, the Deputy Commissioner of Police (DD) called Priyanka Todi and her husband at his office and asked Priyanka Todi to go back to her parents' house, but she refused to accept the proposal. On 08.09.2007, Pradip Todi made another application to police that Priyanka Todi has been detained forcibly by the deceased. On the action of the complaint, the sub-Inspector went to the residence of the deceased and summoned the couple to Police Headquarter, Lai Bazar, Kolkata and the custody of Priyanka Todi was handed over to her uncle Anil Saraogi with condition that she will return to her husband's house after one week.

(b) On 21.09.2007, the dead body of Rizwanur Rahman was found on the railway tracks between Dum Dum and Bidhan Nagar Road Stations with injuries and the head smashed. On the same day, Rukbanur Rahman-the brother of the deceased, lodged a written complaint with Karaya Police Station suspecting the hands of Ashok Kumar Todi behind the unnatural death of his brother and the same was registered as UD Case No. 183 of 2007. The body of the deceased was sent for post mortem. The post mortem report revealed that the death was due to 10 injuries on the body and consistent with the injuries caused by train running at moderate speed. On 24.09.2007, the case was taken over by the Criminal Investigation Department (in short "the CID"). The CID carried out investigation and examined various witnesses including Ashok Kumar Todi and his family members, (c) The mother and brother of the deceased filed Writ Petition No. 21563 (W) of 2007 before the Calcutta High Court. The learned single Judge of the High Court, after hearing the parties, by an interim order dated 16.10.2007 directed the CBI to investigate into the cause of death of the deceased and to file a report in a sealed cover before the Court within two months. Pursuant to the above said direction, the CBI registered case bearing No. ' RC.8(S)/2007-SIU-1/CBI/SCR. 1/New Delhi under Section 120B read with Sections 302 and 506 of the Indian Penal Code (in short "the IPC") against Ashok Kumar Todi and others. On 08.01.2008, the CBI filed report before the learned single Judge which indicates that the deceased committed suicide by laying before the train and sought permission to file charge sheet against Ashok Kumar Todi, his brother Pradeep Todi, Anil Sarogi, S.M.

Mohiuddin @ Pappu, Ajoy Kumar, Sukanti Chakraborty and Krishnendu Das under Section 120B read with section 306 and 506 IPC..

(d) After considering the case, the learned single Judge of the High Court, by final order dated 14.08.2008, granted liberty to the CBI to proceed in accordance with law for filing charge sheet before a competent court under Section 173(2) of the Code of Criminal Procedure (hereinafter referred to as "the Code"). Liberty was also reserved to the CBI to conduct further investigation before it actually files the charge sheet. Pursuant to that order, CBI continued with the investigation and filed a charge sheet being No. 07/08 dated 20.09.2008 under Section 120B read with Sections 306 and 506 IPC in the court of Chief Metropolitan Magistrate, Bank Shell Court, Kolkata. In the said charge sheet, Ashok Kumar Todi, Pradeep Todi, Anil Saraogi, Sukanti Chakraborti and Krishnendu Das, S.M. Mohiuddin @ Pappu, Ajoy Kumar were arrayed as accused. Subsequent to the filing of the charge sheet, all the accused persons surrendered before the Court of Metropolitan Magistrate and were taken into custody, and subsequently, all the accused persons were released on bail on different dates,

(e) Aggrieved by the judgment and order dated 14.08.2008 passed by the learned single Judge, Ashok Kumar Todi and others filed their respective appeals before the Division Bench of the High Court of Calcutta. The Division Bench of the High Court heard all the appeals together and by impugned judgment and order dated 18.05.2010 set aside the judgment and order dated 14.08.2008 passed by the learned single Judge and directed the CBI to start investigation afresh in accordance with law by treating the complaint dated 21.09.2007 filed by the brother of the deceased as F.I.R. and to register a case of murder and further directed to complete the investigation preferably within a period of four months from the date of the order. Aggrieved by the impugned judgment and order dated 18.05.2010, Ashok Kumar Todi filed S.L.P.(CrL) No. 5005 of 2010, the mother and brother of the deceased filed S.L.P.(C) Nos. 29951-29956 of 2010 and the C.B.I, filed S.L.P.(CrL) Nos. 7008-7013 of 2010 before this Court. Hence these appeals by special leave.

3. Mrs. Kiswar Jahan and Rukbanur Rahman-mother and borther of the deceased filed Writ Petition No. 21563 of 2007 before the High Court at Calcutta praying for directions against the State of West Bengal and their officers that the investigation in connection with the unnatural death of Rizwanur Rahman being UD Case No. 183 of 2007 be handed over to CBI and that the CBI should submit a report on such investigation before the High Court and upon such investigation appropriate orders be passed. Apart from the above relief, they also prayed for certain directions for taking action against the officers of the State Police Department. Before considering the final order in the said writ petition, it is useful to refer to the interim direction of the learned single Judge dated 16.10.2007. By pointing out mandates of Sections154(3) and 156(1) of the Code and the Police Regulations of Calcutta, it was submitted before the learned single Judge that the authorities, particularly, the Deputy Commissioner of Police, Detective Department was interested in protraction of the case and not in its investigation. It was also highlighted that several other officers had unauthorisedly intervened in the matter. It was the grievance of the writ Petitioners that in spite of the fact that Rizwanur Rahman and Priyanka Todi married voluntarily and by their free will on 18.08.2007, under the Special Marriage Act, 1954, in the Marriage Registration Office, because of the influence of Ashok Kumar Todi-father of Priyanka Todi, higher authorities in the police department without following the judgment of this Court which directs the administration/authorities to see that spouses of inter-religious marriages are not harassed or

subjected to threats, instead of allowing investigation to take its course in accordance with the provisions of law, the Commissioner of Police had made comments, widely reported, that the reaction of the parents to the marriage was natural and death was due to suicide. It was also projected before the learned single Judge that the police authorities were beneficiaries of undue favours at the instance of Ashok Kumar Todi. It was asserted that no fair investigation by the CID is possible in a manner where the allegation is against the highest brass of the Calcutta Police. In those circumstances and by placing reliance on various materials/instances about the interference by the police authorities on various occasions in the marital life of Rizwanur Rahman and Priyanka Todi, the writ Petitioners prayed for a fair investigation by the CBI under the directions of the High Court.

4. The learned single Judge of the High Court passed an interim order directing the CBI to investigate into the cause of unnatural death of Rizwanur Rahman and to file a report in a sealed cover within a period of two months from the date of service of the copy of the said order.

5. Pursuant to the interim direction dated 16.10.2007; an FIR was registered on 19.10.2007. In the said FIR, apart from the required details, various directions given in the order of the High Court dated 16.10.2007 were incorporated. The Superintendent of Police, CBI after finding that the facts stated in the complaint coupled with the directions of the High Court vide its order dated 16.10.2007, prima facie disclosed commission of offence punishable under Section 120B IPC read with Sections 302 and 506 IPC and substantive offences thereof against Ashok Kumar Todi and others, registered a regular case and started investigation.

6. Pursuant to the interim direction of the High Court, the CBI filed its report and prayed for leave of the Court to file charge-sheet before the competent Court having jurisdictionb ased on the said report as well as the leave sought for in the writ petition.

7. After analysis and having full-fledged hearing, the learned single Judge arrived at the following conclusion:

> (i) When an individual perceives a threat to his life and limb and seeks enforcement of his right to life, interference of the writ court may be more intrusive but to lay down as a matter of rule that a writ petition must be entertained whenever right guaranteed by Article 21 is sought to be enforced despite availability of an alternative remedy would itself result in impinging on exercise of judicial description by the writ court.
> (ii) A man is born free and has the right to stay free unless he indulges in unlawful activities which, if proved, may result in penal consequences depriving him of such right. The Constitution guaranteed this right to Rizwanur Rahman. By marrying Priyanka Todi, he did not commit any crime. Evidence on record is considered sufficient to demolish the allegation leveled against him by Pradeep Todi. He had, therefore, the absolute right to live a life which is decent, complete, fulfilling and worth living. The objection that hotly disputed facts are involved which necessarily cannot be adjudicated by the Writ Court is equally unmeritorious.
>
> (iii) The third Respondent therein - Commissioner of Police, Kolkata, acted irresponsibly and instead of diffusing tension, he added fuel to fire.

(iv) By summoning Rizwanur Rahman without registering any cognizable case against him on the basis of the complaints of Pradeep Todi and/or by invading Rizwanur's previous right to life despite being well and truly aware that Priyanka Todi had married him on her own without pressure exerted from any quarter, Respondents 5, 7, 8 and 9 therein jointly and severally are guilty of exceeding police powers conferred on them and thereby have acted ultra vires the Constitution.

(v) While passing the interim order on 16.10.2007, the learned single Judge duly considered the materials presented and on finding that the investigation by the State CID was not proper, therefore, the CBI was directed to investigate the cause of death of Rizwanur Rahman.

(vi) In the facts and circumstances which fall for consideration on 16.10.2007, the Court is of the considered view that entrusting the CBI with investigation of cause of unnatural death of Rizwanur Rahman cannot be said to be improper or unwarranted and the Court was justified in directing CBI investigation. The CBI was justified in recording an FIR before it proceeded to conduct investigation.

(vii) So long as the investigation is not closed by way of filing of a Final report under Section 173(2) of the Code, persons who might be shown as accused in the FIR have no right to claim copy of the report containing materials which have been collected against them and, particularly, in view of the fact that report filed before the High Court is not a final report but is one in aid of the final report.
(viii) On the basis of the materials collected, it was beyond the jurisdiction of the CBI to make a recommendation for initiation of major penalty proceedings against some of the police officers without obtaining leave from the Court,
(ix) There is no reason as to why CBI should not be allowed to proceed further,
(x) Interest of justice would be best served if liberty is reserved unto the State to proceed in accordance with law. Accordingly, it is observed that the State may initiate such action as it deems fit and proper against any of or all the Respondents in accordance with law.

8. The above said order of the learned single Judge was taken up by way of appeal before the Division Bench by Ashok Kumar Todi, Pradip Todi, Anil Saraogi, Kishwar Jahan and others and State of West Bengal.

9. The Division Bench, after finding that a direction for investigation by the CBI should not be granted on mere asking for, in the absence of any prohibitory or injunction order, preventing the State CID from further investigation commented on the conduct of the State police in not perusing the investigation, concluded that:

(i) Interim order dated 16.10.2007 of the learned single Judge did not authorize the CBI to investigate in terms of Chapter XII of the Code in place of the State CID.

(ii) The order of the learned single Judge directing investigation and, consequently, the report submitted by the CBI and permitting the CBI to submit such report in the form of charge-sheet in the Court are quashed.

(iii) The investigation conducted by the CBI cannot be treated to be an investigation within the meaning of the Code. Recommendation of the CBI to take disciplinary measures against the Police Officers by virtue of the interim order of the learned single Judge are quashed, (iv) For violation of Article 21, a writ Court cannot conclusively decide, whether violation amounts to penal laws, ignoring the provisions of the Code for trial of such offences. The Court can give special protection to the accused in such trial and the procedure of such trial is different from the one provided for the disposal of a writ application. In view of the same, the aggrieved person is not entitled to file an application under Article 226 of the Constitution asking the High Court to decide the issue.

10. After observing and arriving at such conclusion, ultimately, the Division Bench, by the impugned order, set aside the order of the learned single Judge and on the basis of its own finding recorded that it is a fit case for investigation by the CBI, directed the CBI to start investigation afresh in accordance with law treating the complaint dated 21.09.2007 filed by writ Petitioner No. 2 (Rukbanur Rahman) as an FIR and to register a case of murder.

11. On analysis of the orders of the learned single Judge and the Division Bench as well as the issues raised and various contentions by the counsel for either side, following points arose for determination in these appeals:

i) Whether the order of the learned single Judge appointing CBI to enquire into the unnatural Death of Rizwanur Rahman and further direction giving liberty to the CBI to proceed in accordance with law for filing charge sheet before the competent court under Section 173(2) of the Code and to take further investigation before it actually files the charge-sheet on any point it may consider necessary in the interest of justice is acceptable and sustainable? Or;

ii) Whether the decision of the Division Bench, setting aside the order of the learned single Judge, directing the CBI to start investigation afresh by treating the complaint of the writ Petitioner No. 2 therein-Rukbanur Rahman dated 21.09.2007 as FIR and to register a case of murder is sustainable?

12. Since the mother and brother of the deceased-Rizwanur Rahman had a doubt about his unnatural death and they were not satisfied with the investigation by the State CID as well as due to mounting pressure by higher officials of the State Police Department, they prayed for an appropriate direction at the hands of the High Court for investigation by the CBI. In ***State of West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors.*** MANU/SC/0121/2010 : (2010) 3 SCC 571, the issue which was referred for the opinion of the Constitution Bench was whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the CBI established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act") to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government. The Constitution Bench, after adverting to the required factual details, rival contentions and the relevant constitutional provisions has concluded:

In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a

cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

After saying so, the Constitution Bench has clarified that this extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.

13. In view of the above judgment, it is unnecessary to delve into the issue further about appointment of special agency like CBI for investigation under the orders of the High Court. ..

14. On the legality of the order of the learned single Judge in directing CBI to investigate and submit a report instead of the State CID, we are of the view that the learned single Judge assigned acceptable reason.It was highlighted by learned senior counsel for the mother and brother of the deceased that in spite of Sections 154(3) and 156(1) of the Code and the Police Regulations of Calcutta, the authorities, particularly, the Deputy Commissioner of Police, Detective Department was interested in protraction of the case and was not taking any interest in its investigation. The Deputy Commissioner of Police, Detective Department, and Addl. Dy. Commissioner, Headquarters had unauthorisedly intervened in the matter. Since there was no allegation of abduction against the deceased, the said officers made several attempts to mediate between the deceased and his in-laws. Relevant materials were shown that the officer-in-charge of the Karaya Police Station had visited the residence of the deceased, the intervention by Deputy Commissioner of Police, Detective Department, in the conjugal life of the deceased was uncalled for. It was also highlighted that without taking into account the earlier decisions of this Court directing the administration/authorities to see that spouses of inter-religious marriages are not harassed or subjected to threats, the Commissioner of Police had made comments, widely reported, that the reaction of the parents to the marriage was natural and death was due to suicide. The learned senior counsel has also highlighted unholy nexus between the top brass of the Police with father-in-law of the deceased. By placing such acceptable materials, the writ Petitioners expressed doubt about fair investigation under the CID and demonstrated that investigation by the CBI under the orders of the court is necessary, since justice should not only be done but seen to be done. Inasmuch as the grievance of the mother and brother of the deceased are acceptable, the learned single Judge, by interim order dated 16.10.2007, directed the CBI to investigate into the cause of unnatural death of Rizwanur Rahman and file a report before it.

Interference by the police in conjugal life

15. In the earlier paragraphs, we have already adverted to certain factual details about the marriage of Rizwanur Rahman with Priyanka Todi. They themselves highlighted how they married and informed the same to the authorities concerned. The materials placed show that Rizwanur Rahman fell in love with Priyanka Todi, the daughter of Ashok Kumar Todi, and married her on 18.08.20 07 under the Special Marriage Act, 1954. They also registered their marriage before the notified authority and obtained the certificate for the same. Pursuant to the same, Priyanka Todi left her father's house on

31.08.2007 and went to live in her husband's house at Tijala Lane within the jurisdiction of Karaya Police Station, Kolkata. She informed her father about their marriage and also informed the Police Commissioner as well as Dy. Commissioner of Police (South), Superintendent of Police, 24 Parganas (S), the Officer-in-charge, Karaya Police Station and the Officer-in-charge, Bidhan Nagar Police Station. On a complaint made by Pradip Todi, Priyanka Todi and Rizwanur Rahman were summoned to Police HQ., Lalbazar, Kolkata on 08.09.2007 and the custody of Priyanka Todi was handed over to Anil Saraogi - her maternal uncle with condition that she will return to her husband after one week. Thereafter, the dead body of Rizwanur Rahman was found on 21.09.2007 on the railway tracks between Dum Dum and Bidhan Nagar Road Stations with injuries and his head smashed. We have also noted the details furnished by the mother and brother of the deceased about the interference by the various police officers in their marital efforts. In this regard, it is useful to refer to the law laid down by this Court in practice and procedure in a matter involving freedom of conscience and expression in terms of right to marry person of one's choice outside one's caste. The following observation and direction was given in ***Lata Singh v s. State of U.P. and Anr.*** MANU/SC/2960/2006 : (2006) 5 SCC 475 is relevant:

> Even as early as in 1990, this Court has held that everyone associated with enforcement of law is expected to follow the directions and failure shall be seriously viewed and drastically dealt with. We also reiterate that the directions of this Court are not intended to be brushed aside and overlooked or ignored. Meticulous compliance is the only way to respond to directions of this Court. In the light of the direction in Lata Singh's case (supra), it is the duty of all persons in the administration/police authorities throughout the country that if any boy or girl who is major undergoes inter-caste or inter-religious marriage, their marital life should not be disturbed or harassed and if anyone gives such threat or commits acts of violence or instigates, it is the responsibility of the officers concerned to take stern action against such persons as provided by law.

16. In the light of the directions of this Court, it is unfortunate and of the fact that both Rizwanur Rahman and Priyanka Todi married on their own will, who were majors, and the marriage was duly registered under the notified authority, the police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life and, in fact, they are duty bound to prevent others who interfere in their married life.

17. As rightly observed by the learned Single Judge, the officers of the Police Department were not justified in interfering with the married life of Rizwanur Rahman and Priyanka Todi. The learned single Judge, by giving adequate reasons, directed the investigation by the CBI which we concur.

The reasonings of the Division Bench

18. The Division Bench, after analyzing the case has correctly determined the following question for consideration:

> The question involved in the writ application was whether it had been established from the materials on record that there was genuine apprehension in the mind of the writ Petitioners that there might not be fair investigation at the instance of the CID in respect of the unnatural death of Rizwanur Rahman because of the alleged involvement of the high police officials of the Kolkata

Police in the post marital dispute between Todis and the deceased on the one hand and with his wife on the other, justifying investigation by the CBI.

19. While answering those issues, the Division Bench of the High Court committed several infirmities. In the interim order, the learned single Judge decided the question whether investigation by the CID was just, fair and proper or whether such investigation should be conducted by the CBI. Merely because no injunction was passed against the CID from continuing with the investigation in the matter or no order was passed directing the CID to handover all the papers relating to investigation conducted by them to the CBI, does not mean that CID was free to continue with their investigation. On the other hand, the order dated 16.10.2007 makes it clear that the learned single Judge was prima facie satisfied that the case in question necessitated investigation by the CBI.

20. The Division Bench of the High Court also committed an error in holding the order appointing CBI to investigate for the purpose of submitting report to the learned single Judge and not to investigate for the alleged offence in accordance with law in place of State CID and hence conclusion of such investigation by the CBI cannot form the basis of charge-sheet in the criminal trial

21. Section 2(h) of the Code defines investigation which reads as under:

Section 2(h): "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf

Under the scheme of the Code, investigation commences with lodgment of information relating to the commission of an offence. If it is a cognizable offence, the officer-in-charge of the police station, to whom the information is supplied orally, has a statutory duty to reduce it to writing and get the signature of the informant. He shall enter the substance of the information, whether given in writing or reduced to writing as aforesaid, in a book prescribed by the State in that behalf. The officer-in-charge has no escape from doing so if the offence mentioned therein is a cognizable offence and whether or not such offence was committed within the limits of that police station. But when the offence is non-cognizable, the officer-in-charge of the police station has no obligation to record it if the offence was not committed within the limits of his police station. Investigation thereafter would commence and the investigating officer has to go step by step. The Code contemplates the following steps to be carried out during such investigation:

(1) Proceeding to the spot;

(2) Ascertainment of the facts and circumstances of the case;

(3) Discovery and arrest of the suspected offender;

(4) Collection of evidence relating to the commission of the offence which may consist of,

(a) The examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit,

(b) The search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and

(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and, if so, to take necessary steps for the same by the filing of a charge-sheet under Section 173.

22. When the final report is laid after conclusion of the investigation, the Court has the power to consider the same and issue notice to the complainant to be heard in case the conclusions in the final report are not in concurrence with the allegations made by them. Though the investigation was conducted by the CBI, the provisions under Chapter XII of the Code would apply to such investigation.

23. In view of the same, the Division Bench failed to appreciate the order dated 16.10.2007 passed by the learned single Judge directing the CBI to investigate into cause of unnatural death of Rizwanur Rehman. We have already noted that as per Section 2(h) of the Code investigation includes all the proceedings under this Code for collection of evidence conducted by a police officer. The direction to conduct investigation requires registration of an FIR preceding investigation and, therefore had to be treated as casting an obligation on the CBI to first register an FIR and thereafter proceed to find out the cause of death, whether suicidal or homicidal. In order to find out whether the death of Rizwanur Rahman was suicidal or homicidal, investigation could have been done only after registration of an FIR. Therefore, CBI was justified in recording FIR on 19.10.2007 in terms of the order dated 16.10.2007 passed by the learned Single Judge.

24. The inquiry/investigation under Section 174 read with Section 175 of the Code may continue till the outcome of the cause of the death. Depending upon the cause of death, police has to either close the matter or register an FIR. In the case on hand, as per the post mortem report dated 22.09.2007, the cause of death of Rizwanur Rahman was due to the effect of ten injuries on the body and which were anti mortem in nature. In such circumstances, the proceedings under Section 174 of the Code were not permissible beyond 22.09.2007 and registration of an FIR was natural outcome to ascertain whether the death was homicidal or suicidal. Accordingly, in terms of order dated 16.10.2007, CBI registered an FIR on 19.10.2007 under Section 120B read with Sections 302 and 506 IPC. The contrary observations made about the orders of the learned single Judge cannot be sustained. ….the Division Bench has erred in directing the CBI to start investigation afresh in accordance with law by treating the complaint of Rukbanur Rahman-brother of the deceased dated 21.09.2007 as FIR and to register a case of murder. As rightly pointed out by the learned Solicitor General, all this had already been done by CBI three years back. There is no need to register another FIR when in respect of the same offence an FIR had already been registered. Once an FIR had been registered lawfully and investigation had been conducted leading to filing of charge sheet before the competent court of law for the trial of accused persons, absolutely, there was no justifiable reason for the Division Bench to direct re-registration of the same by lodging another FIR after three years and proceed with the investigation which had already been concluded by the CBI.

25. The Division Bench of the High Court has failed to note that the fresh investigation into the same allegation would be a futile exercise and no purpose would be served by investigating the case afresh, more particularly, when there is no adverse comment on the investigation carried out by the CBI.

26. Coming to the directions passed by the High Court about the conduct of the officers and taking action against them on the departmental side, we clarify that the concerned department is free to take appropriate action in accordance with the statute/rules/various orders applicable to them, after affording reasonable opportunity of hearing. It should not be taken as; neither the High Court nor this Court concluded the issue about the allegations made against them. However, we agree with the observation of the learned single Judge in respect of the conduct of the officers in interfering with the conjugal affairs of the couple even without any formal complaint against any one of them.

27. In the light of the above discussion, we conclude:

i) The learned single Judge of the High Court is fully justified in passing interim order on 16.10.2007 appointing the CBI to investigate into the unnatural death of Rizwanur Rahman and submit a report;

ii) The learned single Judge's final order dated 14.08.2008 accepting the report and granting opportunity to the CBI to proceed in accordance with law for filing charge sheet before the Competent Court under Section 173(2) of the Code is accepted.

iii) All the reasonings recorded by the Division Bench of the High Court in the order dated 18.05.2010 are unacceptable and hereby set aside;

iv) Pursuant to the orders of the learned single Judge, after investigation, CBI has filed charge sheet on 20.09.2008 under Section 120B read with Sections 306 and 506 IPC. In view of the same and as per the statement of Mr. Lalit, Ashok Kumar Todi was in custody for 45 days and on the orders of this Court, he was ordered to be released and also of the fact that all other accused were enlarged, no further custody is required. However, we make it clear that CBI is free to move an application before the court concerned for appropriate direction, if their presence is required;

v) Any action against the officers of the State Police Department, as suggested by the learned single Judge, shall be in accordance with law and service conditions applicable to them and after affording opportunity to them.

28. All the appeals are disposed of on the above terms

13. Arumugam Servai vs. State of Tamil Nadu, *2011 STPL (Web) 403 SC*

Markandey Katju & Gyan Sudha Misra, JJ.

1. These appeals have been filed against the common judgment and order of the Madras High Court dated 25.1.2008 in upholding the judgment of the Leaned 4th Additional District and Sessions Judge, Madurai.

2. The allegation against the appellants was that on 1.7.1999, there was an altercation between the appellants and the complainants PW1 Panneerselvam and PW2 Mahamani in a Temple Festival regarding the method of tying bullocks in the Jallikattu. The appellant Arumugam Servai then insulted PW1 by saying "you are a pallapayal and eating deadly cow beef". Then accused 1, 7, and 9 attacked PW1 with sticks causing him injuries on his left shoulder. When PW2 Mahamani intervened he was attacked by the accused with sticks, and he sustained a fracture on his head, on which there was a lacerated wound.

3. Apart from the two injured eye-witnesses, there are 3 othere ye-witnesses to the occurrence. The doctor has testified to the injuries. The head fracture on Mahamani indicates the deadly intent of the accused.

4. Both the Courts below have believed the prosecution case, and we see no reason to differ. We have carefully perused the testimony of the witnesses, and we see no reason to disbelieve them.

5. The accused belong to the `servai' caste which is a backward caste, whereas the complainants belong to the `pallan' caste which is a Scheduled Caste in Tamil Nadu.

6. The word `pallan' no doubt denotes a specific caste, but it is also a word used in a derogatory sense to insult someone (just as in North India the word `chamar' denotes a specific caste, but it is also used in a derogatory sense to insult someone). Even calling a person a `pallan', if used with intent to insult a member of the Scheduled Caste, is, in our opinion, an offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989 (hereinafter referred to as the `SC/ST Act'). To call a person as a `pallapayal' in Tamilnadu is even more insulting, and hence is even more an offence.

7. Similarly, in Tamilnadu there is a caste called `parayan' but the word `parayan' is also used in a derogatory sense. The word `paraparayan' is even more derogatory.

8. In our opinion usage of the words `pallan', `pallapayal' `parayan' or `paraparayan' with intent to insult is highly objectionable and is also an offence under the SC/ST Act. It is just unacceptable in the modern age, just as the words `Nigger' or `Negro' are unacceptable for African-Americans today (even if they were acceptable 50 years ago).

9. In the present case, it is obvious that the word `pallapayal' was used by accused No. 1 to insult Paneerselvam. Hence, it was clearly an offence under the SC/ST Act.

10. In ***Swaran Singh and Ors. v. State thr. Standing Counsel and Anr.*** (2008) 12 SCR 132, this Court observed (vide paras 21 to 24) as under:

> It may be mentioned that when we interpret section 3(1) (x) of the Act we have to see the purpose for which the Act was enacted. It was obviously made to prevent indignities, humiliation, and harassment to the members of SC/ST community, as is evident from the Statement of Objects & Reasons of the Act. Hence, while interpreting section 3(1) (x) of the Act, we have to take into account the popular meaning of the word `Chamar' which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation.

11. In ***Lata Singh vs. State of U .P. and Anr.*** (2006) 5 SCC 475, this Court observed (vide paras 14 to 18) as under:

> "This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. Hence, the court cannot see whato ffence was committed by the petitioner, her husband, or her husband's relatives.

12. We are of the opinion no offence was committed by any of the accused (the couple who had an inter caste marriage) and the whole criminal case in question is an abuse of the process of the Court as well as of the administrative machinery at the instance of the petitioner's brothers who were only furious because the petitioner married outside her caste. We are distressed to note that instead of taking action against the petitioner's brothers for their unlawful and high-handed acts (details of which have been set out above) the police has instead proceeded against the petitioner's husband and his relatives.

13. Since several such instances are coming to our knowledge of harassment, threats, and violence against young men and women who marry outside their caste, the court feels it's necessary to make some general comments on the matter. The nation is passing through a crucial transitional period in our history, and this Court cannot remain silent in matters of great public concern, such as the present one.

14. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation. Hence, inter- caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter- caste marriage, are threatened with violence, or violence is actually committed on them. In the courts opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or

commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

15. We sometimes hear of `honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism".

16. We have in recent years heard of `Khap Panchayats' (known as katta panchayats in Tamil Nadu) which often decree or encourage “honor” killings or other atrocities in an institutionalized way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. The court opines that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh's case (supra), there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respecto f personal lives of people committed by brutal, feudal minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.

17. Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection.

18. The appellants in the present case have behaved like uncivilized savages, and hence deserve no mercy. With these observations the appeals are dismissed.

19. Copy of this judgment shall be sent to all Chief Secretaries, Home Secretaries and Director Generals of Police in all States and Union Territories of India with the direction that it should be circulated to all officers up to the level of District Magistrates and S.S.P./S.P. for strict compliance. Copy will also be sent to the Registrar Generals/Registrars of all High Courts who will circulate it to all Hon'ble Judges of the Court.

14. Bhagwan Dass vs. State (NCT) of Delhi**,** 2011(5) SCALE498

M. Katju, G S Mishra, J.J

1. The prosecution case is that the appellant was very annoyed with his daughter, who had left her husband Raju and was living in an incestuous relationship with her uncle, Sriniwas. This infuriated the appellant as he thought this conduct of his daughter Seema had dishonoured his family, and hence he strangulated her with an electric wire. The trial court convicted the appellant and this judgment was upheld by the High Court.Hence, this appeal.

2. This is a case of circumstantial evidence, but it is settled law that a person can be convicted on circumstantial evidence provided the links in the chain of circumstances connects the accused with the crime beyond reasonable doubt vide Vijay Kumar Arora v. State (NCT of Delhi) MANU/SC/0041/2010 : (2010) **2** SCC 353 (para 16.5), Aftab Ahmad Ansari v. State of Uttaranchal MANU/SC/0036/2010 : (2010) **2** SCC 583 (vide paragraphs 13 and 14), etc. In this case, we are satisfied that the prosecution has been able to prove its case beyond reasonable doubt by establishing all the links in the chain of circumstances.

3. In cases of circumstantial evidence motive is very important, unlike cases of direct evidence where it is not so important vide Wakkar and Anr. v. State of Uttar Pradesh MANU/SC/0093/2011 : (2011) 3 SCC 306 (para 14). In the present case, the prosecution case was that the motive of the Appellant in murdering his daughter was that she was living in adultery with one Sriniwas, who was the son of the maternal aunt of the Appellant. The Appellant felt humiliated by this, and to avenge the family honour he murdered his own daughter.

4. We have carefully gone through the judgment of the trial court as well as the High Court and we are of the opinion that the said judgments are correct.

5. The circumstances which connect the accused to the crime are:

i) The motive of the crime which has already been mentioned above. In our country unfortunately 'honor killing' has become common place… Many people feel that they are dishonoured by the behaviour of the young man/woman, who is related to them or belonging to their caste because he/she is marrying against their wish or having an affair with someone, and hence they take the law into their own hands and kill or physically assault such person or commit some other atrocities on them. It has been held in ***Lata Singh vs. State of U.P. & Anr.*** (2006) 5 SCC 475, that this is wholly illegal. If someone is not happy with the behaviour of his daughter or other person, who is his relation or of his caste, the maximum he can do is to cut off social relations with her/him, but he cannot take the law into his own hands by committing violence or giving threats of violence.

ii) As per the post mortem report which was conducted at 11.45 am on 16.5.2006 likely. The t ime of death of Seema was approximately 32 hours prior to the post mortem. Giving a margin of two hours, plus or minus, it would be safe to conclude that Seema died sometime between 2.00 am to

6.00 am on 15.5.2006. However, the appellant, in whose house Seema was staying, did not inform the police or anybody else for a long time. It was only some unknown person who telephonically informed the police at 2.00 pm on 15.5.2006 that the appellant had murdered his own daughter. This omission by the appellant im ot informing the police about the death of his daughter for about 10 hours was a totally unnatural conduct on his part.

iii) The appellant had admitted that the deceased Seema had stayed in his house on the night of 14.5.2006/15.5.2006. The appellant's mother was too old to commit the crime, and there is not even a suggestion by the defence that his brother may have committed it. Hence we can safely rule out the possibility that someone else, other than the appellant, committed the crime.

Seema had left her husband sometime back and was said to be living in an adulterous and incestuous relationship with her uncle (her father's cousin), and this obviously made the appellant very hostile to her.

On receiving the telephonic information at about 2.00 pm from some unknown person, the police reached the house of the accused and found the dead body of Seema on the floor in the back side room of the house. The accused and his family members and some neighbours were there at that time. The accused admitted that although Seema had been married about three years ago, she had left her husband and was living in her father's house for about one month. Thus there was both motive and opportunity for the appellant to commit the murder.

iv) It has come in evidence that the accused appellant with his family members were making preparation for her last rites when the police arrived. Had the police not arrived they would probably have gone ahead and cremated Seema even without a post mortem so as to destroy the evidence of strangulation.

v) The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162(1) Cr.PC, but as mentioned in the proviso to Section 162(1) Cr.PC it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination; she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such statement.

In our opinion the statement of the accused to his mother Smt. Dhillo Devi is an extra judicial confession.

In the present case the bench was of the opinion that Smt. Dhillo Devi denied her earlier statement from the police because she wanted to save her son. Hence the court accepts her statement to the police and rejects her statement in court. The defence has not shown that the police had any enmity with the accused, or had some other reason to falsely implicate him. We

are of the opinion that this was a clear case of murder and the entire circumstances point to the guilt of the accused.

vi) The cause of death was opined by Dr. Pravindra Singh-PW1 in his post mortem report as death "due to asphyxia as a result of ante-mortem strangulation by ligature." It is evident that this is a case of murder, and not suicide. The body was not found hanging but lying on the ground.

In our opinion both the trial court and High Court have given very cogent reasons for convicting the Appellant, and we see no reason to disagree with their verdicts. There is overwhelming circumstantial evidence to show that the accused committed the crime as he felt that he was dishonored by his daughter.For the reason given above we find no force in this appeal and it is dismissed.

Before parting with this case we would like to state that `honour' killings have become commonplace in many parts of the country, particularly in Haryana, western U.P., and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. It has been held in Lata Singh's case that there is nothing `honourable' in `honour' killings, and they are nothing but barbaric and brutal murders by bigoted, persons with feudal minds.

In our opinion, 'honour' killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on the nation. This is necessary as a deterrent for such outrageous, uncivilized behavior. All persons who are planningt o perpetrate `honour' killings should know that the gallows await them.

Let a copy of this judgment be sent to the Registrar Generals/Registrars of all the High Courts who shall circulate the same to all Judges of the Courts. The Registrar General/Registrars of the High Courts shall also circulate copies of the same to all the Sessions Judges/Additional Sessions Judges in the State/Union Territories. Copies of the judgment shall also be sent to all the Chief Secretaries/Home Secretaries/Director Generals of Police of all States/Union Territories in the country. The Home Secretaries and Director Generals of Police shall circulate the same to all S.S.Ps/S.Ps in the States/Union Territories for information

15. Mayakaur Baldevsingh Sardar and Anr. vs. State of Maharashtra, [2007]10SCR752

S.B. Sinha and Harjit Singh Bedi, JJ.

1. Rajvinder Kaur (PW1) was the youngest daughter of Maya Kaur and Baldev Singh Sardar. In addition to Rajvinder Kaur the couple had another daughter Sulakshana, and two sons Ranprit Singh and Amrit Singh and the entire family was residing in a small township near Panvel City on the outskirts of Mumbai. While studying in school, Rajvinder Kaur fell in love with Ravinder Singh and

the relationship culminated in a secret marriage between the two, as Rajvinder's family did not approve of the relationship on the premise that Ravinder Singh belonged to an inferior caste and was also financially weak. It appears that after Sulakshana's marriage, Baldev Singh and Maya Kaur decided that it was appropriate that Rajvinder Kaur too should be married off. A suitable boy was accordingly selected by them for her but before a final decision could be taken Rajvinder Kaur told the proposed bridegroom of her love affair with Ravinder Singh. He nevertheless still agreed to the marriage. Faced with this difficult situation, Rajvinder Kaur informed her parents that she was already married with Ravinder Singh. This information caused consternation in her family and faced with hostility she left home and shifted in with her husband and his family. She was, however, repeatedly threatened by her relatives including her parents that she would have to suffer the consequences of her misconduct. Maya Kaur and Nirmal Kaur, Rajvinder's maternal aunt, also demanded the return of the ornaments that she had been wearing when she had left her parents home, but she told them that they could collect these articles from the police station (in the presence of the police) as she had already lodged a complaint. On 30th May 1999 at about 8.30 p.m. Rajvinder Kaur was informed that her mother and maternal aunt had come to visit her. She accordingly invited them upstairs to the first floor and on their demand handed over the ornaments to her mother. Maya Kaur and Nirmal Kaur also told Rajvinder Kaur that her maternal uncle (Mama) Bhagwan Singh (accused No. **3**) had also come to visit her and was waiting downstairs. Lakhmindar Kaur, Rajvinder's mother-in-law told Maya Kaur to call her brother upstairs. In the meantime, it appears Ravinder Singh went out on to the balcony to get his shirt and saw some persons armed with weapons in their hands hanging around suspiciously and apprehending mischief, he asked his brother Harvindar Singh to immediately call some of his friends. Harvindar Singh rushed downstairs in an attempt to do so but soon returned with a patch of blood on his shirt on the abdomen and fell in the prayer room. Rajvinder Kaur then saw accused No. 4 Jagpalsingh, husband of Nirmal Kaur, accused No. 5 Kawaljit Singh, cousin of Maya Kaur and Nirmal Kaur accused No. 6 Bakhtavar Singh, maternal uncle of Maya Kaur, accused No. 7 Kuldip Singh, a close relative of Maya Kaur, Baldev Singh and Bhagwan Singh climbing the stair case with weapons in their hands. Maya Kaur and Nirmal Kaur however left the place and went out of the gate. Rajvinder, sensing danger shouted for help but somebody entered the balcony and pushed her therefrom and she fell on the ground floor sustaining severe injuries. She also heard some voices speaking in Punjabi suggesting that she be killed and somebody replying that she was already dead. Rajvinder Kaur, grievously hurt, went crawling' to the house of one Narula, a neighbour, and informed him of the assault on her family on which he called the police. The Police reached the site after a short time and found that Ravinder Singh, husband of Rajvinder Kaur, her brother-in-law Harvindar Singh, and her-in-laws Dilip Singh and Lakhwinder Kaur had all been killed. A formal FIR was thereupon registered at about 3.30 a.m. on 1st June 1999 at the Police Station, five kilometers distant, at the instance of PW7 Sub-Inspector Vikram Bhimrao Patil. On the completion of the investigation, the accused were charged as under:

S. No.	Accused Name	Charged Under Act & Clause
1.	Mayakaur Sardar	I.P.C Sections 302, 307, 120B, 34; Arms Act- Sections 25(1)&(3), 27(3)
2.	Nirmalkaur Sardar	- DO -
3.	Bhagwansingh Randhava	- DO -

4.	Jagpalsingh Toor	- DO -
5.	Kunwarjitsingh Pullar @ Rana Randhava	- DO -
6.	Bakhtawarsingh Randhava	- DO -
7.	Kuldeepsingh Randhava	I.P.C Sections 302, 307, 120B, 34
8.	Baldevsingh Sardar	I.P.C Sections 302, 307, 120B, 34; Arms Act - Sections 25(1)&(3), 27(3)

2. After an elaborate discussion the trial court sentenced Bhagwan Singh, Jagpalsingh, Kanwarjit Singh, Bakhtawar Singh, Maya Kaur and Nirmal Kaur guilty for the offences under Sections 302, 307 read with Section 120B of the IPC and sentenced the first four to death and the other two to life imprisonment under Sections 302/120B and to lesser term of imprisonment for the other offences. Kuldip Singh and Baldev Singh were however acquitted.

3. It is in these circumstances that two sets of appeals have been filed before us, one by the accused appellants challenging their conviction and sentence and the other by the State of Maharashtra praying for the award of the death sentence to the accused.

4. Mr. Vijay Kotwal, the learned senior counsel for the accused-appellants has first and foremost argued that the incident had happened in the evening of 30th May 1999 but Rajvinder Kaur (PW1), the solitary eye witness, had not disclosed the names of the accused to the police till the 8th of June 1999 which clearly revealed that she had not seen the incident and that she had been forced to become an eye witness to the murders. It has also been pleaded that in the case of a single witness it was essential that the testimony should be without blemish and as she had made significant improvements and changes in her statements from those made to the police from time to time, no reliance could be placed on her testimony and as such could not by itself form the basis of a conviction.

5. We have heard the learned Counsel for the parties and have gone through the record very carefully. Several facts are admitted by both sides. The relationship inter-se the parties stands admitted. It is also in evidence that Rajvinder Kaur had secretly married Ravinder Singh and it was only when an attempt had been made to marry her off to some other person that she had been forced to reveal her marriage and that this information had caused great alarm in her family and invited their wrath and that several threats had also been held out to her prior to the murders following which she had made a complaint to the police. It has also come in Rajvinder's deposition that she had initially been hesitant to disclose the names of the assailants as she was mortally scared by what had happened to her husband's family and an attempt made on her life as well. It is in this background that her statement needs to be evaluated. The evidence of Dr. Alexander Martin Alphonse (PW13), a Psychiatrist attached to the MGM Hospital, Bombay also shows that Rajvinder had been examined by Doctor Yamini at about 1.00 a.m. on 31st May 1999 and that he had examined her after she had been referred to him by the Orthopaedic Surgeon Dr. Rajesh Kakvani and that she was in a state of tremendous shock and out of a normal state of mind, sad and tearful and uncommunicative and that she had refused to take any food and complained of lack of sleep on account of immense grief and suffering as a result of traumatic

stress disorder. He further deposed that she had been in that condition for four or five days and had finally been discharged from hospital on the 29th June 1999. It is in these circumstances that the Sessions Judge as also the High Court have categorically found that she was both unwilling and unable to give her statement and it was only after she had recovered from her trauma and had also been provided with security by the police, that she had finally mustered courage and then spoken out. It is also evident from the record that Maya Kaur and Nirmal Kaur had made repeated efforts to get back the ornaments that Rajvinder Kaur had taken with her after she had shifted in with her husband and that she had, without hesitation, handed over the ornaments to them. It has also come in her statement that some efforts had been made (though with extreme reluctance on the part of her parents family) to normalize the relationship by having another marriage between her and Ravinder Singh in a Gurudwara but it appears that her parents, particularly her father, remained unrelenting with what they believed to be a marriage with a person who was financially weak and belonged to an inferior caste. Rajvinder thus held no rancour or ill-will against her family and the manner in which murders had been engineered must have come as the rudest of shocks to her.8. A serious argument has been raised as to the events which had led to the arrest of the accused long before the 8th of June 1999 and on the basis on which the arrests had been made. We find no suspicious circumstance in the arrests for the reason that Maya Kaur and Nirmal Kaur who have admitted their presence and had also been seen by several witnesses, had been arrested on 31st of May 1999 itself and it was possibly on their interrogation that the other accused had been arrested subsequently. We also find from the record that no question had been put to the Investigating Officer in this regard, as it is possible that if he had been questioned, he would have given a cogent explanation.

6. We have something to say on this aspect. The efficacy or otherwise of the death penalty is a matter of much debate in legal circles _ with two diametrically opposite views on the subject. However, as the penal code visualizes the imposition of this penalty, the circumstances under which it should be imposed are also a matter of discussion, the broad principle being its award in the rarest of rare cases. Undoubtedly also while categorizing a case the facts would predominate but the predilection of a Judge, is a human factor (and a factor whose importance cannot be minimized) but as Judges applying the law we must also be alive to the needs of society and the damage which can result if a ghastly crime is not dealt with in an effective and proper manner. We also notice that while Judges tend to be extremely harsh in dealing with murders committed on account of religious factors they tend to become more conservative and almost apologetic in the case of murders arising out of caste on the premise (as in this very case) that society should be given time so that the necessary change comes about in the normal course. Has this hands off approach led to the creation of the casteless utopia or even a perceptible movement in that direction? The answer is an emphatic no as would be clear from mushrooming caste based organizations controlled and manipulated by self appointed Commissars who have arrogated to themselves the right to be the sole arbiters and defenders of their castes with the license to kill and maim to enforce their diktats and bring in line those who dare to deviate. Resultantly the idyllic situation that we perceive is as distant as ever. In this background is it appropriate that we throw up our hands in despair waiting ad infinitum or optimistically a millennium or two for the day when good sense would prevail by a normal evolutionary process or is it our duty to help out

by a push and a prod through the criminal justice system? We feel that there can be only one answer to this question.

7. The present case is a classic example of what we mean. Both parties are Sikhs, a religion which had its genesis in a revolt against casteism with the belief that there was only one caste - humanity - imbued with one spirit, humanism and thus promoted the brotherhood of men with the ethos that no one was good or bad as all had emanated from the same "Noor" (light). And the ironic realism; the accused are Jat Sikhs a proud and aggressive community which has produced some of India's most valorous soldiers and helped fill India's granaries - unwilling to accept the victims as equals - they being Matharu Ramgariah Sikhs, artisans by profession - and in their garbled perception inferior in every way and unsuitable for their daughter. It has come in Rajvinder's statement that she had been the favourite child of her parents but the events show that notwithstanding this deep filial attachment they were of the opinion that she was better dead than alive.

8. The Court further observed that if a murder was committed in circumstances which aroused societal wrath or when the crime was enormous in proportion such as in a case of multiple murders of all or almost all the members of a family or a large number of persons of a particular caste, community or locality or pre-meditated, pre-planned and diabolically executed and the helpless state of the victims were aggravating circumstances...

9. We are of the opinion that strictly speaking the present case would fall within the parameters visualized in Bachan Singh's and Machhi Singh's cases. The diabolical nature of the crime and the murder of helpless individuals committed with traditional weapons with extreme cruelty and pre-meditation is exacerbated by the fact that Maya Kaur and Nirmal Kaur had come upstairs and recovered the jewellery and clothes from Rajvinder Kaur just before the actual murders.

10. Having said all this, the Bench opined that in the peculiar circumstances that they faced, they were not inclined to reverse the life sentences awarded by the High Court and to re-impose the death penalty on the accused. They noted that the Additional Sessions Judge had rendered his judgment on 21st December 2001 awarding the death sentence to four of the accused.The Division Bench of Parkar and Patil, JJ. gave its divergent judgments on February 26, 2003. The third Hon'ble Judge Palshikar, J. delivered his judgment on April 25, 2003 and the matter has been taken up by us four years thereafter. It has also come on record that the accused have served more than 8 years of their sentences as of now. We accordingly allow Criminal Appeal Nos. 1378-1380/2004 in so far as they relate to Kawaljit Singh alias Rana Darshan Singh Puller and order his acquittal. All other appeals are however dismissed.

Registration of marriage

16. Smt. Seema Vs. Ashwani Kumar, Transfer Petition (civil) 291 of 2005, Decided on: 14 February, 2006

A. Pasayat, S. Kapadia J.J.

1. The origin of marriage amongst Aryans in India, as noted in Mayne's Hindu Law and Usage, as amongst other ancient peoples is a matter for the Science of anthropology. From the very commencement of the Rig Vedic age, marriage was a well- established institution, and the Aryans ideal of marriage was very high.

2. The Convention on the Elimination of All Forms of Discrimination against Women (in short 'CEDAW') was adopted in 1979 by the United Nations General Assembly. India was a signatory to the Convention on 30th July, 1980 and ratified on 9th July, 1993 with two Declaratory Statements and one Reservation. Article 16(2) of the Convention says "though India agreed on principle that compulsory registration of marriages is highly desirable, it was said as follows:

"*'It is not practical in a vast country like India with its variety of customs, religions and level of literacy' and has expressed reservation to this very clause to make registration of marriage compulsory*".

3. While a transfer petition was being heard it was noted with concern that in large number of cases some unscrupulous persons are denying the existence of marriage taking advantage of the situation that in most of the States there is no official record of the marriage. Notice was issued to various States and Union Territories and learned Solicitor General and Mr. Ranjit Kumar, learned senior counsel were requested to act as Amicus Curiae to assist the Court in laying down guidelines in the matter of registration of marriages. Without exception, all the States and the Union Territories indicated their stand to the effect that registration of marriages is highly desirable.

4. It has been pointed out that compulsory registration of marriages would be a step in the right direction for the prevention of child marriages still prevalent in many parts of the country. In the Constitution of India, 1950 (in short the 'Constitution') List III (the Concurrent List) of the Seventh Schedule provides in Entries 5 and 30 as follows:

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

30. Vital statistics including registration of births and deaths:

6. It is to be noted that vital statistics including registration of deaths and births is covered by Entry 30. The registration of marriages would come within the ambit of the expression 'vital statistics'.

7. From the compilation of relevant legislations in respect of registration of marriages, it appears that there are four Statutes which provide for compulsory registration of marriages. They are: (1) The Bombay Registration of Marriages Act, 1953 (applicable to Maharashtra and Gujarat), (2) The Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976, (3) The Himachal Pradesh Registration of Marriages Act, 1996, and (4) The Andhra Pradesh Compulsory Registration of Marriages Act, 2002. In five States provisions appear to have been made for voluntary registration of Muslim marriages. These are Assam, Bihar, West Bengal, Orissa and Meghalaya. The "Assam Moslem Marriages and Divorce Registration Act, 1935," the "Orissa Muhammadan Marriages and Divorce Registration Act, 1949" and the "Bengal Muhammadan Marriages and Divorce Registration Act, 1876" are the relevant statutes. In Uttar Pradesh also it appears that the State Government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenance of its records relating to births and deaths. Under the Special Marriage Act, 1954 which applies to Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under the Indian Christian Marriage Act, 1872. Under the said Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony along with the signatures of bride and bridegroom, the officiating priest and the witnesses. The Parsi Marriage and Divorce Act, 1936 makes registration of marriages compulsory. Under Section 8 of the Hindu Marriage Act, 1955 (in short the 'Hindu Act') certain provisions exist for registration of marriages. However, it is left to the discretion of the contracting parties to either solemnize the marriage before the Sub-Registrar or register it after performing the marriage ceremony in conformity with the customary beliefs. However, the Act makes it clear that the validity of the marriage in no way will be affected by omission to make the entry in the register. In Goa, the Law of Marriages which is in force in the territories of Goa, Daman and Diu w.e.f. 26.11.1911 continues to be in force. Under Articles 45 to 47 of the Law of Marriages, registration of marriage is compulsory and the proof of marriage is ordinarily by production of Certificate of Marriage procured from the Register maintained by the Civil Registrar and issued by the concerned Civil Registrar appointed for the purpose by the Government. The procedural aspects about registration of marriages are contained in Articles 1075 to 1081 of the Portuguese (Civil) Code which is the common Civil Code in force in the State. It is pointed out in the affidavit filed on behalf of the respondent-State of Goa that the Hindu Act is not in force in the said State since it has not been extended to the State either by the Goa, Daman and Diu Laws Regulations, 1962 or by the Goa, Daman and Diu Laws No.2 Regulations, 1963 by which Central Acts have been extended to the State after the liberation of

the State. Procedure for marriages is also provided in Code of Civil Registration (Portuguese) which is in force in the State. The Foreign Marriage Act, 1969 also provides for registration of marriages.

8. As noted above, the Hindu Act enables the State Government to make rules with regard to the registration of marriages. Under Sub-section (2) of Section 8 if the State Government is of the opinion that such registration should be compulsory it can so provide. In that event, the person contravening any rule made in this regard shall be punishable with fine.

9. In exercise of powers conferred by Section 8 of the Hindu Act the State of U.P. has framed U.P. Hindu Marriage Registration Rules, 1973 which have been notified in 1973. In the affidavit filed by the State Government it is stated that the marriages are being registered after enactment of the Rules.

10. From the affidavit filed on behalf of the State of Tripura, it appears that the said State has introduced rules called Tripura Hindu Marriage Registration Rules, 1957. It has also introduced Tripura Special Marriage Rules, 1989 under the Special Marriage Act, 1954. So far as the State of Karnataka is concerned, it appears that Registration of Hindu Marriages (Karnataka) Rules, 1966 have been framed. It further appears that Karnataka Marriages (Registration and Miscellaneous Provisions) Act, 1976 has been introduced. Section 3 of the Act requires compulsory registration of all marriages contracted in the State.

11. In the affidavit filed on behalf of the National Commission for Women (in short the 'National Commission') it has been indicated as follows:

That the Commission is of the opinion that non-registration of marriages affects the most and hence has since its inception supported the proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women related issues such as:

(a) Prevention of child marriages and to ensure minimum age of marriage.

(b) Prevention of marriages without the consent of the parties.

(c) Check illegal bigamy/polygamy

(d) Enabling married women to claim their right to live in the matrimonial house, maintenance, etc.

(e) Enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband.

(f) Deterring men from deserting women after marriage.

(g) Deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

12. As noted supra, except four statutes applicable to States of Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh registration of marriages is not compulsory in any of the other States.

13. As is evident from narration of facts though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. Hence, it would be in the interest of the society if marriages be made compulsorily registerable. The legislative intent in enacting Section 8 of the Hindu Act is apparent from the use of the expression for the purpose of facilitating the proof of Hindu Marriages.

14. As a natural consequence, the effect of non-registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered.

15. Accordingly, we direct the States and the Central Government to take the following steps:

(i) The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing Rules, if any, or by framing new Rules. However, objections from members of the public shall be invited before bringing the said Rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the Rules into force.

(ii) The officer appointed under the said Rules of the States shall be duly authorized to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said Rules.

(iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.

(iv) Learned Counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

HIGH COURTS

Acid attacks as a tool of coercion/punishment in sexual relationships

ALLAHABAD

17. Sandeep and Anr. vs. State of U.P, 2009(3) ACR 3281

Imtiyaz Murtaza and Ashwani Kumar Singh, JJ.

1. The above appeal has its genesis in S. T. No. 356/05 and by means of the judgment and order dated 2.6.2007, passed by the Sessions Judge, Muzaffarnagar in the aforesaid Sessions trial, the Appellants have been convicted and sentenced to death under Section 302 read with Section 34, I.P.C. and a fine of Rs. 30,000 and further convicted under Section 316/34, I.P.C. and sentenced to undergo 10 years R.I. with a fine of Rs. 10,000 and in default of payment of fine further imprisonment for one year.

2. The author of the F.I.R. is S. O. Police Station, Ratanpuri namely, D. N. Verma lodged on 17.11.2004 at 11.15 p.m. The deceased is one Km. Jyoti. It is alleged in the report that the aforesaid Station Officer, who is also the author of the F.I.R., along with S.I. Chandra Pal Singh, Constable Ram Veer Singh, Constable Sukhram, Constable Ashok Kumar and Driver Yashveer Singh were on patrol duty and at the relevant time, the police force headed by S.O., D. N. Verma, informant of this case, was on Khatauli Road. Constable Rajesh Kumar and Ram Autar, who were deployed for picket duty, notified the Station Officer that they had seen one Indica car on way to Fulat village in which they heard shrieks of a lady and all of a sudden, the shrieks also stopped. Hearing this, the Station Officer asked the constable to accompany him in the Jeep and he Jeep proceeded towards the road leading to Fulat village. After covering some distance, the police party saw in the headlight of the Jeep two persons pulling out a lady. The police force upon approaching nearer to the car caught hold of the aforesaid two persons and at the relevant time the lady though in precarious state was alive and it was noticed that her head was singed with acid burn and there were marks of injuries on her head, neck and also on her right shoulder. On being queried, she gave her name as Jyoti daughter of Baljeet resident of House No. 56, Gali No. 16, Jagatpuri, P.S. Preet Vihar, and New Delhi. She also disclosed the name of her mother as Smt. Varsha and also gave her mobile number as 9871020368. She also disclosed that one of the accused persons was Sandeep and she was employed at the mobile call centre situated at Mayur Vihar, Phase I. She also told that during courtship, aforesaid Sandeep had access to her and she became enceinte. She also told that the aforesaid Sandeep had called her on telephone to meet him at Laxmi Nagar crossing near lights and to make her understand that he would marry her at Haridwar. It is further alleged that on being interrogated, the accused also told his name as Sandeep and resident of T-8 Sector 15, P. S. Sector 20, Noida The co-accused also gave his name as Shashi Bhusan son of Shyam Singh resident of Kondali House No.D 147, P.S. New Ashok Vihar, New Delhi. The accused persons further told they purchased acid bottles and blade from Modinagar. It is further alleged that the deceased also told the police that Sandeep wanted her to agree to abort the child but when she declined, accused Sandeep started beating and assaulted her. She also told that when she threatened Sandeep to reveal the entire matter to his family members and also to the police, the accused persons took the car to a lonely place and were preparing to throw her in the sugar-cane

field. She also disclosed to the police that she was assaulted by tools of the car namely Jack and Pana and acid was also thrown on her and they also assaulted with blade on her neck. It is further alleged that finding her conditions deteriorating, she was rushed to Muzaffarnagar Government Hospital but upon reaching the hospital, she took her last breath.

3. We have perused the record which no doubt manifests that large number of injuries were sustained by the deceased but there is nothing on record to show that anyone of them was of a very serious nature so as to render her speechless or result in her instantaneous death. It is worth noticing here that the statement of the deceased was recorded on 17.11.2004 wherein she stated in clearer terms that she had become enceinte as during courtship, Sandeep had access to her. This version of the deceased finds corroboration from the D.N.A. test report which in unequivocal terms reveals that Sandeep was the biological father of the foetus. It is also significant to notice here that Sandeep categorically denied his acquaintance or intimacy with Jyoti. In his statement filed along with Section 313, Cr. P.C. statement he stated that

"mera kabhi bhi kisi Jyoti naam ki larki sey koi sambandh kisi bhi prakar ka nahi raha na hi main kisi aisi larki ko janta hu." The above statement of accused Sandeep stood falsified by the D.N.A. examination report.

4. Lastly, it is submitted that the Sessions Judge was not justified in awarding the death sentence. It is submitted by learned Counsel for the Appellants that the case does not fall within the category of rarest of rare case where death sentence should have been inflicted. It is submitted that deceased sustained multiple injuries and except one injury all other injuries were simple in nature and none of the injuries were sufficient in the ordinary course of nature to cause death. The acid burns were also superficial in nature and there was no damage to any internal organ. Further it is submitted that the weapons which were alleged to have been used by the Appellants were spanner and wheel wrench and shaving blades and these weapons are not weapons of assault and accused did not seem intent to commit the murder of the deceased and it is not known as to which accused had caused injuries to the deceased.

In connection with this submission, we may usefully advert to the guidelines laid down in stream of decisions commencing from Bachan Singh v. State of Punjab MANU/SC/0111/1980 : 1980 (2) SCC 684 and thereafter reiterated in subsequent decisions namely Machchi Singh v. State of Punjab MANU/SC/0211/1983 : 1983 (3) SCC 470 and Devender Pal Singh v. State of N.C.T. of Delhi MANU/SC/0217/2002 : 2002 (5) SCC 234: 2002 (2) ACR 1132 (SC). The guidelines laid down in Bachan Singh's case (supra) may be culled out as under:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

5. The Sessions Judge awarded death sentence holding that in the instant case it is established by the evidence adduced by the prosecution that accused Sandeep had established erotic relation with Km. Jyoti, when she was working at a Mobile Shop 7-8 months ago. It has also been established by D.N.A. test and other evidence that Km. Jyoti became pregnant and she was having six month's old unborn child in her womb and accused Sandeep was the biological father of the child. It has also come in the evidence that he drew a plan to eliminate Km. Jyoti and for that purpose, he called Jyoti at Lakshmi Nagar market and assuring her to marry at Haridwar, he won her confidence and he took her in the Indica car which belonged to his mother. Sandeep also took with him his friend Shashi Bhushan. It has also come in the evidence that accused Sandeep insisted on Km. Jyoti on the way near Modinagar to agree to terminate the pregnancy to which she denied. It has also been established that accused purchased blades and two bottles of acid from Modinagar and started assaulting her by pana and jack. It has also come in the evidence that Sandeep assisted by his companion Shashi Bhushan caused several incised wounds on her face, head and neck and other multiple incised wounds in an area of 10 cm. x 12 cm. in front of neck, multiple incised wound in front of inner part of right forearm. He also caused chemical burn injuries all over body ranging from 12 cm. x 8 cm. to 2 cm. x 4 cm. besides multiple lacerated wound by pouring acid. The accused persons committed murder of Jyoti which by all means by gruesome, grisly, and diabolical. In the process, they inflicted injuries on her face, head by blades and poured acid. It has also been established that the alleged incident did not occur on account of any sudden provocation from the side of the deceased.

6. Taking into consideration the brutal, diabolical and gruesome manner of the attack, the age and infirmity of the victim Jyoti, a helpless girl and a strong motive ascribable to accused Sandeep and his act of perversity with a girl who had sacrificed everything for accused Sandeep for the sake of her love, if such person allowed to continue to live in the present society, there may be a great threat to the other persons of the society and there will be no safety and protection for the innocent and helpless unmarried girls of young age. By all reckoning, it is a fit case falling within the category of the rarest of rare case in which accused Sandeep should be awarded capital punishment under Section 302/34, I.P.C.

7**.** In the result, the appeal failed and was dismissed in limine in so far as Appellant Sandeep is concerned and the conviction and sentence awarded by the learned Sessions Judge is affirmed. In so far as Appellant, Shashi Bhushan is concerned, appeal was partly allowed. While affirming conviction

recorded against him, the court was inclined, considering the mitigating circumstances, to commute the sentence of death to imprisonment for life. Therefore, it was ordered that the sentence of death awarded to the Appellant Shashi Bhushan shall stand altered to imprisonment for life.

8. In so far as Appellant Sandeep is concerned, the criminal reference is accepted. However, in so far as Appellant Shashi Bhushan is concerned, the criminal reference shall stand rejected.

ANDHRA PRADESH

18. Marepally Venkata Sree Nagesh Vs State of A.P., 2002(1) ALD (Cri) 905

Bilal Nazki, J.

1. This case is a unique case and first of its kind and with the development of Science and Technology unfortunately we may have to see many more cases of this nature in future. The accused-appellant is a scientist. He was awarded doctorate in Bio-chemistry. He was married to one Smt. Marepally Indira who died on 16-8-96 at 3.45pm at Pramila Kidney centre, Secunderabad. The substance of the charge against the accused was that, on 3-7-96 in the bedroom of his house located at Marwadi bazaar, Tandur the accused with an intention to kill his wife inserted mercuric chloride crystals by mixing it with tamarind into her vagina. On the insertion of mercuric chloride into the vagina she developed severe burnings in her genitals and eventually she died in a Nursing home. This was the case of the prosecution that, since the accused knew that by inserting mercuric chloride into the vagina the lady could eventually die he inserted Mercuric chloride with an intention to kill her without leaving suspicion about his killing her. On the basis of these allegations charges were framed against the accused in the following manner by the trial Court.

> "That you on the early hours of 3-7-96 in the Bedroom of your house located at Marwadi Bazar, Tandur, with an intention to commit murder of your wife Smt. Marepally Indira, aged 27 years, inserted Mercuric chloride crystals by mixing with Tamarind into her vagina and thereby she developed severe burnings for which she died on 16-8-96 at 3.45pm at Pramila Kidney centre, Secunderabad, and thereby committed an offence punishable under section 302 of Indian Penal code and within the courts cognizance. "

2. P.W.1 is the father of the deceased. He was working as an officer in the State Bank of India. In 1996-97 he was posted at Vaddepally branch of State Bank of India in Warangal district. He has two daughters and a son. Indira, the deceased was his eldest daughter. She was married to the accused on 20th May, 1990 at Hyderabad. The accused was a Research scholar in Indian Institute of Science, Bangalore. Parents of the accused stayed at Tandur. His daughter stayed at the house of her in-laws at Tandur. Accused used to visit his parents home at Tandur once in a fortnight or once in a month. Out of the wedlock Indira had a daughter and a son. Accused was suspecting the character of the deceased

and he was ill-treating her. On 5th July, 1996 he got a message that his daughter had been admitted in New Citi Hospital, Secunderabad. On receiving the message he rushed to New Citi Hospital. The Security officer informed him that his daughter was in serious condition and she had chemical burns in her private parts. His daughter told him that her husband inserted some chemicals in her private parts. He met Dr. Shobha Jayanthi, Gynecologist. She told him that his daughter had serious burns in her vagina. His daughter was admitted to new citi hospital by the family members of the accused. He was told by Dr. Shobha Jayanthi that she enquired from the accused as to what he had done with the deceased and the accused had told her that he had mixed Mercuric chloride crystals in Tamarind and made them into small balls and inserted them into vagina of Smt. Indira. His wife and his son accompanied him to the new citi hospital. He stated that his daughter told him that on 3-7-96 the accused inserted something in her vagina. He got a complaint scribed by the police constable at hospital. Ex.P1 is the complaint scribed by him. By the end of March, 1995 his daughter had become pregnant, she had requested him to get the pregnancy terminated as accused was still unemployed. He got her pregnancy terminated with her consent. After her operation he had thought of not sending his daughter to Tandur for 3 or 4 months but the accused, his elder aunt i.e., Varahalamma and his sister Pushpa came to him and assured him that they would treat Indira nicely, so he sent his daughter along with them to Tandur. Indira was in hospital for 40 days and she was discharged from hospital. After her discharge from hospital she was taken to the hospital for one week for dialysis because her both kidneys failed due to insertion of dangerous chemicals in her vagina. She died on 16-8-96 in Pramila Kidney centre while undergoing dialysis. She died because of insertion of dangerous chemicals into her vagina by the accused. In his cross-examination he stated that, after 3 or 4 months of the marriage he came to know that the accused had started suspecting the character of his daughter. He did not attribute her intimacy with any particular person. He had learnt from his daughter that the accused was suspecting her character. She had informed him about it twice or thrice. He was a native of East Godavari district but was staying at Hyderabad since November, 1994. His two brothers were residing at Hyderabad. He had told his brothers and sister about the accused suspecting the character of his daughter. He had told the accused also that his suspicion against his daughter was unfounded. His daughter Indira discontinued her studies after her marriage. For the first four years after the marriage his daughter Indira was not permitted to visit his house by accused and his parents. His daughter wrote to him once complaining against the accused that he suspected her character. The letter was not available with him. Indira had stayed with accused at Bangalore for 6 months. The witness admitted that his daughter wrote letter dated 9-3-96 to accuse Nagesh. He exhibited it as Ex.D1. He also exhibited the other letters written by deceased to the accused.

3. P.W.2 is mother of the deceased. She also corroborated what had been stated by P.W. 1… Her daughter died due to insertion of something in her vagina mixed with tamarind… She was with her daughter throughout the day on 5-7-96. The deceased was in a position to talk from the date of her admission till the date of discharge.

4. P.W.17 is the Assistant Professsor, Forensic Medicine, Kurnool. He was earlier Civil Assistant surgeon, Gandhi hospital, Secunderabad. On requisition from S.I of Police, Tandur he conducted postmortem examination of the dead body of Smt. Indira on 17-8-96 and found the following injuries on the dead body;

1. Healed pale wide fibroush scars over the vagina, curix, fornices and upper and inner aspects of both thighs. The mucus membrances of the cervix and the lower uterus were congested and few types of erosion are present here and there.

5. Coming to the first argument of the learned counsel for the appellant that the evidence in case sheets does not indicate administration of Mercuric chloride crystals by the accused, some Doctors who had deposed that the accused had told them that he had inserted Mercuric chloride crystals into the vagina. Before going to that it would be pertinent to refer to the statement of P.W.4 who is the Chief Security Officer of New Citi Hospital. Although he turned hostile but his statements assumes importance in the facts and circumstances of the case. Even after turning hostile he supported the prosecution story to the following extent. (1) That on 3-7-96 Smt. Indira was brought to the hospital by her husband for treatment (2) that she complained severe stomach pain and burning sensation in her vagina (3) that Dr. Loycamoens suspected that it was a medico legal case and Doctors recorded the case as a medico legal case. (4) Smt. Indira told him that something had happened to her while she was sleeping (5) He registered the case as medico legal case and informed the police by telegram. It is tried by the learned counsel for the appellant to establish that it was a simple case of renal failure. Then, question would arise, why should have the Doctors as early as on 3-7-96 recorded this case as a medico legal case and informed the police about the case. The argument is belied by the record itself. The telegram sent on 4th July, 1996 by P.W.4 to the police reads as under;

"INDIRA WIFE OF NAGESH AGED 27 RESIDENT OF 7-3-71 TANDUR REPORTED TO CASUALTY OF OUR HOSPITAL ON 3 JULY 96 AT 3 PM AND ADMITTED AS IN PATIENT VIDE NUMBER 7521 STOP REGISTERED AS MEDICO LEGAL CASE VIDE MLC NO. 381 STOP ALLEGED TO HAVE SUSTAINED CHEMICAL BURNS STOP CONDITION STABLE STOP FOR YOUR INFORMATION AND NECESSARY ACTION STOP ORIGINAL MEDICO LEGAL RECORD IN POST STOP."

So, in this telegram itself P.W.4 stated that the deceased was alleged to have sustained chemical burns. Therefore, even if it was not recorded in the case history it does not make a difference. The Doctors had informed the Chief Security officer who is P.W.4 that it was a Medico legal case and it was a case of chemical burns, therefore he sent telegram to the police and on the basis of this telegram case was registered. Now, coming to the case sheet, it appears that the lady was first seen by Dr. A.V.Ratnam. He recorded the description of wound as, "Corrosive burns of the vagina, cervix anterior, past 2 lateral walls Brownish material found". Against the column "Alleged cause" he recorded; “alleged to have sustained chemical burns accidentally". The place of occurrence has been recorded as "at her residence". We do not understand how the chemical burns could be sustained inside vagina of a lady accidentally. Two people only can do it in normal circumstances, either the husband of the lady or the lady herself. The lady had no access to such chemicals and the lady had also informed her parents immediately after she met them who had reported the matter to the police immediately. Therefore, we are not convinced that the case sheet does not disclose that it was a case of chemical burns. It appears from the history sheet that the patient was referred to Dr. Loycamoens (PW5). He examined the burns and raised a querry, "Burns due to? Acid? Metallic mercury? No proper history given. No motive given. The lady seems to be unaware of what was done to her. It definitely is a medico legal problem". By going through the history sheet, it is clear that the deceased had always been treated for chemical burns. The learned counsel also referred to

Discharge summary. Even in this discharge summary it was not mentioned that it was a case of poisoning but it was stated; "Entire vaginal valt with cervix / fornices upto lower 2/3 completely corrosive? Burns due to? Acid or metallic mercury. No proper history was given...." Therefore, the argument of the learned counsel cannot be accepted that it was not a case of poisoning by chemical burns but was a case of renal failure simplicitor.

6. The second argument was that the Doctors never said before the police that the accused had told them that he had inserted Mercuric chloride crystals into the vagina of the deceased. It is true that the Doctors had not stated before the police whatever had been told to them by the accused, though the accused had made a confession before them. Although such a statement had been made by P.W.9 allegedly before the police but she resiled from it. It is true that P.W.5 had not stated before the police but he is emphatic before the Court that the accused had told him that he had inserted chemical substance into the vagina of the lady along with tamarind. But, even without relying on the extra-judicial confession there is sufficient evidence to prove the guilt of the accused. Let us see the statement of the deceased which was made before the father and mother on the basis of which the father approached the police which has not at all been contradicted by any evidence. In the report given by P.W.1 to the police he stated that his daughter's character was being suspected by her husband. On 5 -7-96 he had come to know by telephone that his daughter had been hospitalized in New Citi hospital, immediately he and his wife went to the hospital. He stated that his daughter's health was not good. She had a wound in a secret place (vagina) and his was caused by her husband. He also stated that Indira had told him that this had happened on 3-7-96. This statement remains unblemished.

7. The contention of the learned counsel for the appellant was that according to P.W.11 when police came to his laboratory on 23-8-96 the accused was not with them and he had not pointed out towards the bottle, whereas the case of the prosecution was that the accused had disclosed that he had brought Mercuric chloride crystals from the laboratory at Bangalore. In the facts and circumstances of the case it is not necessary to go into this controversy at all because even if the police had not gone to Bangalore and not seized any material from the laboratory, it had been established that the accused was a scientist who had done his Ph.D. in the Bio-chemistry, these Mercuric chloride crystals are available in the laboratory in which he worked for number of years, these crystals are also available in other laboratories and according to P.W.11 these crystals are available in open market. The most important point in this case is that the accused knew the use or misuse of this chemical. It is not known to everybody that by inserting Mercuric chloride crystals into the vagina death can be caused but it was known to the accused who was a scientist in Bio-chemistry. Therefore, it was immaterial whether he got crystals from Bangalore where he worked or whether he got it from somewhere else. Even in this context the conduct of the accused is suspicious. During the same period he sent a telegram of resignation just to create another circumstance that the laboratory was not accessible to him. Therefore, whether the accused had pointed out towards the bottle containing Mercuric chloride crystals in the laboratory or not would not make a difference in the disposal of the case. Even otherwise, there is nothing to disbelieve the police officer and the panch witnesses who had accompanied the accused to Bangalore.

8. Now, the most important question that arises is, whether the death had been caused by insertion of any chemical into the vagina of the deceased or by renal failure. The learned counsel for the appellant submits, as has been pointed herein above, that the Doctor who conducted the postmortem had no basis to

come to the conclusion that the death was caused due to insertion of Mercuric chloride crystals and the resultant complications. He submits that, even according to the Doctor who conducted the postmortem, he had not found Mercuric chloride in the vagina or any part of the body of the deceased. The Doctor had further stated that F.S.L report also did not indicate the presence of Mercuric chloride crystals in any of the part sent for examination. Therefore there is no basis for his conclusion that the death was due to Mercuric chloride poisoning with resultant complications. It is true that the lady underwent dialysis for renal failure and she died due to renal failure but the renal failure, according to the learned Public Prosecutor, was caused because of poisoning which was done by insertion of Mercuric chloride crystals in to her vagina. We have already dealt with the case sheet of the lady to show that the Doctors from the day one had treated the deceased for chemical burns. Now, the only question remains is whether insertion of Mercuric chloride can cause renal failure or not. The Doctor who examined her on 5-7-96 had written in the case sheet, "chemical vaginal burns with toxic renal failure". In Modi's Medical Jurisprudence & Toxicology (22nd edition) in Section-II dealing with Toxicology he gave Routes of administration of poison. He stated that, "poisons may gain entry into the body by various other routes. These can grossly be considered as enteral routes. The poison may come in contact with the skin, mucous membrane of the respiratory tract, gastrointestinal tract, eye, ear, and the vagina." In the same book Modi has dealt with Mercury and its compounds as poisons. About Mercury it is stated at page 135 that, "Persons concerned with mercury mining are also liable to get poisoned. It is easily converted into a dull grey powder when shaken up with oil or triturated with sugar, chalk, or lard. The process is known as deadening and is used in preparing mercurial ointment and emplastrum. The metal is not acted upon by hydrochloric acid. It is slightly dissolved by dilute cold sulphuric acid but completely dissolved by strong sulphuric and nitric acids." About compounds of Mercury, against Mercuric chloride he stated, "It is a violent poison, and is obtained in the bazaar, often mixed with impure sub chloride." The learned counsel for the appellant, however, submits that the F.S.L did not find traces of any poisoning in any part of the body sent to it and even the Doctor who conducted the postmortem did not find any poison in the body of the deceased. It must be remembered that the patient died after 44 days of the administration of poison and according to Modi, "After mercury is absorbed into the system, it is eliminated in the saliva, urine, and faeces, and in the milk and perspiration, if the quantity is large. It also passes rapidly to the foetus in uterus through the placental circulation particularly methyl mercury compounds. Elimination commences within a few hours of the administration of a single dose and is completed within four to five days after which the metal cannot be detected in the urine, but its excretion is very slow, if mercury is given in repeated small doses it may be detected in the solid organs after long periods. According to Modi this type of poison can cause renal failure.

9. A characteristic feature of poisoning by Mercury is suppression of urine at early stage of poisoning and presence of blood and albumin in urine. This is because mercurials are specific poisons to kidneys and cause necrosis of glomeruli. Shock and collapse supervenes and the cause of death is mostly kidney failure. This is the view of Dr. Bernard Knight in his book Medical Jurisprudence and Toxicology (5th edition) page-599.

10. The next and last argument was that there were cordial relations between the accused and the deceased and there was no reason for the deceased to have killed her. He specifically mentions all these letters or cards sent by the deceased to the accused and they merely show how much the deceased loved

the accused, but there is not a single letter written by the accused to his wife produced. In any case, these letters do not in any way create a doubt in the mind of the Court about the culpability of the accused.

11. For these reasons, the court did not find any merit in this appeal which was accordingly dismissed.

JHARKHAND

19. Awadhesh Ray @ Babua Pathak Vs. The State of Jharkhand, Cr. Appeal No. 38/2001, Decided on: 12.06.2006, MANU/JH/0558/2006

D.P. Singh, J.

1. This appeal was directed against the judgment of conviction and order of sentence dated 27.11.2000 and 29.11.2000 passed in Sessions Trial No. 102 of 1998, whereby and where under the learned 2nd Additional Sessions Judge, Dhanbad held the appellant guilty under Section 324 IPC and convicted and sentenced him to undergo RI for three years.

2. The brief facts leading to this appeal are that the informant Sangeeta Kumari, PW 15, daughter of Jawahar Lal Tiwari, PW 12 was standing at about 9.30 AM at the bus stop and talking with her friend Sarita Kumari, PW 1 in the morning of 11.11.1997 in Loyabad, district Dhanbad, while she saw the appellant coming towards her on a scooter. It is further stated that he appellant stopped the vehicle near the informant and took out a small dibba and poured the acid on her head and face. The informant getting acid burn injury started crying. According to the informant the appellant stated that he has poured the acid on her face because she did not agree to his demands. The informant was taken to hospital by PW 3, Md. Aslam with the help of a scooter driver immediately, where she was admitted. The reason behind pouring of acid was that the appellant was in possession of photo of the informant and he was blackmailing her and when she did not accede to his demands, she has been subjected to this incidence. The statement of the informant was recorded by Loyabad police in the hospital at about 3 PM. On the basis of which Loyabad P.S. case No. 121/1997 was registered under Sections 324, 326, 307 IPC. The police investigated the case and finally submitted chargesheet against the appellant under the aforesaid sections.

3. The defence taken by the appellant was that there was love affair between the informant and the appellant and after his marriage; this false case has been registered to implicate him. It is further submitted that there was some disputes between the family of the informant and the appellant. The trial court has charged the appellant for the offences mentioned above on 12.6.1998 and examined witnesses of the prosecution and the defence. The trial court finally found and held the appellant guilty under Section 324 IPC only and sentenced him to serve RI for three years.

4. The present appeal was filed on the ground that the learned trial court has committed errors on record and did not consider the contradictions available in the evidence of the witnesses. It was further asserted

that the appellant was the Director of a Coaching Institute of which the father of the informant was the Secretary. According to the counsel for the appellant, there was a dispute between the family of the appellant and the informant regarding management of the institute for which this false case has been lodged. It is also submitted that the informant is in an illegal relation with one Niraj and she is a woman of loose character. According to this memo of appeal, there was no eye witness of the occurrence and the appellant has already remained in custody from November, 1997 till the date of judgment November, 2000 and suffered sufficiently and as such the appeal may be allowed.

5. The Court considered the argument advanced by the learned Counsel for the appellant along with materials on record. It appears that Sangeeta Kumari examined as PW 15, has been cross examined at length on several dates. She has denied that she has got any relationship with Niraj said to be her second lover. She has proved the letter written by the appellant as Ext.4 in the writing of the appellant in which he has threatened her. In cross-examination this witness has admitted that she could not say the exact time when her statement was recorded by the police. She has denied any letter written by her to the appellant on being shown to her. Though, she admitted that certain photographs were taken along with her family members by one Ram Naresh Paswan. She specifically denied that she used to write letter to the appellant, vide para 41. She has specifically denied that acid was thrown upon her by Niraj.

6. The evidence on record supported the prosecution story and proved it beyond doubts that acid was thrown by appellant on the informant on 11.11.1997. The learned Counsel for the appellant submitted that the appellant has already served the sentence during trial itself and he has already been released from the custody.

7. Having considered the facts and circumstances, mentioned above, the court found that the present appeal has got no merit, which was accordingly dismissed.

MADRAS

20. Balu vs. State represented by Inspector of Police, C.A No. 1078/ 2004, Decided on: 26.10.2006, MANU/TN/9699/2006

R. Balasubramanian and M. Chockalingam, JJ.

1. Challenging a judgment of the Sessions Division, Nagapattinam, made in S.C. No. 33/2004 whereby the sole accused/appellant stood charged under Section 302 of I.P.C., tried, found guilty as per the charge and awarded life imprisonment along with a fine of Rs.2,000/- and default sentence, the appellant has brought forth this appeal.

2. The short facts necessary for the disposal of this appeal can be stated thus:

> (a) The deceased Thangamayil was the daughter of P.W.2. She was given in marriage to Pandian. On divorce, she was given in marriage to the appellant/accused as second wife.

They had children, and they were living together during the relevant time. The appellant/accused had a friend by name Vaithi. He used to come to the house of the accused, and she used to have frequent chatting with him. The accused entertained suspicion that she developed illicit intimacy with him. On 1.10.2002 at about 9.30 A.M., there was a distressing cry coming from the house of the deceased, and it was heard by P.W.1, a neighbour. Immediately, he went over there. At that time, the deceased was taken in an auto by some persons. He followed them in a bicycle. At that time, she had injuries caused due to burning. The accused fled away from the place of occurrence. P.W.2 took her to the hospital at about 9.30 A.M., where she informed to the Doctor that her husband poured acid on her, and she sustained burn injuries. She was admitted at 9.45 A.M. by P.W.11, the Doctor, attached to the Government Hospital, Mayiladuthurai, to whom she has given the said statement. The accident register copy is marked as Ex.P5. On the very day at about 10.05 A.M., the accused also came to the hospital with burn injuries and was admitted by the same Doctor. The accident register copy is marked as Ex.P6.

(b) A requisition, was given to P.W.10, the Judicial Magistra te, Mayiladuthurai, who came to the hospital and on being certified that she was conscious enough and in a frame of mind to give the statement, the dying declaration was recorded by him, wherein she has spoken as to how she sustained injuries. Intimation, was given to the Out-Post Police Station, and in turn, it was forwarded to the respondent Police Station. P.W.17, the Head Constable, who was on duty at that time, proceeded to the Government Hospital, Mayiladuthurai, and recorded the statement of the deceased. He also recorded the statement of the accused, which is marked as Ex.P10. On the strength of the complaint, given by her, a case came to be registered in Crime No.1664/2002 under Section 307 of I.P.C. The printed First Information Report, was sent to the Court. She was also advised to be taken to the Government Hospital, Chidambaram, for further treatment. Thereafter, she was taken to JIPMER Hospital, Pondicherry, where she was given treatment.

(c) On receipt of the copy of the FIR, P.W.20, the Inspector of Police, attached to the respondent Police Station, took up investigation, preceded to the spot, made an inspection in the presence of two witnesses and prepared an observation mahazar, and a rough sketch. Then, he went over to the hospital and recorded her statement. The accused was also arrested on 21.10.2002. He gave a confessional statement, which was also recorded. Thereafter, he was sent for judicial remand. When she was under treatment, she died on 24.10.2002. Intimation was given to the respondent Police Station. The case was altered to Section 302 of I.P.C., and the express report, was also sent to the Court. The Investigator proceeded to the mortuary, where he conducted inquest on the dead body of Thangamayil in the presence of witnesses and panchayatdars. Then, he gave a requisition, to the hospital authorities for conducting autopsy.

(d) On receipt of the said requisition, P.W.13, the Chief Medical Officer, Department of Forensic Medicine, JIPMER, Pondicherry, conducted autopsy on the dead body of Thangamayil and issued a postmortem certificate, with his opinion that the deceased died of septicemia due to burns.

(e) The material objects recovered from the place of occurrence, were subjected to chemical analysis, as a result of which the Chemical Analyst's report, was received by the Court. P.W.21, the Inspector of Police, took up further investigation, and he examined P.W.12, the Doctor, and recorded his statement. P.W.22, the Inspector of Police, who took up further investigation, on completion of investigation, filed the final report.

3. The case was committed to Court of Session and necessary charge was framed. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses. He has not only denied them as false, but also given a statement to the effect that it was she who poured acid on him, and he sustained injuries. No defence witness was examinedA fter hearing the arguments advanced on either side and scrutiny of the materials, the trial Court took the view that the prosecution has proved the case beyond reasonable doubt, found him guilty as per the charge and awarded the punishment as referred to above, which is the subject matter of challenge before this Court.

4. It was not a fact in controversy that the wife of the appellant/accused one Thangamyil, following an incident that took place at about 9.30 A.M. on the day of occurrence, was taken to the Government Hospital at Mayiladuthurai. She was admitted by P.W.11, the Doctor. Following the same, she was sent to the Government Hospital, Chidambaram, and then, she was taken to JIPMER Hospital, Pondicherry, where she died on 24.10.2006. The Doctor, P.W .13, who conducted postmortem, has spoken to the fact that she died out of septicemia due to burns. The Court said that it is not in dispute that burn injuries were sustained by her due to the pouring of acid. Apart from that, this fact that she died out of burn injuries was never questioned by the appellant at any stage of the proceedings. At this stage, it has to be pointed out that the first contention that the intervening circumstance that she developed septicemia and also she was suffering from pneumonia, and thus, she died cannot be accepted at any stretch of imagination because not even a suggestion was put to the Doctor, who conducted the postmortem. But, the Doctor has given a specific opinion that she died out of septicemia due to burns, and thus, the argument put forth by the learned Counsel, has got to be discountenanced.

5. Secondly, in the instant case, immediately after the occurrence, she has made a statement to P.Ws.1 and 2, who took her to the hospital, and at the hospital, she was admitted by P.W.11, the Doctor. The earliest version given by her to the Doctor, P.W.11, is recorded, the copy of the accident register, wherein she has clearly spoken to the fact that it was her husband who poured acid, due to which she sustained burn injuries. A perusal of the dying declaration recorded by the Judicial Magistrate would clearly indicate that it was free from doubt that it was the accused who poured acid on her. This Court was of the considered opinion that this is a strong piece of evidence against the accused.

6. So far as the last contention that the act of the accused would not attract the penal provisions of murder is concerned, the same though attractive at the first instance, will not stand the scrutiny of law. In the instant case, there is nothing to show that there was any sudden quarrel or anything to provoke the accused to act so. Apart from that, it is a case, where she has narrated that he asked her to become nude, and when she refused, he has acted so by throwing acid on her body. Thus, it would be quite indicative of the intention of the accused to commit the act. The Hon'ble Court was of the view that the lower Court was perfectly correct in rejecting the defence plea and accepting the prosecution case. Therefore,

the act of the accused would certainly attract the penal provisions of murder warranting a punishment of life imprisonment, which has been rightly done by the lower Court. This Court is unable to notice any reason to interfere either in the conviction recorded or in the sentence imposed by the Court below. Hence, the appeal has got to be dismissed sustaining the judgment of conviction and sentence passed by the lower Court.

7. In the result, this criminal appeal fails, and the same was dismissed, confirming the conviction and sentence imposed by the lower Court.

Religious Conversion for marriage

DELHI

21. Faheem Ahmed vs. Maviya @ Luxmi, 178(2011) DLT671.

Kailash Gambhir, J.

1. By this appeal filed under Section 39 of the Special Marriage Act, 1954, the Appellant sought to challenge the judgment and decree dated 18.11.2008 passed by the learned trial court, whereby the petition filed by the Respondent under Section 24(2) of the Special Marriage Act was allowed.

2. Brief facts of the case as set out in the petition relevant for deciding the present appeal are that the parties were friends since college days and were also subsequently classmates, pursuing a course together at the Gems Craft Jewellery Institute, Lajpat Nagar, New Delhi. As per the case of the Respondent, she wanted to get the membership of the library in Jama Masjid and on the assurance of the Appellant in helping her get the same, he persuaded her to convert to Islam for this purpose. That for this purpose, the Respondent signed and executed certain documents which the Appellant claimed to be the registration of marriage and conversion certificate and that by virtue of those the Respondent became his wife. The Respondent hence preferred a petition under Section 24(2) of the Special Marriage Act, 1954 for having the registration of the marriage declared to be of no effect which vide judgment and decree dated 18.11.08 was decreed in favor of the Respondent. Feeling aggrieved with the same, the Appellant preferred the present appeal.

3. India is a secular country and under Article 25 of the Constitution of India, right has been given to every citizen to profess, practice or propagate any religion. The cherished ideal of secularism which is the hallmark of our Constitution has been expressly recognized under the said Article 25 of the Constitution of India. The Constitution does not put any kind of embargo on the right of any person to freely choose any religion he or she so likes or the religion which one is to adopt and practice in his or her life. It is well-settled that freedom of conscience and right to profess a religion implies freedom to change his or her religion as well. The Constitution of India does not define the word 'religion' and rightly so, as the framers of the Constitution could not have perceived to give any exhaustive definition of "religion".”

The learned trial court also relied on the judgment of the Supreme Court in ***Lily Thomas vs. Union of India*** (2000) 6 SCC 224 wherein while dealing with the issue of feigned conversion by a Hindu to Islam religion, the court observed that:

> "39. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith, and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith, or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

In ***Kailash Sonkar vs. Smt. Maya Devi*** AIR 1984 SC 600 reiterating the same approach even for re-conversion, the Apex Court observed that:

In our opinion, the main test should be a genuine intention of the reconvert to abjure his new religion and completely dissociate him from it. We must hasten to add here that this does not mean that the reconversion should be only a ruse or a pretext or a cover to gain mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery. The reconvert must exhibit a clear and genuine intention to go back to his old fold and adopt the customs and practices of the said fold without any protest from members of his erstwhile caste. In order to judge this factor, it is not necessary that there should be a direct or conclusive proof of the expression of the views of the community of the erstwhile caste and it would be sufficient compliance of this condition if no exception or protest is lodged by the community members, in which case the caste would revive on the reconversion of the person to his old religion.

4. Now analyzing the facts of the case at hand in the backdrop of the aforesaid legal position, the court was of the view that the learned trial court has rightly observed that the Respondent prepared her conversion certificate because she wanted to marry the Appellant and to achieve this purpose, she did feign to have adopted another religion which was for the only purpose of worldly gain of marriage. It would be appropriate to reproduce para 35 of the impugned judgment as under:

The Petitioner got herself the conversion certificate because she wanted to marry the Respondent. In this manner she did feign to have adopted another religion which was only for the purpose of the worldly gain of a marriage. Her act had nothing to do with her faith in Islam. This is confirmed by the Respondent himself in his testimony wherein he has deposed that she converted by executing an affidavit expressing her intent to convert and the Qazi issuing a conversion certificate after seeking her affidavit expressing her intent to convert. There is no mention of the Qazi confirming her change in faith or making her utters the Kalma.

5. The learned trial court further found that in the affidavit filed by the Respondent in evidence, she testified that she never had professed Islam, and were a worshipper of Lord Shiva and such a deposition of the Respondent remained un-rebutted in the absence of any cross-examination by the Appellant. The learned trial court also found that no suggestion was given by the Appellant to the Respondent that she practiced Islam or read the namaz or kept rozas. The learned trial court further found that even the families of both the parties were not aware of either the said conversion or of the marriage. The learned trial court also found that even the publication of name Maviya by the Respondent nowhere proved the fact that she intended to change her religion from Hinduism to Islam.

6. In view of the above discussion, this Court did not find any infirmity in the findings of the learned trial court and it has been rightly held that there was no conversion of the Respondent from Hinduism to Islam.

7. This now brings me to the finding of the learned trial court on Issue No. 2 concerns the question as to whether there was proper solemnization of marriage between the parties or not.

8. Referring to the essentials of a Muslim marriage, the learned trial court pointed out that the Appellant being a Sunni what was required was that there should be a proposal of marriage made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other in the presence and hearing of two males or one male and two female witnesses, who must be sane and adult Muslims. It could prove on record that essential ceremonies of the nikah were performed between the parties.

9. Marriage amongst the Muslims is not a sacrament but purely a civil contract. There are no rituals or ceremonies which are essential for solemnization of Muslim marriage. The twin objectives which the Muslim marriage seeks to achieve are; (i) legalization of sexual intercourse (ii) procreation of children. The essence of Muslim marriage is mutual consent. The proposal and acceptance need not be in any particular form

10. In the present case, although the nikahnama was proved on record, but except the said nikahnama nothing was proved on record to establish the fact that the essential requirement of offer and acceptance was made by the parties in the presence and hearing of the witnesses. The learned trial court in para 44 has clearly observed that there was no mention either in the pleadings or in the evidence about the essential ceremonies of the nikah being performed between the parties. The learned trial court has also taken note of the two affidavits filed by the parties before the Marriage Officer which were executed by them on 9.12.2005 i.e. after a gap of 10 days from the date of the alleged marriage but the same carried a declaration that "marriage would be solemnized in a Masjid at Delhi" meaning thereby that the marriage was yet to be performed between the parties. This Court, therefore, does not find any infirmity in the finding of the learned trial court on Issue No. 2 as well.

The learned trial court further observed that the Appellant and the Respondent never lived together as husband and wife after their alleged marriage and prior to the registration and therefore such a marriage was clearly in contravention of Section 15 (a) of the Special Marriage Act, 1954.

11. The other argument raised by the counsel for the Appellant that the marriage certificate became a conclusive evidence under Section 13(2) r/w Section 40(c) of the Act and also r/w Section 4/36 of Indian Evidence Act is also equally devoid of any merit. The marriage certificate is conclusive evidence so far it proves its issuance by a proper and competent Marriage Officer after following the due procedure prescribed under the Act and the Rules famed there under. The said conclusive evidence, however, cannot come in the way of the parties challenging such a marriage certificate or the marriage itself.

12. All other contentions raised by the counsel for the Appellant were found to be devoid of any merit as this Court does not find any illegality or perversity in the reasoning given by the learned trial court in accepting the case of the Respondent that she had never adopted Islam religion and there was no proper solemnization of marriage between the parties.

13. At omega, it would be befitting to mention that the Hon'ble Division Bench of the Kerala High Court in the case of ***Re: Betsy and Sadanandan***, 2009(4) KLT 631 decided on 16th October, 2009, while dealing with a joint application moved by the parties for dissolution of marriage under Section 13B of the Hindu Marriage Act, 1955, examined the issue as to how, in the absence of any specific procedure prescribed under the Hindu law, custom and statute, the Court may hold whether there has been conversion or re-conversion to Hinduism. The Hon'ble High Court invited the attention of the Law Commission in order to address the need for legislation on the issue.

14. The Law Commission, therefore, proposes to formulate the following recommendations:

> 1. Within a month after the date of conversion, the converted person, if she/he chooses, can send a declaration to the officer in charge of registration of marriages in the concerned area.
>
> 2. The registering official shall exhibit a copy of the declaration on the Notice Board of the office till the date of confirmation.
>
> 3. The said declaration shall contain the requisite details viz., the particulars of the convert such as date of birth, permanent address, and the present place of residence, father's/husband's name, the religion to which the convert originally belonged and the religion to which he or she converted, the date and place of conversion and nature of the process gone through for conversion.
>
> 4. Within 21 days from the date of sending/filing the declaration, the converted individual can appear before the registering officer, establish her/his identity and confirm the contents of the declaration.
>
> 5. The Registering officer shall record the factum of declaration and confirmation in a register maintained for this purpose. If any objections are notified, he may simply record them i.e., the name and particulars of objector and the nature of objection.
>
> 6. Certified copies of declaration, confirmation and the extracts from the register shall be furnished to the party who gave the declaration or the authorized legal representative, on request.

15. Now, the question arises as to how the above recommendations could be implemented. It is clarified that in whichever State, there is a law governing conversion such as Freedom of Religion Act; the above recommendations do not apply. The question then is whether for implementation of the said recommendations in other States, the enactment of law by Parliament is necessary. The Commission is inclined to think that a separate enactment or amendments to the respective personal laws is not required to give effect to this simple recommendation having regard to the fact that it does not go contrary to the existing provisions of law nor does in any way impinge on the religious freedom or faith of any person. Matters relating to conversion/reconversion are governed by the personal laws in respect of which Parliament has power to make laws. The Central Government can exercise its executive power under Article 73 to issue appropriate instructions to the Union Territories. Similar communications may be addressed by the Central Government to the States (where there are no laws governing the conversion) to give effect to the recommendations set out supra. The Governments concerned in their turn will have to issue necessary orders to the Registration officers. That can be done by the Governments of UT and State Governments administratively.

16. In the light of the above discussions, no merit was found in the present appeal and the same is hereby dismissed.

Charges of Kidnapping and Rape in cases of Right to Choice and use of Haebas Corpus

ALLAHABAD

22. Khusboo vs. State of U.P. and Ors. 2009(2) ACR1204

R.K. Rastogi and A.K. Roopanwal, JJ.

1. This habeas corpus Writ petition had been filed by the Petitioner, Khusboo, for quashing the order dated 12.10.2008, passed by the S.D.M., Sadar, and Gorakhpur and for issuing a direction to the Respondents to produce her corpus before this Court and for other suitable directions.

2. The Petitioners case is that she is major and her date of birth is 5.2.1989. She has filed a photocopy of the School Leaving Certificate issued by the Headmaster, Primary School, Khorabar, Gorakhpur. She has alleged that she performed marriage with Ram Dayal out of her own choice but her parents were not satisfied with this marriage. She also moved an application before the S.D.M., Sadar, Gorakhpur on 12.2.2008 asserting that she wanted to go with her husband. It was registered as Misc. Case No. 3 of 2008. The Petitioner Khusboo was produced before the C.M.O., Gorakhpur, by the police and the C.M.O. after obtaining X --ray report ascertained her age to be about 19 years. A photocopy of the medical certificate issued by the C.M.O., Gorakhpur, has been annexed as Annexure--3 to the petition. Even then the S.D.M., Sadar, Gorakhpur, did not permit her to go to her nuptial home and passed order for keeping her at the Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi, (Respondent No. 2). She alleged that

since she is major, she has the right to live with a man of her choice and so she filed this petition challenging the above order. She has also alleged that her parents are not ready to keep her with them.

3. The State filed a counter-affidavit of Devendra Prasad Tiwari, Sub--Inspector of Police, Police Station Khorabar, district Gorakhpur, in which he stated that on the basis of the information given by Rajendra Prasad, Respondent No. 3, under Sections 376 and 506, I.P.C. was registered at Police Station Khorabar, district Gorakhpur, on 19.7.2008, and in this case Ram Dayal, so called husband of the Petitioner, was an accused. The case was investigated and after investigation the charge-sheet had already been submitted against Ram Dayal. It was also alleged that Khusboo was still a minor. Her date of birth according to her School Leaving Certificate is 5.2.1995. It was on the basis of the above School Leaving Certificate in which the date of birth of Khusboo was mentioned as 5.2.1995, that the S.D.M., Sadar, Gorakhpur, held that she was still a minor and so she should not be permitted to reside according to her wishes and he passed an order that she should be kept at Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi.

4. It is to be seen that according to the medical certificate issued by the C.M.O., Gorakhpur, the age of the Petitioner--Khusboo was about 19 years on 23.7.2008. The medical report reveals that all the epiphysis of elbow joints and knee joints were fused. In case of wrist, lower ends of ulna and radius were also fused. It may also be mentioned that Khusboo was produced by the police before the C.M.O. for her medical examination and there was no reason to doubt its veracity regarding ascertainment of the age done by the C.M.O., Gorakhpur, on the basis of fusions of the epiphysis.

5. As regards the dates of births mentioned in the School Leaving Certificates, the Petitioner had filed a photocopy of the certificate issued by the Headmaster of the School in which she had studied and in which her date of birth was mentioned as 5.2.1989, but in another certificate issued by the same school her date of birth has been mentioned as 5.2.1995. Both the certificates are self-contradictory and there is contradiction regarding her age in the school record.

6. We are of the view that when the documentary evidence of date of birth of the Petitioner Khusboo is self-contradictory, the medical ascertainment of age done by the C.M.O., Gorakhpur, on the basis of X--ray report would be more reliable, and according to that ascertainment of age, the Petitioner was apparently major and so she cannot be kept in Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi, against her wishes.

7. This habeas corpus writ petition is, therefore, allowed, the order of the S.D.M., Sadar, Gorakhpur dated 12.10.2008 (Annexure--4 to the petition) is quashed and the Petitioner Khusboo is ordered to be released from Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi.

8. Since the Petitioner Khusboo has been produced in this Court by CP 1386 Smt. Maya Devi and CP 261 Sri Anil Kumar Mishra, Constables, Police Lines, Varanasi, she is permitted to be released in the Court and she is at liberty to go anywhere she likes.

23. Aneeta Rana vs. Mool Chandra Rana, 2008 6 AWC5960

Barkat Ali Zaidi, J.

1. This habeas corpus petition has been filed by an ardent lover with the allegation that his fiancee namely Km. Aneeta Rana (Daroga) is in love with him and since counsel for both the parties admit that she is 21 years of age and is major, she has a right to marry according to her wishes, but her father is forcing a marriage upon her, against her wishes, and the marriage is scheduled to take place day after tomorrow, i.e., 1.3.2008.

2. Counsel appearing from the side of the father has filed counter-affidavit, purporting to be, on behalf of the girl stating therein that she is willing to marry where her father wants her to marry, and that she has no relations with the Petitioner. There is also a controversy whether the boy falls within the prohibited family degree; this is a matter, to be decided subsequently.

3. The controversy in question has to be subsequently decided, but in the present case, it is just fair and necessary that status quo should be maintained and for that purpose the marriage of the girl, scheduled to be held on 1.3.2008 should be stayed, so that petition may not become infructuous.

4. Marriage of the girl namely Km. Aneeta Rana (Daroga) is, therefore, stayed till further orders of this Court and the girl shall be produced in this Court on the next date of hearing, which is fixed as 12.3.2008.

Put up on 12.3.2008 for hearing.

5. The girl is living with Respondent-father namely Mool Chandra Rana and he will produce the girl in the Court on the date fixed.

6. The counsel for the Respondent-father has been told to communicate this order to Respondent-father forthwith. The Petitioner requests that an Advocate Commissioner be appointed to serve the order of the Court so that father of the girl may not plead ignorance about the order of the Court and the marriage may not be gone there.

7. Sri Birendra Kumar Mishra, advocate is appointed as Advocate Commissioner and he will go and serve the order of the Court on Respondent-father. His fees are fixed as Rs. 5,000 which will be paid to him by the Petitioner, and who will certify the receipt of the same to the Court.

24. Asrey vs. State of U.P., 2008(1) ACR91, Allahabad

Alok K. Singh, J.

1. The facts wrapped in brevity are as under:

> The complainant Kabir Saran resident of village Bilauli Bhgha Jot, Police Station Utraula, district Gonda, lodged a report on 3.6.1991 at 7.10. p.m. (Ext. Ka-1) at Police Station, Utraula saying that on 1.6.1991 early in the morning at about 4 a.m. when his 14 years old daughter, Samundra had gone to ease out in the east of the village, all the four accused who belong to the same village enticed and kidnapped her with intention to perform her marriage. After registration of the case the matter was investigated upon. On 20.8.1991 the girl was recovered from the possession of Ram Asrey in front of brick kiln of Shyam Lal in village Banbhusa under Police Station, Utraula, vide Fard (Ext. Ka-2). Then on 21.8.1991 she was medically examined. The vaginal report was found negative. The age of the girl on the basis of ossification report and the report of radiologist was found to be 15 years. She was also found to be used to sexual intercourse. On 27.8.1991 her statement under Section 164, Cr. P.C., was recorded in which she stated to have gone on her own sweet will with convict Atwari. She did not make any allegation against any of the remaining accused also (Paper No. Ka-17/1). After completing the investigation the charge-sheet was submitted against the accused persons under the aforesaid sections.

2. The case was committed by the concerned C.J.M. to the Court of Sessions. During trial in all seven witnesses were examined in support of the prosecution case. P.W. 1 Kabir Saran is the complainant who besides proving the report (Ext. Ka-1) and recovery fard of the girl (Ext. Ka-2) also deposed that the residences of convict Kallu and Asrey are towards north of his house. On the day of occurrence, his wife and daughter were lying on separate cots outside the house. At about 4 a.m. when his daughter went for easing Asrey, Kallu, Atwari and Kanhaiya Lal kidnapped his daughter with intention to perform her marriage. It is noteworthy that during trial Kanhaiya Lal had expired and as such the case has already abated against him. The complainant further deposed that after about 2-3 months his daughter was recovered and was given in his custody. She deposed that while she had gone towards east of the village for easing out at about 4 a.m. all the four accused got hold of her and gave assurance of her marriage. At that time she was 14 years of age. They took her to Utraula. There she boarded a Bus along with convict Asrey. From that place the remaining convicts returned back. Convict Asrey took her to a village where she lived with him for about 15 days. During that period Asrey had sexual intercourse with her against her wishes several times. Then finally while she was coming from Utraula she was arrested along with Asrey by the police and thereafter she was given in the custody of her father. She denied to have given statement (under Section 164, Cr. P.C.) to the Magistrate to the effect that she went with Asrey of her own sweet will and that her step mother is a lady of bad character. As Dr. Km. L. Nandan, who had performed medical examination of the girl, had expired, he also proved the medical examination report as Ext. Ka-6. No definite opinion about rape could be given in view of the vaginal smear report. S. I. Bhunnu Yadav has been examined as P.W. 6 who after recording statements of the witnesses inspected the site and prepared the site plan (Ext. Ka-7). He told to have recovered the girl on 20.8.1991 in the presence of

witness Ayodhya and Bhiki and father of the prosecutrix from the custody of Asrey vide Ext. Ka -2. He also prepared a separate site plan in this regard (Ext. Ka-8). This witness proved the charge-sheet (Ext. Ka-12). Radiologist Dr. J. N. Prasad has been examined as P.W. 7 who proved the ossification report (Ext. Ka-13) according to which the age of the girl was found to be 15 years.

3. In the statements under Section 313, Cr. P.C. all the accused denied the evidence which came against them. None of them adduced any evidence in defence.

4. After relying upon the ocular evidence of the prosecutrix and the other witnesses, the learned lower court convicted and sentenced the accused persons in the manner mentioned hereinbefore.

5. As already mentioned the case has already abated against Kanhaiya due to his death. Out of the remaining three, convict Kallu, the father of Appellant Asrey, did not file any appeal. The impugned judgment was delivered in the year 2002. Since then, more than four years have elapsed. As both the sentences against him had to run concurrently, the maximum sentence being for three years, he must have been released from jail after completion of sentence. It appears that Appellant Asrey had also undergone a total period of about three year imprisonment. Similarly Atwari had undergone imprisonment for about nine months.

6. In view of the aforesaid definition now the first and foremost question is whether the girl was under 18 years of age at the time of occurrence as alleged by prosecution or she was adult (18 years or above) and a consenting party as claimed by defence. It is needless to say that the entire criminal trial is based on preponderance of probabilities. On the point of age the oral evidence on record consists of father (the complainant) the mother and the prosecutrix. According to father her age was 14 years. It has also come on record that the complainant had three children including the prosecutrix from his first wife who remained with him for 15 years. The present one is his second wife who is living with him for the last about 22 years. There does not appear to be any issue from the second wife. When cross-examined he told that the eldest issue is the son, the second issue is the prosecutrix and the third is again a daughter, namely Muntu, who was also married at the time of his evidence (he was examined on 20.1.2001). When his wife died the prosecutrix wasl -1/2 years old. In reply to a question he also told that the younger daughter Muntu is two years younger than the prosecutrix. Probably he is not telling the truth because at the time of death of his first wife his middle child Samundra was 1-1/2 years old and she is two years older than Muntu, then how could it have been possible. It appears that whenever the defence tried to pinpoint him and asked some crucial questions indirectly or directly connected with the age of the prosecutrix, he tried to evade those questions. In reply to one of such questions he expressed his inability to tell as to how many years before his first wife died. His second wife Indrani (P.W. 2) was also examined in the year 2001, and at that time she told her age as 40 years. According to her the age of Samundra, i.e., prosecutrix was 8 or 9 years at the time of incident. This is again a funny statement. When asked about her own age she told that at the time of her Gauna (after which the lady comes to reside in her in-laws' house) she was 20-25 years old and at that time the age of Samundra was 12-13 years. If from the aforesaid age of 40 years these 25 years are subtracted then it comes out that about 15 years before (with effect from 2001 when evidence was recorded) she was married. That means she was married around 1986. She has told that at the time of her marriage the prosecutrix was 12-13 years of age which means that on the date of incident which is said to have taken place after 5 years, i.e., on 30.6.1991, she was 13+5=18 years of age.

From the aforesaid statement it also comes out that the age difference between the step mother and the prosecutrix was about 25-13=12 years. If we check it out from this angle then also her age at the time of occurrence comes to about 18 years because she was examined in 2001 and at that time she was 40 years of age. The age difference between step mother and the prosecutrix being 12 years in the year 2001, the age of the prosecutrix was 28 years. The incident is said to have taken place about 10 years before, i.e., in 1991. Therefore, in 1991, the prosecutrix was in any case 18 years of age. Besides these two witnesses Samundra herself entered in the witness box and stated her age at the time of occurrence to be 14 years. She was also examined in the year 2001. According to her at the time of incident, i.e., in the year 1991, she was 14 years of age. Apparently she is giving tutored version. Her real age has come out to be 18 years as discussed above.

7. Thereafter, in the medical evidence also the aforesaid age was substantiated. On careful examination, the supplementary report (Ext. Ka-6) mentions her age as "sixteen" years which has been subsequently made "fifteen" by superimposing alphabets "fif" on "six" without any initials. There is also overwriting in the alphabet 'Y' in word "years old". Then with a view that age "sixteen" may appear as "fifteen" after full stop a bracket has also been added to write '15' in numerical. The Hon'ble Apex Court has settled the law on the point that when the age has to be determined on the basis of radiological or orthopaedic test the Court can always take judicial notice that margin of error of age ascertained by such medical tests is two years on either side. One of such case is of ***Jaya Mata v. Home Secretary 1982 SCC 502***, on which the learned Counsel has placed reliance. It is needless to say that if two interpretations are possible then the interpretation which is in favour of the accused will have to be taken into account. Therefore, in the present case margin of error of two years has to be on the side of the accused and from this calculation also it comes to 16+2=18 years.

8. Thus, if we take into account both the oral evidence as well as the medical evidence and read it together then the Court came to the conclusion that the age of the prosecutrix was 18 years at the time of alleged occurrence. In other words she was not below 18 years. Therefore, at least reasonable doubt is created in favour of the accused that probably the prosecutrix was not below 18 years of age. Therefore, the defence case of her being consenting party can also be taken into account. Some of the points occurring in oral evidence may be of great significance to reach to any conclusion in respect of her being a consenting party. Concededly the house of convict-Appellant and his father Kallu (who has not filed any appeal) is adjacent to the house of the complainant towards north.In her statement under Section 164, Cr. P.C. (Paper No. Ka-17/1) she stated that about three years before she was married with one Babu Lal and in the year when the incident is said to have taken place in the month of Baisakh her Gauna was also performed and thereafter she went to the house of Babu Lal and remained there for 5-6 days but her father-in-law Madhau used to tease her and wanted to have intimate relations with her to which she denied. Her father-in-law used to beat her also. Therefore, after 5-6 days she came back to her mother's place along with her father. She also stated that she has a step mother, namely Indrani. She told about behavior of her father-in-law to her mother and father but they did not do anything. Her step mother was also a lady of bad character who had illegitimate relations with several villagers and she wanted her also to adopt the same way but she refused. She further stated that due to this reason about 3 months before she had gone on her sweet will with Ram Asrey who resides in the same village. Initially she went to village Ghuswa where Kaka of Ram Asrey (convict) resides. Ram Asrey did not do any wrong with her. Rather he wanted to marry her. His mother and father were also agreeable to this marriage. After some

days Ram Asrey took her to another village Khajuria where his father's sister lives. There also she was not teased or misbehaved with. In this way she lived with Ram Asrey for about 2-1/2 months in village Ghuswa and Khajuria. In the last she expressed her desire to go and live with Ram Asrey to whom she wants to marry also. She also stated that she does not want to live with Babu Lal and also does not want to go to her mother and father's place. It is true that this statement has not been formally proved. Nevertheless such type of previous statements can be referred to its author. She admitted to have given the statement before the Magistrate after recovery. So the factum of recording her statement under Section 164, Cr. P.C. is proved. It is another matter that after a gap of about 10 years when this time she appeared before the Court to give substantive statement she was a more grown up lady and by that time had also performed another marriage with another person as has come in evidence and, probably due to this she was bound to deny the contents of her earlier statement lest she may be ridiculed to have consented to go with Appellant Ram Asrey on her own sweet will at that time. Therefore, when she was asked about her earlier statement she simply evaded the question by saying that she does not remember as to what statement she had given. But it is difficult to believe because she remembers all other things and tried to give out each and every detail of her tutored version in respect of alleged incident. She also took the pretext of fear for deposing before the Magistrate. But she did not make it clear as to from which fear she was suffering. In fact after the alleged recovery she was given in the custody of her father only. Before the learned Magistrate she gave entire statement in favour of the accused-Appellant and did not mention anything about the remaining accused persons.

9. Therefore, the story of enticing away on the ground of performing her marriage or taking her away from the guardianship of her father and mother did not inspire confidence. It also becomes doubtful from the manner of the incident as has come in evidence of the prosecutrix herself. First of all she is said to have gone on that particular day early in the morning at about 4 a.m. to ease out because of some pain in her stomach. That means that usually she was not supposed to go for easing out so early. Therefore, unless the Appellant Ram Asrey or his alleged associates had some inclination given by the prosecutrix herself, there was no reason for them to have met heraat bout 4 a.m. in the field to entice her away. Though according to her mother and father all the three were sleeping that day outside their house on separate cots but according to her all of them were sleeping inside the house. Similarly it has come in evidence that the place of occurrence was hardly 100 yards from her house but she did not raise any alarm allegedly due to fear although none of the four accused (the original F.I.R. was against four persons) had any weapon in their hands. She was taken on a bicycle from that place up to Bus stop. Even at that time she also did not shout or raise any alarm. When she reached along with them at the Bus stop there were about 4 persons waiting for the Bus but at that time also she did not raise any alarm or try to run away. After she boarded the Bus with Ram Asrey Appellant the rest of the accused went back from there. Then Appellant Ram Asrey took her from one village to another. She used to go by sitting on the back of bicycle or travelling in tempo with other passengers but there also she never told anything to anybody or tried to run away. It is law of the nature that somehow or the other truth ultimately comes on the surface. In the present case also one of the prosecution documents reveals the real fact. This document is copy of G. D. dated 27.8.1991, time 3.25 p.m., of Police Station, Utraula, distt. Gonda (Ext. Ka-11). This G. D. speaks about addition of Section 376, I.P.C., when the girl was found to be habitual of sexual intercourse. It also mentions about the statement of the girl under Section 164, Cr. P.C. The significant thing which is mentioned in this G. D. is that after getting her statement recorded under Section 164, Cr. P.C. the girl

refused to go with her parents. It is further mentioned that the girl expressed her desire to go with Appellant Ram Asrey. ..

10. As defined under Sections 359 and 361, I.P.C., kidnapping from lawful guardianship or minor girl under 18 years of age, if female, is required to be proved. But in the instant case, as has been discussed above, the girl was 18 years of age and at least a reasonable doubt is created in this regard on the basis of prosecution evidence itself. Even if a girl, though a minor, is at the verge of attaining majority and accompanies the accused all along, it is quite apparent that she has her own desire to be the wife of the accused. In such circumstances no inference can be drawn that the Appellant-Ram Asrey or his associate Atwari were guilty of taking away the girl out of the keeping of her father. The Hon'ble Supreme Court in the case of ***S. Varadrajan v. State of Madras MANU/SC/0081/1964 : AIR 1965 SC 942***, upon which reliance has been placed from the side of the Appellants, has laid down that there is distinction between 'taking' and 'allowing to accompany a person'. The expressions are not synonymous. It cannot be laid down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purpose of Section 361, I.P.C. Where the minor lady leaves her father's protection knowing and having capacity to know the full import of what she was doing voluntary joins the accused person, the accused cannot be said to have taken her away from keeping of her lawful guardian. The Hon'ble Apex Court emphasized that something more has to be shown in a case of this kind that is some kind of inducement held out by the accused persons or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would 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. If evidence to establish one of those things is lacking, it is not legitimate to infer that the accused is guilty of taking the minor out of keeping the lawful guardian merely because after she has actually left her guardian's house, joined the accused and the accused helped her in her desigm ot 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. But that part 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". In the present case even if the girl is taken to be minor then also the aforesaid evidence is lacking in respect of both the Appellants. Therefore, ine ither of the situation, i.e., if she was 'minor' or 'major' the prosecution has failed to bring home both the charges, i.e., Sections 363 and 366, I.P.C.

11. Now conviction under Section 376, I.P.C. of the Appellant -Ram Asrey remains to be considered. At the outset it was mentioned that in her medical examination it was found that vagina admitted two fingers easily but neither any tear nor any laceration was found present. In the vaginal smear report also no spermatozoa was found. It may be recapitulated that in her statement under Section 164, Cr. P.C. (paper no. Ka-17) she clearly stated to have gone with Ram Asrey on her own choice but categorically denied any rape upon her by Ram Asrey or anybody else. She also stated about going with Ram Asrey and staying in two villages at the place of his relatives but according to her Ram Asrey did not do anything wrong with her. Ram Asrey and his parents were agreeable to perform her marriage with Ram Asrey. When confronted with her aforesaid earlier statement she evaded the question and merely took pretext of the memory loss. It is true that she came to give her substantive statement after about 10 years of the alleged incident and this time she supported the prosecution version which is opposed to her earlier statement under Section 164, Cr. P.C. As noted before she has now married another person and has

attained more maturity. Therefore, she supported the prosecution version lest she may be looked upon by her husband to be a lady of easy virtues who had gone on her own with accused Ram Asrey 10 years before. Though she admitted to have given statement under Section 164, Cr. P.C. before the Magistrate but expressed her inability to recapitulate the contents of her earlier statement. Thus, her evidence does not inspire confidence and it would not be safe to place any credence on her statement and on the basis of her statement alone it would not be safe and proper to deprive the Appellant Ram Asrey of his personal liberty by convicting and sentencing him to jail. Unfortunately he has already undergone a period of about 3 years. First of all the alleged commission of rape is not established beyond reasonable doubt. Secondly, even if intercourse took place between the two, it was probably with her consent. Some of the following factors are indicative of the same:

(i) Going out on the pretext of easing out due to stomach pain without informing her father and mother at an unusual time, i.e., 4 a.m. in the early morning.

(ii) Travelling on bicycle and tempo etc. without making any noise or protest or resistance

(iii) Living with Ram Asrey for about 2-1/2 months in different villages

(iv) Stating everything in favour of Ram Asrey in her statement under Section 164, Cr. P.C. but subsequently denying it under compulsion of present married life

(v) The doctor finding nothing in her medical examination suggestive of rape or intercourse.

12. Finally, therefore, the charge under Section 376, I.P.C., against Appellant Ram As rey was not established beyond reasonable doubt.

13. In the result both the appeals were allowed. The conviction and sentence of the Appellant Ram Asrey and Atwari under Sections 363 and 366, I.P.C., were set aside. Further, the conviction and sentence of Appellant Ram Asrey under Section 376, I.P.C. was also set aside. They were acquitted of the aforesaid charges. As they are on bail, they need not surrender. Their bail bonds were cancelled.

25. Kumari Shabnoor (Minor) D/o Mohammad Tahseen vs. State of U.P. through Chief Secretary (Home) and Ors., 2007 2 AWC1719

Vinod Prasad, J.

1. This Habeas Corpus Petition has been filed by Mohammad Tahseem, father and Guardian of Km. Shabnoor (Minor) praying for issuance of a writ, order or direction in the nature of Habeas corpus directing respondent No.2 and 3 to produce the victim Km. Shabnoor (Minor) before this Court on a particular date and release her from the illegal custody of respondents No. 4 to 8. It has further been

prayed that a writ order or direction may be issued to the respondents to hand over the custody of petitioner Km. Shabnoor (Minor) forthwith to her natural guardian Mohammad Tahseem, the petitioner who is her father.

2. The brief facts as are averred in this petition are that Km. Shabnoor is the daughter of Mohammad Tahseem and is a minor. Km. Shabnoor (minor) was a regular student of Primary Pathshala, Agwanpur, Block Parikshitgarh, District Meerut and had studied there upto class IIIrd. After her admission in class 4th she left going to school, Her date of birth as is mentioned in school leaving certificate is 10.4.1994 which has been filed as annexure No. 1 to this petition. According to Mohammad Tahseem also she is a minor. On 12.5.2006 Smt. Kausar and Km. Lubana took away Km Shabnoor along with them and thereafter she was kidnapped by Rizwan, Zaheed, Mehmood, Shaheed, and Wakeel, who all are arrayed as respondents' No. 4 to 8 in this petition. The petitioner made an endeavour to lodge a report for the said abduction of his daughter by the aforesaid persons with the police but it yielded no results. At last he approached the Magistrate through an application, under Section 156(3) Cr.P.C, on 5.6.2006, seeking his direction to the police to register his FIR and investigate the offences. His said application was registered as Misc. Case No. 119 of 2006. On 15.6.2006 Judicial Magistrate IInd Meerut, ordered for registration and investigation of the case on his said application vide annexure No. **2** to this petition. Pursuant to the said order a FIR was registered against the accused on 17.6.2006 as crime number C- 8 of 2006 for offences under sections 363. 366. 120B, 504, 506 IPC at PS Parikshitgarh district Meerut Vide annexure No. 3 to this petition. Even after registration of the FIR the police did not recover the victim Km. Shabnoor who was allegedly kept in illegal confinement by respondents' No. 4 to 8. Respondents No. 4 to 8, on the contrary started threatening Mohammad Tahseem, the father, therefore he filed an application to the higher police officials on 28.6.2006(Annexure No. 4) but that too was a futile effort, Being disillusioned by the police and their inaction in recovering his daughter the petitioner filed this habeas corpus petition in this Court with the prayers mentioned above. On 18th July 2006, this Court issued notices to respondents' No. 4 to 8 to file counter affidavit and also directed them to produce Km. Shabnoor, the victim in this Court. Respondents 4 to 8 appeared in this Court through Sri Amit Daga, advocate on 23.8.2006 and prayed time for filing counter affidavit. How ever they did not produce Km. Shabnoor on that date before this Court. On their request 11.9.2006 was fixed for the said purposes .and the respondents were also directed to produce the victim in this Court on the date so fixed in pursuance of the earlier order passed by this Court. On11.9. 2006 the respondents filed a counter affidavit and also produced the corpus of Km. Shabnoor in the court. Her statement was recorded by this Court in open court which forms the part of record of this petition. The said statement is signed by Shabnoor, the victim. This petition thereafter was listed on 20.9.2006 when a rejoinder affidavit was filed and this Court ordered for verification of the school leaving certificate (Annexure No. 1) which was filed along with the petition. The verification of the said certificate was received to this Court from the court of CJM, Meerut vide his letter dated 5.10.2006. The said report is appended with five other papers which include report of police station Parikshitgarh dated 31.10.2006, Certificate by Principal of Primary School Agwanpur, Meerut dated 3.10.2006, Letter dated 4.10.2006 of the BSA, Meerut addressed to CJM, Meerut, Letter dated 3.10,2006 of ABSA, Meerut and photo copy of the school leaving certificate issued by the said school which is annexure No. 1 to this petition. These reports in six leafs are on record and they directed to form the part of the record of this petition.

3. In the counter affidavit filed by Shabnoor, the victim and the alleged abductee, on behalf of respondents' No. 4 to 8 it has been averred by her that she is major aged about 18 years and her date of birth is 2.1.1988. Respondent No. 4, Rizwan is also major aged about 21 years and his date of birth is - 5.2.1985. In para 4 of the said counter affidavit it is averred by her that both of them are illiterate persons and so can not bring any document relating to their date of birth. It is also averred that both of them are the resident of the same locality- Mohalla Sher Khan, village Agwanpur District Meerut and hence they knew each other since long and were in love with each other. Both of them because of said love decided to live with each other as married couple as per Muslim customs and rituals. For the said purpose both of them left the house in the first week of May 2006 and went to Delhi were they were advised to perform a court marriage to which they agreed, Then they came to know that for the solemnization of court marriage they require a age certificate. For the said purpose they contacted Dr, Raman Khurana who after conducting x-ray and other necessary tests gave them a age certificate by opining that her age is above 18 years. The said certificate by Dr. Raman Khurana, dated 3.6.2006, is annexed as CA 1 to the counter affidavit. Thereafter the relatives of and all the near and dear ones of both of them advised them to perform *Nikah* as per Muslim customs and rituals. On 3.6.2006 they both contracted *Nikah* in New Delhi which was performed by a *Kazi* namely Maulana Kazi Abdul Salam Kazmi. The photo copy of *Nikah Nama* is filed as annexure CA 2 to the counter affidavit. Since after the marriage the couple is residing happily as husband and wife in Seelampur Colony, New Delhi. It is further averred that father of Shabnoor Mohammad Tahseem knew about the love affair between the two and only when he came to know about the marriage between them that he lodged the FIR mentioned above only to harass the two of them. The registration of the FIR under the direction of the Magistrate against respondent No. 4 and others as has been mentioned above is admitted in the counter affidavit though it is said that the same was lodged for harassment. It is further the case of respondents that as soon as the deponent Shabnoor came to know about the said FIR she filed an application along with an affidavit before the concerned Magistrate on 16.6.2006 (Annexure No. CA 5) that she is a major and that she had married with respondent No. 4 on her own accord and sweet will and the allegations of the complaint is absolutely baseless. However her application was rejected by the Magistrate as not maintainable on 16.6.2006 itself, Because of the FIR the police started harassing them and other relatives therefore Shabnoor, Rizwan, Km. Lubna, Smt. Kausar, Zaheed, Mehmood, Shahid, and Wakeel filed criminal Revision No. 3315 of 2006 Rizwan v. State of UP and Ors. and challenged the order dated 15.6.2006 passed by Magistrate for registration and investigation of the case on which notices were issued to respondent No. 2 (Mohammad Tahseem) on 29.6.2006, fixing 11.9.2006 and it was further directed to the police not to harass the revisionists in that revision. The copy of' this order is annexure No. CA 6 to the counter affidavit. It is further averred in the counter affidavit that to avoid any complications the couple applied for a marriage certificate at Meerut which is still pending and they were advised to get a age certificate from CMO, Meerut which they obtained on 21.7.2006 vide annexure No. CA 7 to the counter affidavit. With these facts the averments made in the Habeas Corpus petition are denied with reiteration of the above defence in reply.

4. In the rejoinder affidavit filed by the petitioner the averments made in the counter affidavit are denied and the facts mentioned in the writ petition are reiterated.

5. The controversy in this Habeas corpus petition lay in a narrow compass as the only two questions which required determination are those as to whether Shabnoor is major or not? And secondly whether her *Nikah* with respondent No. 4 Rizwan is legal or not? If she is major then according to her statement

she had married with respondent No. 4 Rizwan on her own free will and so her *Nikah* with him will be legal and justified according to Muslim law and she is entitle to live with respondent No. 4 Rizwan. If she is not major and at the time of *Nikah* the fact of her age was not in the knowledge of *KAZI* then her *Nikah*, in absence of any proof of her age before *Kazi*, was not in accordance with Muslim law as she was incapable of contracting marriage being minor and hence she cannot be allowed to live with respondent No. 4 a gainst the wishes of her guardian (Father) Mohammad Tahseem, who is her natural and legal guardian. But before cogitating over the merits of the petition a brief sketch of the relevant laws.

6. Thus from the two texts quoted above it is clear that unless a person has attained the age of majority according to the law to which he is subject, Muslim Law in the present case, he can not enter into any contract on his own even though it is a contract of marriage. Muslim marriages being a contract also require, for a valid marriage, that both the parties, if they are contracting marriage on their own, have attained the age of majority, which according to the Book by Maulana Muhammad Ali - *THE HOLY QURAN*, is eighteen years. Under the Contract Act, as well as under the Muslim Law any marriage by a person who has not attained the age of eighteen years, is not a valid marriage and is null and void which literally means that no marriage at all has taken place between the spouses. On such an exposition of law, now, the present petition has to be decided.

7. I have considered the submissions raised by both the sides. In this case some facts are not in dispute. They are that Shabnoor is the daughter of Mohammad Tahseem. It is also not in dispute that both the parties are Muslims governed by *Shariat law*. The only bone of contention is regarding age of Shabnoor and validity of her marriage with respondent No. 4. So far age is concerned in this respect the school leaving certificate filed by father was got verified by the court through CJM, Meerut and his report. Which is on record indicates that the said school leaving certificate is genuine and is not a sham document. In that certificate the date of birth of Shabnoor is recorded as 10.4.1994. The father Mohammad Tahseem has also averred the same date of birth. Thus I don't find any reason to disbelieve the said certificate. On the contrary, according to the respondent's case Shabnoor did not know her date of birth and she was informed of her date of birth by her father and uncle. So far as the two medical reports which are the sheet anchor of respondents case are concerned it is difficult to place any reliance on them for the simple reason that annexure CA 1 is bereft of scientific data on which the opinion of Dr. Raman Khurana is based and secondly it can not be said that the said report is related with Shabnoor as the name mentioned therein is Shabnoor Khanam which does not find place any where in the pleadings of both the parties and even in her counter affidavit Shabnoor has not mentioned her name as such. More over the medical report does not contain any identification marks or any other feature to relate the said report with Shabnoor daughter of Mohammad Tahseem. Further it is extremely doubtful that Shabnoor had in her possession the said medical report before she contracted her marriage as she, in unequivocal terms has stated before this Court that she did not produce before *KAZI* any certificate of her date of birth or any medical certificate at the time of contracting marriage. Mad Shabnoor or Rizwan, respondent no 4 been in possession of the same they would have produced it before the *Kazi* at the time of marriage as the same was obtained for the said purpose only. So far as the second medical report Annexure No. CA -7 is concerned the same was obviously obtained after the marriage is alleged to have been contracted by Shabnoor with Rizwan. This is the pleading in para 12 of the counter affidavit. This medical report (annexure CA 7), according to the pleadings made in para 12 of the counter affidavit, was obtained to avoid complications. Thus this medical report also can not be believed and it seems that the same was

obtained to avoid the arrest and cover up the void marriage and give it a shape of a valid marriage according to Muslim customs and rites. Admittedly theses two medical reports were not furnished to the *Kazi* who got the marriage contracted. This all creates a doubt regarding genuineness of the said medical reports filed along with the counter affidavit. Thus on the basis of the two medical reports produced by respondents it can not be said that Shabnoor is a major and at the time of her marriage she had attained the age of majority. Contrary to it the case of the father is consistent and more probable. Hence I am of the view that Km.Shabnoor is not major and she had no right to enter into wed lock with Rizwan, respondent No. 4. Her marriage is against the mandate of Muslim law as is spelt out herein before. It is the moral duty of every Muslim to follow the teachings of *Islam*. She being minor would have been given in marriage only by her father or guardian and she had no right to contract the same on her own free will. She is declared to be a minor.

8. Resultantly, this habeas corpus petition deserves to be allowed. The petitioner Mohammad Tahseem, the father, is entitled to have the custody of his daughter Km. Shabnoor and respondents Nos. 4 to 8 Rizawan, Zahid, Mahmood, Shahid, and Wakeel deserved to be restrained from interfering with the life of Km. Shabnoor.

9. Consequently, this Habeas corpus petition is allowed. Km, Shabnoor, the petitioner, daughter of Mohammad Tahseem resident of Mohalla Sher Khan, Village Agwanpur PS , Parikshitgarh District Meerut is directed to be taken out of the illegal custody of respondent No. 4 Rizwan respondent No. 4 forthwith and be handed over to her father petitioner Mohammad Tahseem forth with and further respondents No. 4 to 8 namely Rizawan son of Liaquat Ali, Zahid son of Shabbir Khan Wakeel son of Sanif all resident of Mohalla Sher Khan, Village Agwanpur PS Parikshitgarh District Meerut, Mahmood son of Anwar Khan, and Shahid son of Mahmood both residents of village Palwada, PS, Sayana District Meerut, are restrained from interfering in the life of Km. Shabnoor aforesaid in any manner what so ever, however, the parties were to bear their own costs.

10. With the aforesaid direction, this Habeas Corpus Petition is allowed.

26. ***Manoj Kumar Gupta S/o Sri Vijay Kumar Gupta vs. State of U.P. through Principal Secretary, Ministry of Home, U.P. Government and Ors., 2007 2 AWC1780***

Vinod Prasad, J.

1. This Habeas Corpus Petition has been filed by Manoj Kumar Gupta son of Sri Vijay Kumar Gupta, Resident of Village and Post Haldi, P.S. Haldi, District Ballia, presently residing at Malli Bazar, Police Station Malli Bazar, District Namachi, and South Sikkim.

2. The averments, which have been made in this Habeas Corpus Petition, are that Smt. Asha Gupta, respondent No. 6 (wrongly described as respondent No. 7) is the legally wedded wife of the petitioner Manoj Kumar Gupta and their marriage was solemnized on 5.5.2005 according to Hindu customs and rights at Malli Bazar, South Sikkim. Smt. Asha Gupta, respondent No. 6 after the marriage went along

with the petitioner and started living with him as his wife with full pleasure and love. Father of Smt. Asha Gupta, namely, Ashok Kumar Gupta, respondent No. 5 brought back Smt. Asha Gupta, respondent No. 6 to his house at Ballia on the pretext of her serious illness. The petitioner approached Ashok Kumar Gupta many times to send Smt. Asha Gupta but respondent No. 5 all the times made excuses and did not send her. On 11.6.2006 Vijay Kumar Gupta, father of the petitioner along with other respectable persons requested respondent No. 5 Ashok Kumar Gupta to send Asha Gupta to her husband on which a condition was put forth by Ashok Kumar Gupta respondent No. 5 that if he (Vijay Kumar Gupta) deposits Rs. ten lacs in the name of his daughter Smt. Asha Gupta and transfer some portion of his land in her name only then she will be sent. It is further averred in the petition that the petitioner are four brothers and he is the eldest amongst them and therefore, the land cannot be transferred in the name of Smt. Asha Gupta. It is also averred that Ashok Kumar Gupta respondent No. 5 is pressurizing the petitioner to come and live at Ballia but that is not possible as the petitioner's birth and all educational had taken place in Sikkim and only there he can arrange for a job for him as he is an un-employed youth. He will face great hardship in residing at Ballia as he is not accustomed to social and cultural life of Ballia. The further averment is that petitioner had a very sweet relation with respondent No. 6 and from their marital relationship; Smt. Asha Gupta had become pregnant also. The further averment of the petitioner is that Smt. Asha Gupta is ready to go with the petitioner to live with him in Malli Bazar, South Sikkim but her father Ashok Kumar Gupta is an impediment in such an effort. It is further mentioned that respondent No. 5 is pressurizing respondent No. 6 to get aborted and in that event the petitioner will lose the first child. When all the efforts made by the petitioner proved futile to bring back his wife, he approached District Authorities at Ballia for resolving the matter and had also sent letters and representations to the District Magistrate, and Superintendent of Police Ballia on 26.6.2006. (Annexure no 1 and 2) The District Administration did not help the petitioner. It is further averred that respondent No. 5 has no right to restrain and detain illegally his wife Smt. Asha Gupta respondent No. 6 and respondent No. 5 is acting illegally and unconstitutionally. The petitioner has averred that the rights guaranteed to him and to his wife under the Constitution are being infringed and curtailed by respondent No. 5. Since the petitioner did not have any other alternative remedy he filed the present habeas corpus petition in this Court.

3. Ashok Kumar Gupta respondent No. 5 had filed a counter affidavit on his behalf as well as on behalf of respondent No. 6 Smt. Asha Gupta, his daughter wherein he stated that the petitioner is an accused under Section 494, 495, 498 I.P.C, at Police Station Kotwali, District Ballia as at the time of marriage with respondent No. 6 the petitioner was already married to one lady Teena Gurang daughter of Padam Bahadur Gurang, resident of Dara Gaon, Post Tadang Bazar, District Gangtok, East Sikkim. He further alleged that in the marriage he had given dowry of Rs. One lac, he had filed copy of the F.I.R. of Police Station Kotwali, District Ballia. He had also filed the marriage certificate of the petitioner along with Teena Gurang, to the counter affidavit which indicates that Manoj Kumar Gupta, the petitioner was married with Teena Gurang on 25.2.2005 before Tandra Mittra, Marriage Officer, and Village Balakova. Respondent No. 5 also filed the marriage card of the marriage of the petitioner with his daughter, which indicates that the marriage between petitioner and respondent No. 6 was solemnized at Ballia. The said marriage invitation card is from the petitioner's side. He had also filed the letter written by respondent No. 6 on 13.6.2005 which indicate that the petitioner's family were demanding a dowry of Rs one lac and respondent No. 6 was also assaulted for the same and she had showed the danger and apprehension to her life. The said letter is annexure No. 4 to the counter affidavit.

4. Under the orders of this Court respondent No. 6 Asha Gupta had appeared before this Court on 30.10.2006 and her statement was recorded in open court. In her statement she had clearly stated that she was a graduate from S.C. College, Ballia. She had married with the petitioner Manoj Kumar Gupta, who is present in Court. At the time of marriage neither she nor her family members were informed that Manoj Kumar Gupta was already married. Her marriage was solemnized on 5.5.2005 at Ballia. Six days after the marriage she came to know that the petitioner was already married. She does not want to live with the petitioner as he was already married.

5. Manoj Kumar Gupta, the petitioner also accepted the fact, on enquiry being made by the court that he had married with Teena Gurang in the month of February 2006 and the same year in the month of May 2006 he had marriage with respondent No. 6 Smt. Asha Gupta. He had admitted that he had not sought any divorce from Teena Gurang and she had left the marital company of the petitioner and never came back. There is nothing on record to suggest or even to indicate nor is there any pleading that any divorce, customary or otherwise, took place between petitioner Manoj Kumar Gupta and his first wife Teena Gura

6. I have considered the submissions raised by both the sides. It is an admitted case of both the sides that both the parties are Hindus and are governed by the Hindu Marriage Act 1955 (Act No. 25 of 1955). Section 5 of the said Act lays down conditions for a valid Hindu Marriage. It provides that:

> ***Conditions for a Hindu marriage-*** A marriage may be solemnized between any 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 lime 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 an extent as to be unfit for marriage and the procreation of children; or*
> >
> > *(c) Has been subject to recurrent attacks of insanity*
>
> *(iii) The bridegroom has completed the age of [twenly-on years] and the bride, the age of [eighteen years] at the lime 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;*

7. Thus from the above mentioned Section it is clear that a marriage between any two Hindus can be solemnized only when the condition mentioned in (i) to (v) of the above section are fulfilled. It is to be

reminded that the Hindu marriage is sacrosanct. To be a valid marriage between the two Hindus the conditions laid down in Section 5 of the Hindu Marriage Act has to be fulfilled which is the sine -qua-non for it, The very first condition (i) provides that neither party has a spouse living at the time of marriage. Since rest of the conditions in this habeas corpus petitions are not relevant and germane to the controversy at hand therefore, I am not referring them in any detail. Admittedly, in this case the petitioner was married to Teena Gurang and he had not sought any divorce from her. She is also not reported to be dead or missing since more that seven years as to presume her lifelessness. Thus the marriage of the petitioner with the said Tina Gurang still subsists. Consequently the marriage of the petitioner with respondent No. 6 Smt Asha Gupta was not valid marriage and was void and illegal.ng.

8. Section 11 of the Hindu Marriage Act relates with void marriages. It provides that any marriage solemnized after commencement of Hindu Marriage Act shall be null and void for the reasons mentioned there under.

9. Section 17 of the Hindu Marriage Act provides for punishment for bigamy.

10. Reverting to the present case, in view of Sections 5l, 1 and 17of the Hindu Marriage Act it is abundantly clear that the marriage between the petitioner Manoj Kumar Gupta and Smt. Asha Gupta was null and void because petitioner Manoj Kumar Gupta had a living spouse Teena Gurang to whom he had married just three months prior to the solemnization of marriage with respondent No. 6 Asha Gupta and he had not sought any divorce from her. This was in the breach of condition (i) of Section 5 of Hindu Marriage Act. Once the marriage of Manoj Kumar Gupta, the petitioner, with respondent No. 6 Asha Gupta is null and void, he cannot be considered to be a legally wedded husband of respondent No. 6. A marriage, which is null and void, does not confer any right on any of the spouses as husband and wife. The term 'null and void' means in essence ‘have got the effect of no marriage at all’. The word 'void' literary means 'state of non-existence'. Thus, the marriage of the petitioner with respondent No. 6 never existed in the eyes of law. In such a state of affair the petitioner has no right to pray for a writ of Habeas Corpus from this Court, as he was not the husband of respondent No. 6 at all much less to say a legally wedded husband. In the habeas corpus petition the petitioner has very dexterously concealed this important aspect of the matter in the pleading that he was already married to Teena Gurang three months prior to the solemnization of marriage with respondent No. 6 and that he had not sought any divorce from her. This material concealment of fact goes a long way to show the intention of the petitioner. The petitioner has also concealed the fact of lodging of a case against him as Crime No. 6/2006 registered on 5 1.2006 at Police Station Kotwali, District Ballia. He had filed the Habeas Corpus Petition on 11.7.2006 after a gap of six months from the filing of F.I.R. The petitioner has further wrongly stated the fact that his marriage was solemnized at Sikkim whereas, in fact, as is clear, that the marriage was solemnized at Ballia in U.P. on 5th May 2006. All these facts are material concealment of fact. More over respondent No. 6 was tortured for demand of dowry as well which is clear from her letter filed along with the counter affidavit.

11. Respondent No. 6, Smt. Asha Gupta also had admitted in this Court that she was not in an illegal detention and she has stated in open Court that she does not want to live with the petitioner as he was already married. The court already held that the marriage between the petitioner and respondent No. 6 was no marriage in the eyes of law and was null and void. Since respondent No. 6 Smt. Asha Gupta

according to her statement given in Court, was not detained illegally by her father, respondent No. 5 but was living according to her own will with him that the question of issuing of writ of Habeas Corpus does not arise at all. It is not a case of illegal detention and therefore, the relief claimed in the instant petition by the petitioner cannot be granted to him. As a matter of fact the present habeas corpus petition is not maintainable at the behest of the petitioner Manoj Kumar Gupta who was not the legally wedded husband of respondent No. 6 Smt. Asha Gupta.

12. Now coming to the question of compensation which has been argued by counsel for the respondent in this case. As has been discussed above the petitioner has made intentional concealment of relevant facts which was not only relevant and germane for deciding the controversy but where absolutely essential to be mentioned. The petitioner has ruined the life of a young girl, at the prime of her youth, in connivance with his parents and his family members. She has been devoid of the marital happiness and the most cherish moments of life which a legally wedded wife desires. By his suppression and concealment of fact he has diminished the joys of respondent No. 5 and 6 as well as of her family members. Respondent No. 5 who is the father had to suffer huge economic loss worth rupees lacs and the severe ignominy in society. The blemish, which has been implanted on the girl and her family, is unredeemable. Such an act cannot be easily excused and the family who has been disgraced and the lady respondent No. 6 Asha Gupta who has been subjected to unimaginable agony must be suitably compensated. In this view of the matter, the court directed that the petitioner and his father will pay a compensation of Rs. 3 lacs to respondent Nos. 5 and 6 over and above Rs. 5000/-, which has been deposited by the petitioner in this Court for summoning respondent No. 6. If the petitioner and his father failed to pay the said compensation to the respondents Nos. 5 and 6 within the stipulated period then C.J.M. Ballia is directed to realize that the said compensation as arrears of land revenue from the estate, movable and immovable property, of the petitioner Manoj Kumar Gupta and his father.

13. Summing up this habeas corpus petition was not maintainable and was dismissed with costs. A copy of the order was sent to CJM, Ballia for his intimation and action.

27. Rahul alias Chunmun vs. State of U.P. and Ors. 2007(2) ACR2164

Amar Saran and R.N. Misra, JJ.

1. We have passed an order on 14.2.2007 directing the Petitioner, Rahul alias Chunmun, to produce the girl Radha today (29.3.2007). Respondent No. 4, Raj Kumar Sharma was also allowed to be present today. However, although Radha and Rahul alias Chunmun were present in the Court but Raj Kumar Sharma, Respondent No. 4, has chosen not to appear.

2. The allegation in the F.I.R. at Case Crime No. 896 of 2006 under Sections 363/366, I.P.C., P.S. Kotwali Nagar, district Bulandshahr, lodged by Respondent No. 4 on 27.11.2006 were that the relations of the informant's mama (maternal uncle) Prabhu Dayal Sharma including Rahul, son of Prabhu Dayal Sharma, used to visit their house. On 17.11.2006, Radha, aged about 16 years, had gone for tuition at 5 p.m. and she did not return. On enquiries from the neighbors and relations it was learnt that at 7 p.m. she

had been seen going away with the Petitioner on a bus headed for Meerut. They were seen by some other relations who did not object because Rahul was a relation of the informant. It was further alleged that the Petitioner had enticed away the girl by deceitful means; hence the report was lodged under the aforesaid sections.

3. On 12.12.2006 an interim order was passed in this case staying the arrest of the Petitioner on the ground that the victim had wrongly been shown a minor in the F.I.R. whereas she was a major as per her High School certificate and her date of birth was 23.3.1987. The date of birth of the Petitioner Rahul alias Chunmun was 1.11.1985. A marriage certificate was also annexed. An application was also given by Radha to the S.S.Po n 4.12.2006 wherein she annexed her High School certificate and certificate of marriage to Rahul on 28.11.2006 and claimed to have voluntarily married Rahul because her brother and other family members wanted her to marry a person twice her age and were unduly pressurizing her for that purpose.

4. We are not impressed by the vague denial of Respondent No. 4 that "at the best of knowledge of the deponent" the said High School certificate was forged as the Petitioner has filed a copy of the document in this writ petition as well as before the S.S.P. concerned. He would realize the consequence of filing a forged document. In case, at any stage the said document is found to be forged, action can always be taken against the Petitioner or any other person guilty of forging the same. From appearance also, Radha appears to be over 18 years in age. Moreover, it is stated by the learned Counsel for the Petitioner that she is pregnant.

5. Another objection raised by learned Counsel for Respondent was that Radha could not marry Rahul alias Chuhmun as he is her maternal cousin brother and the same would be hit by the provisions of Section 5 of the Hindu Marriage Act as being within the prohibited degrees.

6. We are not called here to decide on the question of the void or voidable nature of the claimed Marriage of Radha with Rahul alias Chunmun. If two consenting adults decide to live together, in our view, no offence of kidnapping under Section 363/366; I.P.C. is disclosed irrespective of their marital or non-marital status.

7. In this view of the matter, this writ petition succeeds and is allowed and the F.I.R. above mentioned and all consequential proceeding therein are quashed.

28. Smt. Alam Kaur W/o Shri Dharamvir Singh and Dharamvir Singh son of Late Ram Chandra Singh Vs. State of U.P. and Ram Naresh Chaudhry S/o Sri Sher Singh, Decided on: 26.04.2007, MANU/UP/0547/2007

Vinod Prasad, J.

1. In the present case the progenitors turned destroyers of the nuptial life of their own daughter Komal Singh because to them virtuosity of clan, caste and status is more sacrosanct than the love of their own daughter in this ephemeral life.

2. The four revisionists in these two connected criminal revisions - Smt. Alam Kaur and Dharamvir Singh, and Monu @ Kuldeep and Sandeep Chaudhari, have challenged their summoning order passed by Chief Judicial Magistrate, Ghaziabad in State v. Monu @ Kuldeep and Ors. under Sections 363/ 366 / 102B IPC (relating to crime number 412 of 2005).Since both the revisions arises out of the same criminal case and in both the same impugned order has been challenged therefore both these revisions were directed to be clubbed together and both are being disposed of by this common order.

3. The genesis of the factual matrix lies in the love between Sandeep Chaudhari, son of revisionists Smt. Alam Kaur and Dharam Veer Singh with Komal Singh, daughter of respondent No. 2 and culmination of the same into marital relationship between the two on 5.6.2005 in district Chandausi, UP. in the temple of Lord Shiva according to Hindu customs and rites. Various photos of the marriage are annexed as annexure 1 to the affidavit filed in support of this revision. The newly wed also got their marriage registered on 14.7.2005 with the Registrar of Marriages, Moradabad which is annexure No. 2. Both bride and the bride groom belong to the same caste Jats. In Criminal Revision No. 259 of 2006 the revisionist No. 1 is the real brother of the aforesaid Sandeep Chaudhari revisionist No. 2. How ever the marriage of Komal Singh became an eyesore to her father Ram Naresh Chaudhari, respondent No. 2. who lodged a FIR, annexure No. 3 on 19.7.2005 at 8.15 p.m. at police station Kavi Nagar District Ghaziabad, for offences under Sections 363, 366, 506 IPC against Smt. Alam Kaur, her husband Dharamveer, the two Revisionist, and their sons Sandeep @ Kallu and Monu, mentioning that he is the resident of Raispur District Ghaziabad and on 12.7.2005 the accused have enticed away and abducted his minor daughter Komal Singh aged about 16 years and 3 months whose date of birth was 31.3.89 in their Maruti car No. UP 14 H 7074 with golden colour with black window panes. Her daughter had left the house with cash of Rs. 48000/- along with 9-10 Tolas of ornaments and after that he is receiving threats. The FIR of respondent father was registered as crime No. 412 of 2005.

4. It transpired from the affidavit filed in support of this revision that when Komal Singh aforesaid came to know of the said FIR, she filed a complaint case, Komal Singh v. Ram Naresh Singh and Others under Sections 323/504 IPC in the court of CJM, Moradabad on 29.8.2005 against her father Ram Naresh Singh and her two uncles Kishanvir and Sudhir. She alleged in her complaint that she is residing with her husband Sandeep Kumar Chaudhari who had got the business of interior decorator. Her father wanted to get her married with a middle aged person of 45 years of age to which she was not agreeable and therefore she married with Sandeep Chaudhari on her own sweet will and got her marriage registered in Moradabad on 14.7.2005. (Annexure No. 2). Annoyed by her wedlock her father and uncles collected a *Panchayat* on 21.7.2005 and became *Panchas* themselves along with two other relatives as *Panchas* and without giving her any opportunity of hearing passed order for annihilating her and her husband and since then she is living in district Moradabad. She was not endeavouring to enter her parental village because of fear that she and her husband will be burnt alive as in district Muzzafar Nagar and Meerut many such incidents of killing love married couples had occurred. She had made many complaints to the police as well. She also mentioned that she is intermediate pass from CBSE Board and she can look after her

welfare well. She further alleged that her father had lodged a false FIR against her husband on 28.8.2005. On the occasion of *Krishna Janmashtami*, her father and aforesaid two uncles even tried to abduct her from Shiv Temple situated at Ram Ganga Vihar, Civil Lines, Moradabad but because of presence of large crowd they failed in their attempt. In endeavouring her abduction she was slapped and abused also by them. She prayed that the accused be summoned and be punished. In her statement recorded on 29.8.2005 itself, under Section 200 Cr.P.C, she disclosed her age to be 19 years and repeated her version mentioned in the aforesaid Complaint and stated that she was tried to be abducted in an Indica car on gun and pistol points.

5. Apprehension of being arrested by the police compelled the couple to file Criminal Misc. Writ Petition in this Court arraying father as respondent No. 2 and praying for quashing of the FIR and stay of arrest. A division bench of this Court stayed the arrest of the petitioners (The couple) in that writ petition on 8.9.2005 after hearing Komal Singh in person. On 2.12.2005 both the rival sides Komal Singh and Sandeep Chaudhari the petitioner's side and Ram Naresh Chaudhari and his wife Smt. Urmila Devi for the respondents appeared in this Court in that writ petition and the parents of the Komal Singh gave an under taking that they will not interfere in the marital life of Komal Singh vide annexure No. 10 to the affidavit. The said writ petition was, however finally disposed off on that day by this Court.

6. Ram Naresh Singh, father of Komal Singh not being satisfied filed habeas Corpus Writ petition in this Court being Habeas Corpus Writ petition, Ram Naresh Singh v. Sandeep Chaudhari where in this Court ordered for the medical examination of Komal Singh for determination of her age by Chief Medical Officer Allahabad who reported that Komal Singh was aged about 19 years and hence on 6.1.2006 the said habeas Corpus Petition was dismissed by this Court.

7. However the police in the FIR lodged by Ram Naresh Singh submitted a charge sheet on 24.11.2005, against the revisionists in the court of Chief Judicial Magistrate, Ghaziabad for offences under Sections 363, 366, 506, 120B IPC, on the basis of which CJM Ghaziabad took the cognizance on 28.11.2005 and criminal Case was registered against the revisionists in his court in which on the same day the Chief Judicial Magistrate Summoned the revisionists and fixed 20.1.2006 for their appearance, hence these two criminal revisions challenging the summoning order.

8. During the course of hearing of these revisions it was stated by the counsel for the revisionist that Komal Singh is living with Sandeep Chaudhari as his wife and she is in a family way therefore both, the parents and the couple, were directed to appear in person in this Court for settlement between themselves if possible as the dispute was matrimonial between parents and daughter and her husband. Komal Singh on the date so fixed, 24.1.2007, appeared along with her husband and her parents also appeared in this Court. Komal Singh stated before the court that she had married with Sandeep Chaudhari on her own accord and she is aged about 20 years and has studied up to class 12^{th}. She also expressed her desire to go along with her husband who had come to the High Court along with her. Her statement was taken down which has been signed by her as well.

9. I have considered the arguments of both the sides and have gone through the record of both the connected revisions. It is born out from the record and also from the submissions of the parties that it is not in dispute that Komal Singh is the daughter of respondent No. 2 Ram Naresh Singh. It is also not in dispute that She has married with Sandeep Chaudhari who is the son of revisionists in Criminal Revision

No. 173 of 2006 and brother of Revisionist Monu @ Kuldeep one of the two revisionist in Criminal Revision No. 259 of 2006. It is also not in dispute that in Criminal Misc. writ Petition No. 9329 of 2005 Komal Singh v. State of U.P. and Ors. Her father Ram Naresh Singh was respondent No. 4. It is also not disputed that in the aforesaid writ petition Komal Singh appeared along with her husband Sandeep Chaudhari one of the revisionist and she had made a statement that she was major aged about 19 years and her medical examination report indicated that she was pregnant. She had also made a statement that she had married with Sandeep Chaudhari according to her own wish. She had also filed a criminal case against her father and uncles with the allegations that she was major and had married with Sandeep Chaudhari on her own accord as her father wanted to get her married with an elderly person of 45 years of age and in her that complaint case she had mentioned her age to be 20 years in her statement under Section 200 Cr.P.C. recorded by the Magistrate. It is also not in di spute that Ram Naresh Singh had filed Habeas Corpus Writ Petition No. 59522 of 2005 claiming custody of her in which both the sides appeared in person and were heard in person as well. It is also not disputed that the said Habeas Corpus Petition was dismissed on 6.1.2006 and that order of dismissal of Habeas Corpus Petition became final as the counsel for the respondent did not argue that the order passed in that habeas Corpus petition was challenged in the Apex Court at any point of time. From such facts it is clear that the detention of Komal Singh with revisionist Sandeep Chaudhari was not declared to be illegal and respondent No. 2 failed in his attempt to get the custody of Komal Singh. Further from the order passed in Criminal Misc. writ Petition it leaves no doubt that arrest of accused in crime number 412 of 2005 was stayed by this Court. The said order is referred to below:

Amitava Lala, J. The matter was placed yesterday i.e. on 1 st December, 2005 when the petitioner contended before this Court for quashing of F.I.R. lodged on 19.7.2005, under Sections 363, 366, 506 I.P.C., P.S. Kavi Nagar, District Ghaziabad. Further prayer is made not to arrest her.

Learned counsel appearing for the respondent No. 3 in presence of Sri Ram Naresh Singh, father of the girl and Smt. Urmila, mother of the girl, in this Court contended that they have apprehension that the girl (the petitioner) is not alive or somewhere taken. Therefore, there was lot of hue and cry before the Court and the mother of the girl started crying on such apprehension.

Learned Government Advocate contended before this Court that charge sheet has been filed, but he is not specific regarding such submission without instruction.

Under such circumstances, the matter was directed to be placed today (2.12.2005) to produce the girl before this Court with the help of the police. The girl has been produced before the Court accompanied by her husband. The parents of the girl met with her separately pursuant to the direction of the Court. Thereafter, the father of the girl has made an allegation against the girl about the past incident which he hided till this date. He also said that he facing problem in the society for this girl's activities. The girl said before the Court that she is aged about 19 years. According to Sri Viresh Misra, learned Senior Counsel appearing for the petitioner, she has already been medically examined by the Chief Medical Officer, Ghaziabad, which report says that her age is above 19 years. According to school leaving certificate, which has been shown by learned Counsel for the complainant, her date of birth is 31st March, 1989. However, there is no scope of passing any order in respect of the facts hereunder except recording the above statements.

Learned Government Advocate contended before this Court that charge sheet has already been filed and cognizance has been taken. Photocopy of the charge sheet has been placed before this Court which is kept with the record. Therefore, no further order is needed to be passed with hope and trust on the assurance of the parents, who are present herein that they will not disturb the peaceful life of the petitioner and both the parties will co-operate with the Investigating Officer in further, if any. If any further order is required, prayer/s can be made before the Bench taking the Habeas Corpus Writ Petition No. 59522 of 2005. However on the basis of the consensus as arrived by the parties and their Advocates the boy and girl will be sent to their respective places, from where they have taken by the police. Presently on the basis of the statement as made by the learned Government Advocate himself, the arrest of the petitioner is stayed for a period of eight weeks, within which period she will apply for bail in connection with Crime No. 412 of 2005, under Sections 363, 366, 506 I.P.C., P.S. Kavi Nagar, District Ghaziabad.

With the above observations and order, the writ petition is disposed of without imposing any costs.

10. It has further been held in the same judgment as follows:

> The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission, for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum, e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his ' behalf was void as he was minor. A court of law for the purpose o f determining the age of a party to the lis, having regard to the provisions of the Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecution although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

11. I am also taking the above view because to me the whole prosecution of the revisionist seems to be mala fide and illegal.

12. Resultantly both the above criminal revisions Criminal Revision No. 173 of 2006 Smt. Alam Kaur another v. State of U.P and Anr. AND criminal Revision No. 259 of 2006 Monu @ Kuldeep and Anr. v. State of U.P. and Anr. are allowed and the impugned order of summoning dated 28.11.2 005 passed by Chief Judicial Magistrate, Ghaziabad in case No. 10940 of 2005, State v. Monu @ Kuldeep and Ors. Under Sections 363/ 366 /120B, IPC (relating to crime number 412 of 2005) is hereby quashed.

29. Smt. Pooja Arya @ Tabassum Bano wife of Santosh Kumar Daughter of Sri Amanat Ali and Santosh Kumar son of Sri Narhey Lal Vs. State of U.P. through Home Secretary, Superintendent of Police and Station House Officer, Police Station Kotwali Dehat, AIR2006All60

V.M. Sahai and Barkat Ali Zaidi, JJ.

1. A Hindu boy, one of the petitioners got married to a Muslim girl (the other petitioner) who created a furore in the local communities, which is of course nothing unusual, in the prevailing social scenario. In cases like these, the Law Enforcement Authorities usually buy peace at the cost of the constitutional rights and privileges of citizens of this country. They pander to the sentiments of the illiterate masses which comprised the major part of our communities in order to maintain peace. They fail to realize that they are thereby rendering the constitutional rights of individuals nugatory and redundant.

2. The real role of the Law Enforcing Agencies is to protect and preserve the rights of individuals guaranteed by our paramount parchment, and, to deal with an iron hand all those persons, who want to decimate and demolish those privileges.

3. As usual, this did not happen in this case, and the police was trying to dislodge and undo even the Marital-tie between the two of them. The Court held that the police must be emphatically asked to refrain their doing so. They are free citizens of this country and they have a right to marry according to their own wishes, of course if they have attained the age of majority. Their sacrosanct privileges should not be allowed to be rendered non-functional.

4. As the question whether the boy and the girl are major or not, they have filed affidavits about the same, in which they have given their age as being above 18 years. There is no counter affidavit and there seems no reason, for the court to disbelieve them, and at this stage to demand any evidence about the same. Both appeared before the Court and have unequivocally stated that, they are major and have married to their own free will. There is no reason, for the court, not to accept their statements.

5. Accordingly, the police was directed, not to interfere in the matrimonial life of the petitioners, and to provide an appropriate protection to them, as and when necessary.

6. Writ is issued accordingly.

30. Syed Sadab Hasan son of Syed Mahmood Hasan and Smt. Beena Mishra alias Zeenat Parveen wife of Syed Sadab Hasan Vs. State of U.P. through its Secretary, Home Department, Station House Office and Smt. Bindu Mishra wife of Dinesh Mishra, Writ Petition No. 799 of 2006, Decided on: 6.3.2006.

Amitava Lala and Shiv Shanker, JJ

1. The petitioner no. 2, the girl, is produced before this Court by the police. Dispute arose previously in connection with her age, hence, the Court directed to go for ossification test by an order dated 24.1.2006.

Thereafter, other problem arose in connection with the appropriate ossification test by the Chief Medical Officer, Varanasi when the Court was pleased to direct that the same is to be done by the Chief Medical Officer, Allahabad. A controversy arose about her arrest by the police officer during the interregnum period in view of non-validity certified copy of the order. The learned Govt. Advocate explained that formally she has not been arrested. There was a communication gap. However, in view of earlier direction, the Police Officer is present before this Court along with the girl.

2. From the ossification test, as placed before this Court, we find that the age of the girl is 18 years…

3. In all the cases one point has been categorically stated that once the girl become major she has her own right to stay as per her will and she cannot be protected even by sending her to any home i.e. Nari Niketan etc. The guardians, as prayed by learned Counsel appearing on behalf of the complainant, cannot be allowed, to keep her. Since Mr. A.N. Mulla, who is not appearing in the present case for either of the parties, is directed by the Court to act as friend of Court in asking question to the girl- where she wants to go? She categorically said that she wants to go with her husband. Learned Counsel appearing for the complainant also contended that document of marriage is not valid document. At this stage, we do not want to go in to such controversy. The controversy should be resolved in the following manner.

4. The Investigating Officer will complete the investigation of Case Crime No. 234 of 2005, under Sections 363 and 366 I.P.C., P.S. Chetganj District Varanasi, within a period of three months from the date, on which a certified copy of this order is presented before him. The petitioner/s is/are directed to co-operate with the Investigating Officer in all possible manner. If the Investigating Officer or informant found himself aggrieved due to falsification, misstatement, fraud, non-cooperation with the Investigating Officer or any other reasons whatsoever relevant for the purpose; they are at liberty to apply for recalling/variation/vacating/modification of the order.

5. However, the petitioner/s will not be arrested in the aforesaid case crime number till the submission of chargesheet/final report, if any.

6. Accordingly, the writ petition stands disposed of.

7. However, no order is passed as to costs.

31. Madhu Priya Singh vs. State Of Uttar Pradesh, II (2003) DMC 294

M Katju, R Tripathi J.J.

1. This writ petition has been filed for a mandamus directing the respondent Nos. 1, 2 and 3, State of U.P. through Home Secretary. The District Magistrate and Senior Superintendent of Police, Basti to protect

and safeguard the petitioner's life and liberty, and restraining them as also respondent No. 4 from harassing or victimizing the petitioners.

2. In para 4 of the petition it is stated that the petitioner No. 1 Madhu Priya Singh was born on 13.12.1981 and thus she is about 22 years of age. Her High School Certificate showed her date of birth as 13.12.1981 is Annexure 1 to the writ petition. The petitioner No. 1 has done her B.Sc. (Home Science) in 2001, and copy of her mark sheet is Annexure 2 to the petition. She has also done one year's computer course and was working as a Counseller at the Aptech Computer Training Institute, Basti.4. It is stated in para 7 that the petitioner No. 2 was born on 16.5.1979, and thus, he is about 24 years of age as per the High School Certificate. He has done his B.Com./Bachelor of Journalism and Mass Communication from the University of Allahabad and was working as Sub-Editor in Amar Ujala, Kanpur. The petitioners were of different castes. While the petitioner No, 1 was Kshatriya (Thakur) by caste, the petitioner No. 2 was a Brahmin by caste. However, owing to the difference in their castes, the father and family of petitioner No. 1 were resolutely opposed to the marriage of the petitioners and they have threatened the petitioner with dire consequences. The petitioner No. 2 was threatened with loss of life and limbs if he did not detach himself from the petitioner No. 1. The parents of petitioner No. 1 were planning to marry her to a boy, whose family was based in Rewa, Madhya Pradesh against her wish, and hence she quietly slipped away on 25.7.2003 and contacted petitioner No. 2 and they left Basti to get married of their own free Will by Arya Samaj rites and now they are husband and wife.

3. It is alleged in paras 17 to 20 that they went to Arya Samaj, Krishna Nagar, Prayag and got married by Arya Samaj rites and now they are husband and wife. However, they have been threatened as stated in paras 22 to 25 of the writ petition and hence they have filed this writ petition.

4. Sweeping revolutionary charges are taking place in Indian society today. While in the traditional Indian society, marriage of a boy and girl was arranged within the same caste and same religion, now these feudal barriers .are breaking up, particularly in the younger section of the society. This Court approved this trend as it is in the national interest.

5. We regret to say that the authorities seldom take any action in the matter even when reported to them and thereby they abdicate their duty to uphold the law. A large number of such cases have been reported particularly from western Districts of U.P. e.g. Meerut, Muzaffarnagar etc. e.g. where a Jat boy wanted to marry a Harijan girl, and both were killed by their own family members or members of their castes and this was regarded honour killing. Such incidents widely occur in Pakistan, but we will not tolerate such acts to take place in our country with impunity. 'Honour' killing is nothing but cold blooded, brutal and ghastly murder, and there is nothing honourable about it. Those who are found guilty of committing it must be given death sentence by the Court, treating it as rarest of the rare cases.

6. The petitioners were both majors and there was no dispute that they were voluntarily living with each other, even though they were of different castes. Hence the Court said that “nobody can interfere with their lives. Hence we direct the authorities to see it that nobody harasses or interferes with the petitioners' lives in any manner and if anyone does so strong action has to be taken against that person.

7. Since a large number of petitions of this nature e.g. petitions relating to inter-caste and inter-religious love marriages are coming before us, we have expressed our views on this matter strongly so that everyone in the State knows that how to conduct themselves with regards to such matters. The administrative and police authorities must see to it that anyone who threatens or attacks or intimidates or confines a major who wants to marry outside the caste or religion is prevented from doing so and criminal proceedings are instituted against that person.

8. This writ petition is therefore allowed with the above directions. The presence of the Principal, Home Secretary, and D.G.P. are dispensed with. However, they are directed to issue circulars to all the District Magistrates, Senior Superintendent of Police/Superintendent of Police in the Districts of U.P. enclosing copy of this judgment, and direct its strict compliance.

32. Jyoti Alias Jannat and Anr. Vs. State of U.P. and Ors., 2003 (4) AWC 2844

M Katju, R Tripathi, J.J.

1. The petitioners as well as the mother of petitioner No. 1 have appeared before us.Petitioner No.1 is a major as is evident from her High School Certificate which showed that her date of birth is 20.7.1984. Thus, she was over 19 year of age. According to the provisions of the Indian Majority Act, 1875, a person who is 18 years of age is major vide Section 3 of the said Act. The law deems that a major understands his/her welfare. Hence a major can go wherever he/she likes and live with anybody. This is a free, democratic, and secular country. Hence, if a person is major even parents cannot interfere with that individual.

2 .Under the facts and circumstances of this case, the writ petition was allowed. A mandamus was issued to the respondents not to harass or threaten the petitioners and allow them to live peacefully with each other. The Senior Superintendent of Police, Agra and Superintendent of Police, Firozabad, will ensure compliance of this order.

3. The petitioners have stated that they need security to go from here to Firozabad as they have apprehension about their safety. The Court Officer of this Court will contact the local police for providing security to them at Allahabad and for their journey to Firozabad. Further, the petitioners shall be provided security at Firozabad, by the police authorities concerned, there

33. Smt. Shahana alias Shanti vs. State of U.P. and Ors., 2003CriLJ3438

U.S. Tripathi and D.P. Gupta, JJ.

1. The petitioner has filed this petition for issue of a writ, order or direction in the nature of habeas corpus commanding the respondents to set her at liberty immediately and a writ, order or direction in the nature of mandamus commanding the respondent No. 2 to produce her before this Court,

2. It is alleged by the petitioner that she is the wife of Damodar Das with whom she married in the month of February, 2002 with her own free will and she changed her name as Shanti and started living with her husband. After her marriage with Damodar Das she conceived and is in a family way. The petitioner went to her parental place in the month of May, 2002 where she was beaten and threatened with dire consequences for marrying a Hindu boy. She was asked to severe all her relations with Damodar Das. When she refused to do so, she was assaulted and threatened that her husband would be sent to jail. However, the petitioner escaped from her parental house and reached her in-laws place on 18-8-2002 and after some time she started living at Pilibhit. Thereafter, her father, uncle, and brother along with some other relatives came to the house of petitioner and scolded her saying that she had lowered down their image and reputation. They tried to forcibly take her away, but she was saved by the neighbours. The petitioner along with her husband went to the police station to lodge report of the occurrence, but her report was not written by the police. She was very much disappointed and, shocked. Then she filed a complaint against the accused persons, which was registered as Case No. 1543 of 2000 under Sections 323: 304: 504 and 452, IPC and got her statement recorded under Section 200, Cr. P.C. before the Additional Chief Judicial Magistrate II, Pilibhit. The father of the petitioner lodged a FIR against her husband under Sections 363, 366 and 376. IPC. In the said case her husband was released on bail on 1-11-2002. The petitioner was detained by the police and therefore her father-in-law made an application before the Additional Chief Judicial Magistrate, VII, Bareilly in connection with Case Crime No. 335 of 2002 under Sections 363: 366 and376, IPC, P.S. Nababganj, district Bareilly and also made an application for the custody of the petitioner. The A.C.J.M. VII, Bareilly passed an order on 30-9-2002 summoning the petitioner fixing 30-10-2002. However, on the request of father-in-law of the petitioner the case was fixed for 7-10-2002 and thereafter on 8-10-2002. On 8-10-2002 the Magistrate passed an order directing the police to set the petitioner at liberty to go to place of her choice. Father and brother of the petitioner filed revision against the order of the Magistrate before Sessions Judge. The Revisional Court stayed the order of the Magistrate and the petitioner is languishing in Nari Niketan where she had been tortured and beaten.

3. A counter-affidavit was filed by Km. Tahira Begum, In-charge Assistant Superintendent, Nari Niketan, district Bareilly deposing that the petitioner was admitted in Nari Niketan by the order of the Court and she had not been tortured or ill-treated.

4. In the case of Parvati Devi v. State of U. P. 1982 (19) ACC 32 : 1982 ALJ 115, where the mother of Smt. Parvati Devi lodged a report under Section 366, IPC against Jokhu alleging that he had enticed away Smt. Parvati Devi, who was a minor girl. The police arrested Jokhu and also recovered Smt. Parvati Devi from his house and produced Smt. Parvati Devi before the Judicial Magistrate, Handia and prayed for appropriate orders for her custody. The Magistrate took steps to obtain medical report with regard to age of Smt. Parvati Devi and directed that in the meantime she be kept in the Nari Niketan, Khuldabad, and Allahabad. On the above act it was held that the confinement of Smt. Parvati Devi in Nari Niketan, Khuldabad, and Allahabad against her wishes could not be authorised either under Section 97 or under Section 171, Cr. P.C. The resp ondents failed to bring to the notice of the Bench any legal provision where

under the Magistrate has been authorised to issue direction that a minor female witness shall, against her wishes, be kept in Nari Niketan.

5. Thus, in the instant case, the Court observed that the Magistrate had directed the petitioner to be released and to go to place of her choice. However, a revision was preferred against the said order and the Revisional Court directed detention of petitioner in Nari Niketan. Bareilly. Undisputedly, the petitioner is not an accused in any offence. Assuming that her age is about 17 years she cannot be detained against her will as provisions of Sections 97 and 171, Cr. P.C. do not justify detention of the petitioner. No other provision has been shown under which the petitioner could be detained against her wishes. Therefore, we are of the view that detention of the petitioner in Nari Niketan Bareilly is illegal and order directing her detention passed by the Sessions Judge; Bareilly in Criminal Revision No. 605 of 2002 being against law is quashed. The respondent No. 2, Superintendent, Nari Niketan Bareily is directed to release the petitioner forthwith to go to place of her choice.

34. Bobby & Anr. vs. State of UP & Ors. 2002 Cr. L. J. 2227

S.R. Singh and R.K. Dash, JJ.

1. These two petitioners arraigned as accused for the offence punishable under Sections 363 and 366 I.P.C. in case crime No. 321 of 2001 P.S. Sirsaganj District Firozabad have filed this writ petition under Article 226 of the Constitution seeking quashing of the FIR and restraining the police to arrest them in the aforesaid case. The prosecution case as borne out from the FIR , is that on 12th November, 2001 Km. Sangeeta aged about 14 years daughter of Sanjeev Kumar, the informant had been to market during day hours but did not return. A search was made in course of which two persons namely; Sunil and Shivkant disclosed that they had seen Sangeeta going with the present petitioners. The informant made a written complaint to the police on the basis of which, the aforesaid case has been registered under Sections 363 and 266 I.P.C.

2. The case of the petitioners as stated in the writ petition is that the informant, father of Sangeeta was tenant under their father and both the families had cordial relationship. Both Javed Khan and Sangeeta were intensely lovelorn which drove them to a marriage. According to the petitioner, the marriage was performed on 15th November, 2001 and 'Nikahnama' was executed accordingly. Besides, on the legal advice both of them entered into a written agreement admitting marriage and this agreement was preceded by a certificate issued by the Chief Medical Officer, Etah who upon examination certified. Sangeeta was aged about 19 years.

3. In a case under Sections 363 and 366 I.P.C., determination of age of the victim girl is one of the main factors to bring home the charge to the accused. It is, therefore, the duty of the investigating officer to get the victim girl examined by the doctor by way of ossification test and in that process no one can complain the identity of the girl.

4. Taking all the above aspects into consideration, we are of the view that issuance of such certificate by the Chief Medical Superintendent, Etah (annexure-3) either on asking of Sangeeta or Bobby alias Javed Khan, petitioner No. 1 amounts to interference with the process of investigation. We, therefore, feel it expedient to give the following directions to be followed before issuing age certificate of a girl if asked for:

i) That as and when an application is filed by a girl or anybody else on her behalf for issue of age certificate, the Chief Medical Officer/Superintendent concerned shall ask for an affidavit of the applicant indicating the necessity of such certificate and whether any report has been made to the police alleging kidnapping/abduction;

ii) That the police station under which the girl usually resides with her parents shall be noticed to inform as to whether any case has been registered alleging kidnapping/ abduction of the girl;

iii) That the parents and in their absence near relations of the girl shall be noticed at the expense of the petitioner to appear at the time of medical examination. If it is reported by the police that on the basis of a complaint, FIR has been registered under Sections 363 and 366 I.P.C. or for any other offence, the Medical Officer shall refuse to examine the girl and issue certificate of age.

5. The directions as aforesaid shall be strictly followed by all the Medical Officers of the State and any violation thereof may entail serious consequence. The Principal Secretary of Health Department, Government of U.P. is directed to communicate this judgment to the Chief Medical Officers/ Chief Medical Superintendents for compliance.

6. Coming to the present case, we are of the considered opinion that the FIR in case crime No. 321 of 2001 P.S. Sirsaganj District Firozabad under Sections 363 and 366 I.P.C. cannot be quashed. It is, however, provided that arrest of the petitioners shall be stayed for a period of six weeks from today within which they shall produce Km. Sangeeta before the Investigating Officer who shall get her medically examined by way of ossification test for ascertaining her age besides recording her statement under Section 161 Cr.P.C. On receipt of the medical report, the investigating officer will be free to proceed with the investigation in the manner as provided under law.

7. With the above observation and direction, the writ petition stands finally disposed of. Registry is directed to send a copy of this judgment to Principal Secretary, Health Department, and Government of U.P. for compliance.

35. Shamsher Alam vs. State of U. P, 2002 Cr.L J. 3588

Binod Kumar Roy and R.C. Deepak, JJ.

1. The petitioners have come up with a prayer to quash the First Information Report dated 24-1-2002 giving rise to registration of Case Crime No. 53 of 2002,P.S. Kotwali Mau, District Mau, under Sections

363/366/506, I.P. C. (as contained in Annexure 1) by granting a writ of certiorari. Their second prayer is to command the Police not to arrest them in relation to Criminal Case aforementioned. Their last prayer is to issue any other writ, order or direction of suitable nature which may be deemed fit and proper.

2. A perusal of the impugned First Information Report shows, inter alia, that respondent No. 3 herein Jafrul Hasan lodged a written report on 24-1-2002 to the effect that her daughter Kumari Rumi Parveen, who is a student of II year B.A. of Degree College Talimuddin Niswaj Mau in the morning of 10th January, 2002 had gone out for her studies along with her friends Nasreen and Pinki but she did not return back to home after closure of the school and then an enquiry was made on which it transpired that while returning from the School, petitioner No. 1 herein Shamsher Alam alias Sheru son of Ziyaul Hasan, Ansar Ahmad Son of Hafiz, Ikramul Son of Mohd.Mustafa alias Lali all residents of Mohalla Pathan Tola and petitioner No. 2 herein Mohd. Sahid son of Mushtaq Ahmad resident of Bans Ki Masjid had enticed and kidnapped her away on a Tata Sumo vehicle; that in the act of kidnapping of his daughter, Ikramul and Mohd. Sahid had also associated, and thus the requesf or registration of a First Information Report and taking steps for safe recovery of his daughter.

3. The petitioners assert, *inter alia,* that the entire case set up is absolutely false and concocted, as a matter of fact Rumi Parveen, who was born on 7-7-1980 meaning thereby is 22 years of age, was major, who of her own accord and free will without any pressure or threat, married petitioner No. 1 under Muslims rites and customs after the marriage, the couple came up to Mau; respondent No. 3, after having come to know of the Nikah felt annoyed as it was solemnized against his wishes; on account of intervention of some respectable persons and relatives of the petitioners, the matter was pacified and respondent No. 3 accepted her marriage, however, on 24th January 2002, respondent No. 3 at the behest of the persons, who are inimical to the petitioners, approached the Police…

4. On 18-2-2002 we had passed the following order:

…Miss Rumi Parvin to appear in the Court of the Chief Judicial Magistrate, Mau and make her statements before the Court, which after its recording shall be transmitted to this Court while retaining a copy of the same by the Chief Judicial Magistrate, Mau.

…we restrain the Police from coercing the petitioners pursuant to the impugned First Information Report dated 24th January, 2002 giving rise to registration of Case Crime No. 53 of 2002, under Sections 363, 366 and 506, I.P.C., P.S. Kotwali (Mau), District Mau till further orders to the contrary.

5. The facts speak for themselves and need no further reiteration or detailed comments of ours. According to the stand taken by the respondents in their respective counter-affidavits, it is crystal clear that Rumi Parveen was born in 1980. Thereby admittedly she was major on the alleged date of occurrence. She is a College going student. She has every right to take an independent decision in regard to performance of her marriage to lead her life as per her own wishes. From her averments on the record, it is clear that she of her own sweet will, after having fallen in love with petitioner No. 1, had performed Nikah with petitioner No. 1.

6. From a conjoint in depth reading of the aforementioned Article it is clear that the Constitution guarantees its citizens freedom of expression, who can meet peaceably, but without arms, and move freely, reside and settle throughout the country. Thus petitioner No. 1 and Rumi Parveen both have the aforementioned freedoms.

7. None of the ingredients constituting the offences described in Sections 363 and366 prima facie are found in the impugned F.l.R. in view of the moot issue that Rumi Parveen being major was not under the guardianship of her father and that she had left the paternal home and had married petitioner No. 1 of her own free will. The remaining allegations in the F.I.R. that once the boys that threatened to kidnap the girl, in view of our findings, does not even prima facie constitute the committal of the offence under Section 506 of the Indian Penal Code.

8. Accordingly, vested with powers under Article 226 of the Constitution of India and upholder of the freedoms guaranteed under Articles 19 and 21 of the Constitution, we quashed the First Information Report aforementioned since it contained wrong facts and command the respondents not to interfere with the life and liberties of the petitioners and Rumi Parveen.

Let a writ of certiorari and a writ of mandamus issue accordingly.

36. Smt. Kamlesh and another, Petitioners vs. State of U.P. [2002 Cr. L. J.3680]

S.R. Singh and R.K. Dash, JJ.

1. This writ petition has been filed seeking quashing of first information report in Case Crime No. 155 of 2001, under Sections 363/366, I.P.C.. Police station Zarif Nagar, district Badaun. A report was lodged by Vinay Kumar, respondent No. 4 complaining that his sister Km. Kamlesh, aged 15 years had been to the school, to prosecute her study, but did not return home. He made a search during which two persons, namely, Natthu and Ram Mohan informed him that they had seen her going with Dinesh, petitioner No. 2 towards Dharampur. When her whereabouts could not be traced, he lodged report for taking appropriate legal action against petitioner No. 2. On the basis of the aforesaid report, the police registered a case sprang into action. Petitioner No. 2 in order to avoid arrest has filed the present writ petition arraying Km. Kamlesh as a co-petitioner.

2. The case of petitioner No. 2 is that Km. Kamlesh was major being aged 19 years and both were intensely in love which drove them to marriage. They got their marriage registered before the Registrar of Marriages, Ghaziabad on 20.8.2001. The fact that Km. Kamlesh was major by the time she left her parental home is certified by the Chief Medical Superintendent, Rampur. In view of such fact, it is urged that Km. Kamlesh having entered into marriage tie with him on her freewill, no offence under Sections363/366, I.P.C. can be said to have been made out against him and, therefore, aforementioned first information report should be quashed in exercise of extraordinary Jurisdiction under Article 226 of the Constitution.

3. The informant, respondent No. 4 has filed his return traversing the allegations made in the writ petition. He has asserted that at the time of incident. Km. Kamlesh, his sister, was minor being aged 15 years and this gains support from the school living certificate, Annexure-CA-1. The plea taken by petitioner No. 2 that Km. Kamlesh was 19 years of age is untrue and the medical certificate filed in support thereof has been procured for the purpose of this case.

4. It has become a common feature that as soon as report is lodged with the police that a minor girl has been kidnapped, the kidnapper in connivance with District Medical Officer or any other Government doctor procures certificate that the girl is major and armed with the said certificate, he approaches the Court seeking judicial intervention in the matter of investigation by the police. When the girl's father, mother, or any other relative has made specific allegation in the first information report that she is minor, it is the statutory duty of the police to proceed with the investigation in the manner as provided in law. The Court should be slow to interfere in the functioning of the police except in an appropriate case where there is convincing and undisputed material to show that girl is major and prosecution has been launched with mala fide intention.

5. As stated that, there are two versions, one by the informant, respondent No. 4 that Km. Kamlesh was minor being aged 15 years and in support thereof he relies upon the copy of school leaving certificate and the other by petitioner No. 2 that she was major being aged 19 years and in support thereof he relies upon medical certificate issued by the Chief Medical Superintendent, Rampur.

6. Needless to say that, it is the duty of the Investigating Officer to get Km. Kamlesh examined by way of ossification test to ascertain her age. Besides, he is also required to collect other evidence, such as horoscope, school leaving certificate, and ocular version of the parents and other near relatives. Till now, the Investigating Officer has not been able to get Km. Kamlesh medically examined in view of the interim order passed by the Court restraining police to arrest the petitioner No. 2 in whose custody she is expected to be. In that view of the matter, no implicit reliance can be placed on the medical certificate produced by petitioner No. 2 and quashes the first information report at the threshold.

7. It may be noted, doctor's opinion about the age of Km. Kamlesh is not conclusive as provided under Section 45 of the Evidence Act. It is opinion evidence and, therefore, its probative value can be judged along with other evidence.

8. In view of the discussions made above, the court felt not inclined to quash the first information report in Case Crime No. 155 of 2001, under Sections 363/366, I.P.C., police station Zarif Nagar, district Budaun in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India and directed that petitioner No. 2 to produce Km. Kamlesh before the Investigating Officer within two weeks hence in order to enable him to get her medically examined by way of ossification test to ascertain her age.

9. In the result writ petition fails and the same is dismissed.

37. Smt.Takabul Jahan and Ors. vs. State of U.P. and Ors., 2002(2)ACR1177

Binod Kumar Roy and R.C. Deepak, JJ.

1. The Petitioners have come up with a prayer to quash the first information report dated 19th February, 2002, lodged by informant-Respondent No. 3, who is father of Petitioner No. 1, giving rise to registration of Case Crime No. 263 of 2002, P. S. Asmoli, district Moradabad, under Sections 363 and 366, Indian Penal Code, against Petitioner Nos. 2 to 4 appending its copy as Annexure-4 to this writ petition, asserting, that Petitioner No. 1 is major and has married Petitioner No. 2, they being in love, in presence of witnesses, advocate and molvi on 20.2.2002 at New Delhi as per the Muslim customs, who had also sworn affidavits before the Notary and filed them before S.D.M., Parliament Street, New Delhi and that since Respondent No. 3, the father of Petitioner No. 1 did not agree, hence he lodged the first information report in order to harass them and on account of frustration.

2. A perusal of the impugned first information report showed, inter alia, that the informant Bhura [Respondent No. 3 herein] alleged to the effect that his daughter Km. Takabul (Petitioner No. 1) is aged 14 years, who has been enticed away by the remaining Petitioners.

3. In paragraph 5 of this writ petition, it has been asserted to the effect that the date of birth of Km. Takabul is 30.12.1980. The affidavit accompanyingt his writ petition asserts that this statement is based on information received without disclosing who the alleged informer was, and whether the alleged information was given in writing and/or otherwise.

4. The Petitioners had also brought on record Medical Certificate dated 5.3.2002 granted by the Chief Medical Officer, Moradabad. The Court found that the doctor found the numbers of her teeth to be 11/14, who has not stated in regard to presence of axillary hair and pubic hair on her person, though he has opined that she is about 19 years.

5. As per the decision of the Apex Court in ***Jaya Mala v. Home Secretary, Government of J. & K***., AIR 1982 SC 1297 (Paragraph 9), there can be a margin of error of two years on either side in ascertainment of age on the basis of radiological examination.

6. It is not possible for us to place reliance on the affidavit dated 20th February, 2002 of Petitioner No. 1, for several reasons:-Firstly, in paragraph 2 she has stated her date of birth as 30.12.1980 declaring aforementioned statement as true to the best of her knowledge and belief. She has not disclosed therein as to how she had knowledge of the fact that she was born on 30th December, 1980. Her second affidavit is of the same date wherein she asserts that her true and actual date of birth is 30.12.1980 again asserting that this statement is true and correct to the best of her knowledge and belief. Surprisingly, she has also asserted in this affidavit that she does not possess any other documentary proof in support of her date of birth except this affidavit.

7. In the backdrop afore-mentioned, we are not in a position to hold Petitioner No. 1 major ignoring the affidavit of Petitioner No. 1 and the entries in the Family Register.

8. Consequently, this writ petition is dismissed but without cost.

38. Payal Sharma alias Kamla Sharma vs. Superintendent, Nari Niketan, Agra, and others, AIR2001All254.

M. Katju and R.B. Misra, JJ.

1. Petitioner Smt. Payal Sharma @ Kamla Sharma appeared before us and stated that she is about 21 years of age which is borne out from the High School certificate which shows that her date of birth is 10.7.1980. Thus, the Court said that, "Hence she is a major and she has the right to go anywhere and live with anyone. In our opinion a man and a woman, even without getting married can live together if they wish. This may be regarded immoral by society but it is not illegal. There is a difference between law and morality."

2. Since the petitioner is a major, we direct that she be set at liberty and she can go anywhere and can live with anyone as she desired. Petitioner further states that her life is in danger. The police will ensure her security. The petition is allowed.

ANDHRA PRADESH

39. Kokkula Suresh S/o Sri Narayana Vs. The State of Andhra Pradesh rep. by its Secretary, Home Department, The State Home for Girls rep. by its Director and Gaddam Gangaram S/o Sri Yellaiah, AIR2009AP52

G. Rohini, J.

1. This writ petition is filed seeking a declaration that the order dated 4.7.2008 passed by the learned Judicial Magistrate of First Class, Jagtial, directing to send the petitioner's wife by name Gaddam Sandhya to State Home for Girls, Nimboliadda, and Chaderghat, Hyderabad as arbitrary and illegal.

2. The petitioner states that he married Gaddam Sandhya, the daughter of the 3rd respondent herein, on 19.06.2008 as they liked each other. However, since the marriage was against the wishes of the 3rd respondent, he lodged a complaint in P.S. Dharmapuri on 20.06.2008 alleging that his daughter Sandhya was kidnapped by the petitioner. On the basis of the said complaint FIR No. 130 of 2008 was registered, and the petitioner and his wife Gaddam Sandhya were called by the Police for enquiry. Though Gaddam Sandhya categorically stated before the Police that she married the petitioner on her own and wanted to lead a happy married life with him and refused to go with her parents, the Police produced her before the learned Judicial First Class Magistrate, Jagtial, on 4.7.2008. When her statement was recorded

by the learned Magistrate, again she expressed her unwillingness to go to her father's house and reiterated that she voluntarily left her father's house along with the writ petitioner and that they got married. Having recorded the said statement, the learned Magistrate passed the impugned order dated 4.7.2008 sending her to the State Home for Girls, Nimboliadda; on the ground that she is a minor.

3. The said order dated 4.7.2008 is under challenge in this writ petition contending *inter alia* that though she is a minor, being the natural guardian, the petitioner/husband alone is entitled to her custody and therefore sending her to State Home is unwarranted.

4. As per Section 5(iii) of the Hindu Marriage Act, 1955, one of the conditions to be fulfilled for a Hindu marriage is that the bridegroom has completed the age of 21 years and the bride has completed the age of 18 years at the time of the marriage. However, the marriage, if any, solemnized in contravention of the said condition is not a void marriage under Section 11 of the Hindu Marriage Act. It is not even a voidable marriage under Section 12 of the Hindu Marriage Act. However, every person who procures a marriage of himself or herself to be solemnized in contravention of the said condition shall be punishable under Section 18 of the Hindu Marriage Act with simple imprisonment which may extend to 15 days or with fine which may extend to Rs. 1,000/- or with both.

5. Thus, it is clear that the petitioner's marriage with the daughter of the 3rd respondent cannot be held to be a nullity merely on the ground that the girl is a minor by the date of the marriage.

6. Coming to the provisions of the Hindu Minority and Guardianship Act, 1956, it is true that a person who has not completed the age of eighteen years is a minor and as per Section 6(a) of the said Act, the father is a natural guardian of a Hindu minor unmarried girl. However, as per Section 6(c) of the said Act, in the case of a Hindu minor married girl, the husband is the natural guardian in respect of the minor's person as well as in respect of the minor's property.

7. On a combined reading of Section 5(iii) read with Sections 11, 12 & 18 of the Hindu Marriage Act and Section 4(a) and Section 6(a) & (c) of Hindu Minority and Guardianship Act, 1956, the court found force in the submission of the learned Counsel for the petitioner that the petitioner who is the husband of 3rd respondent's minor daughter is her natural guardian and consequently her custody shall be with the petitioner.

8. A Division Bench of this Court in ***Makemalla Sailoo v. Superintendent of Police, Nalgonda District MANU/AP/0028/2006 : 2006(2)ALD290*** in identical circumstances held that the 3rd respondent therein was entitled to the custody of his wife, who was a minor girl of 13 years, since he was the natural guardian under the provisions of the Hindu Minority and Guardianship Act, 1956, and accordingly directed that the minor girl who was sent to State Home for Child-care Centre by the Magistrate shall be handed over to her husband, the 3rd respondent therein.

9. The r atio laid down in the above decision squarely applies to the present case. The petitioner's wife (daughter of the 3rd respondent) though a minor at the time of the marriage, in her statement before the learned Magistrate she had categorically stated that she voluntarily left her home along with the petitioner and that they got married and that she was not willing to go with her parents. As expressed above, since

the marriage between the petitioner and the 3rd respondent's daughter is not a void marriage or voidable marriage under the provisions of the Hindu Marriage Act, 1955, and since the writ petitioner being the husband is her natural guardian under the provisions of the Hindu Minority and Guardianship Act, 1956, the petitioner alone is entitled to have the custody of the 3rd respondent's daughter. Hence, the impugned order dated 4.7.2008 passed by the learned Judicial First Class Magistrate, Jagtial, sending the minor girl, to the State Home for Girls is erroneous and cannot be sustained.

10. Accordingly, the impugned order dated 4.7.2008 was hereby set aside and the Writ Petition was disposed of directing the respondents 1 and 2 to allow the minor girl namely Smt. Gaddam Sandhya to go with her husband, the Writ Petitioner. No costs.

40. S. Mahaboob Sharif Vs Jareena Banu and Ors. 2008(5) ALD519

Bilal Nazki, A.C.J. And Ramesh Ranganathan, J.

1. Earlier, we had directed that the boy and the girl, who are petitioners in the writ petition, be present in person in this Court. Today they appeared. The boy i.e., writ petitioner No. 2 contended that he was married to the girl, who is writ petitioner No. 1 and therefore he wanted to take the custody of petitioner No. 1. Originally, the writ petition had been filed for the purpose of quashing Crime No. 137 of 2007 of II Town Police Station, Proddutur, and Kadapa District, which was registered against writ petitioner No. 2. Without passing order in that writ petition, an order came to be passed by the learned Single Judge on 27th of November 2007 directing that the girl shall be lodged in a Home run by the Women and Child Welfare Department. This order is challenged by the father of the girl. Today, we examined the girl in the open Court, in which, she stated that she wants to go with her parents. Then the learned Counsel for writ petitioner No. 2 stated that the girl was under the pressure of her parents, therefore, she should be examined in-camera. We examined her in-camera and we also afforded an opportunity to writ petitioner No. 2 to have a conversation with writ petitioner No. 1. She accepted that she had voluntarily gone earlier with writ petitioner No. 2 and had stayed with him for a period of three months, but she denied that any registered marriage had taken place between the two. She also stated that she had gone with writ petitioner No. 2 with her own free will and he had not used any force, coercion or undue influence on her and had not kidnapped her.

2. Since the writ petitioner No. 1 is a major and her date of birth according to school certificate is 26th June 1988, therefore, she is free to choose the place where she wants to live. Therefore, the order of the learned single Judge is set aside and the writ petitioner No. 1 is at liberty to go anywhere she likes. Since the writ petitioner No. 1 made a statement that she was not kidnapped or was not taken away by writ petitioner No. 2 by force or deceit, the court felt that no further orders are necessary to be passed in the writ petition. The investigating agency shall take into consideration the statement made by writ petitioner No. 1 before this Court, while investigating the matter under Crime No. 137 of 2007 of II Town Police Station, Proddutur, Kadapa District.

Writ appeal and the writ petition were accordingly disposed of.

41. Makemalla Sailoo vs. Superintendent of Police and Ors, 2006(2) ALD290

Bilal Nazki and S. Ananda Reddy, JJ.

1. This is an unusual case in which a girl of 13 years claims to have married 3rd respondent. The petitioner was the father of the girl viz., Arpitha who was a student of 7th class. He contended in this writ petition that while he was sleeping outside his residence, on 26.4.2005, the 3rd respondent took away his minor daughter, and then he lodged a complaint with the police. The complaint was registered on 4.6.2005 as Cr.No. 116 of 2005 under Section 366 read with Section 109 IPC. The police could not trace out the girl. Therefore the writ petition was filed on 7.11.2005. According to certificate, her date of birth is 12.9.1993.

2. Counter-affidavit was filed by 2nd respondent in which it is admitted that the report had been filed. It is stated in counter-affidavit that on 11.11.2005 the police got information that the alleged detenue and the accused were staying in Chennai. A police team went there and traced the alleged detenue and the accused. Their statements were recorded. The accused in his statement stated that he married one Laxmi two years back against his will. Subsequently he developed relationship with the alleged detenue and eloped with her on 26.4.2005. The police claimed that in the statement under Section161 Cr.P.C. the alleged detenue stated that she was induced by the accused to run away with him. They were brought to Devarakonda on 12.11.2005 and produced before the Magistrate. The alleged detenue refused to go with her parents, therefore the Magistrate sent her to State Home for Child Care Centre, Nimboli Adda, and Hyderabad with a direction to retain her in the Home till she attains the majority or till further orders from the Court. The accused was remanded to judicial custody and he was presently lodged in Sub-Jail, Devarakonda. During the course of hearing, we summoned the alleged detenue from the State Home for Child Care Centre. She made a statement that she had studied up to 8th class, she was 13 years old and she had married 3rd respondent eight months before. Since the 3rd respondent was in custody and he was not represented, by an order dated 12.12.2005 the court ordered his production. He also accepted that he had married the alleged detenue. The alleged detenue Arpitha before this Court also stated that she was not ready to go with her parents.

3. In the light of these facts, the question before this Court is whether a minor girl claiming to have married can be allowed to join her husband or she can be forced to go with her parents or she be put in the State Home for Child Care Centre till she attains majority.

4. Going by these provisions of law, a marriage solemnized in contravention of Section 5(iii) of the Act is not a void marriage. Therefore there is nothing in the Hindu Marriage Act, 1955 which would make a marriage illegal if it is solemnized if the bride has not completed the age of 18 years. Although it is an offence under Section 18 of the Act, but in our view, it does not make the marriage an illegal marriage.

5. Let us examinet he position under the Child Marriage Restraint Act, 1929 is: "Child" is defined under Section 2(a) as a person who, if a male, has not completed 21 years of age and if a female, has not completed 18 years of age. Child marriage is defined under Section 2(b) as a marriage to which either of

the contracting parties is a child. Then the Act provides for punishment to a male adult below 21 years of age marrying a child under Section 3. Under Section 4 it provides for punishment to male adult above 21 years of age marrying a child. Section 5 provides for punishment for solemnizing a child marriage and Section 6 provides for punishment to parent or guardian concerned in a child marriage. Offences under the Act are made cognizable and there is a power to issue injunctions under Section 12 prohibiting marriage in contravention of the Act. This Act also does not make the marriage void even if one of the spouses or both the spouses are minors. Therefore the marriage contracted by a minor neither under the Child marriage Restraint Act nor under the Hindu marriage Act is void and nullity.

6. Did the framers of law intend that a marriage contracted in violation of the provision contained in the proviso to Section 15 to be void? While enacting the legislation, the framers had in mind the question of treating certain marriage void and provided for the same. It would, therefore, be fair to infer, as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in Section 5 each of the six conditions was not considered so sacrosanct as to render marriage in breach of each of it void. This becomes manifest from a combined reading of Sections 5 and 11 of the Act. If the provision in the proviso is interpreted to mean personal incapacity for marriage for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (iii) of Section 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a valid marriage is prescribed in condition (iii) of Section 5 it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if marriage is contracted Section 11 does not render it void even though Section 18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nor does Section 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication.

7. However, there are certain offences prescribed under the Indian Penal Code with respect to taking away a child even for marriage. Section 361 of IPC makes kidnapping of a female less than 18 years of age an offence if she is taken from the custody of guardian without the consent of the guardian. Similarly if a marriage is performed, it can be presumed that sexual relationship will also develop and under Section 375 if a man has sexual intercourse with a woman with or without her consent under 16 years is rape. There is an exception to it that sexual intercourse by a man with his wife may not be an offence of rape if the wife was not under 15 years of age. In the present case the girl is 13 years, therefore the marriage by a minor would be contravening the various laws and the factum of marriage in itself would be an offence under various laws, but we do not agree that such marriage would be an invalid, illegal, or null and void marriage.

8. Now the question remains whether the girl who has married, according to her, 3rd respondent and who is not willing to go with her parents can be allowed to live with the 3rd respondent. In this connection, the court relied on the provisions of the Hindu Minority and Guardianship Act, 1956. This Act has an overriding effect under Section 5 which lays down,

9. **Overriding effect of Act.--**Save as otherwise expressly provided in this Act,-

(a) Any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect insofar as it is inconsistent with any of the provisions contained in this Act.

10. Minor is defined under Section 4(a) as a person who has not completed the age of 18 years. Section 6 defines the natural guardians of a Hindu minor and it lays down that the natural guardians of a Hindu minor, in respect of his person and property would be the father in case of a boy or an unmarried girl and then it mentions other guardians who can be guardians after the father. Under Section 6(c) it lays down that in the case of a married girl, the husband would be a natural guardian. So this Act in a way recognizes the marriages of minor girls. The Act deals with minors and mentions the husband as a guardian of a married girl. This itself conveys the intention of the legislature that for a married minor girl, guardian would be the husband. There cannot be any guardian for a major under the Hindu Minority and Guardianship Act, 1956. Therefore the only meaning which has to be given to Section 6(c) is that if a minor girl is married, her natural guardian is the husband.

11. The learned Counsel for the respondents has placed reliance on an unreported judgment of the Delhi High Court in Ravi Kumar v. The State WP (Crl.) No. 942 of 2005. It was dealing with the subject as to whether in the circumstances of the case the accused could have been charged of an offence of kidnapping. Therefore that judgment is not directly on the point which we are deciding in this petition. We have no option, but to allow this girl who is only 13 years old to go with her husband, but we feel that the Legislatures have not done much to stop the child marriages which are a menace. We cannot expect healthy growth of the society if a child of 12 years is allowed to be married. There are so many Acts to which a reference has been given by us hereinabove, which make the child marriage an offence, but which do not make the child marriage a void marriage. Since the marriage which has taken place between the alleged detenue and the 3rd respondent is a valid marriage in the eye of law, though it may be an offence under various provisions of various statutes, yet the marriage cannot be nullified and under the Hindu Minority and Guardianship Act, 1956 the 3rd respondent becomes a natural guardian of the detenue**.** These directions we are giving with a heavy heart and reluctantly, but the existing law does not leave any scope for us to take a different view. It is for legislature to look into the serious issues…

12. Therefore the writ petition is disposed of with a direction that the girl be handed over to the 3rd respondent. No costs.

DELHI

42. Sh. Jitender Kumar Sharma vs. State and Anr., WP (Crl) 1003/2010, Decided On: 11.08.2010, 171(2010) DLT 543, I(2011) DMC 401

Badar Durrez Ahmed and V.K. Jain, JJ.

1. Jitender Kumar Sharma and Poonam Sharma fell in love, eloped together, and got married. The problem is that they were both minors: Jitender was just under 18 years of age and Poonam was 16 years old. The further problem is that Poonam's family is strongly opposed to this alliance. Her parents, grandfather, and paternal uncle who have been attending the court proceedings are not ready to accept this marriage at any cost. So much so, that Poonam has serious apprehensions about the safety to her life and to the life of Jitender. Another complication is that Jitender's sister happens to be Poonam's paternal uncle's wife. And, perhaps because of this incident, the uncle has turned out his wife (Jitender's sister) from her matrimonial home.

2. Without any information to their respective families Poonam and Jitender ran away from their homes and got married according to Hindu rites and customs on 03.05.2010 at Shiv Mandir, Garima Garden, and Sahibabad (U.P.). On that date itself, not knowing the whereabouts of Poonam and suspecting that she had gone with Jitender, Poonam's father (Shri Jai Prakash Sharma) lodged First Information Report bearing No. 110/2010 at Police Station Gandhi Nagar, New Delhi under Section 363 of the Indian Penal Code. Subsequently, when it was revealed that Jitender and Poonam had lived as husband and wife, Section 376 IPC was also added. On 05.05.2010 a typed letter signed by Poonam was received at PS Gandhi Nagar in which she stated that she had married Jitender and requested that no case be registered on the complaints of her parents. On 06.05.2010, Jitender and Poonam were 'apprehended' from Bilaspur, District Rampur, and U.P. Both were produced before the concerned court in Delhi. Jitender, being a juvenile, was sent to Sewa Kutir Bal Sudhar Ghar and Poonam was handed over to her parents. Poonam refused to undergo an internal medical examination and her mother also did not give her consent. In her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, Poonam did not state anything against Jitender.

3. On 12.05.2010, Poonam's father once again went to PS Gandhi Nagar to report that Poonam was missing from his house since 11.05.2010. Information was received that Poonam had gone to Jitender's house. The police reached there and took away Poonam for production before the concerned court where,

on refusing to go with her parents, she was sent to Nirmal Chhaya. From there, she was, once again, taken by her parents to their home. It was pertinent to mention that Poonam had given in writing that she had left her parents' home of her own will and went to Jitender's house, as that was the house of her in-laws. It must also be pointed out that all this happened when Jitender, himself, was lodged in Sewa Kutir Bal Sudhar Ghar. Jitender was released on bail much later, on 03.06.2010.

4. Apparently, on 11.06.2010 Poonam's mother went to the police station and alleged that Poonam had been 'kidnapped' by Jitender. Raids were conducted at the houses of Jitender and his relatives but Poonam was not there. On 11.06.2010 Poonam wrote letters to various police authorities, with a copy to Jitender, indicating that she married Jitender of her own free will; that her parents wanted to get her married to someone else without her consent; that her parents were beating her and that she did not want to live with them but was being forcibly kept by them; that she wanted to live with her husband; that she was writing this letter as she had got an opportunity; that she feared that her father, brother and grandfather would kill them. In the end, she questioned - "Please tell me, is it a sin to marry on account of one's free will' Is it such a big offence that a person ought to be killed? And, is the fact that I married out of my own volition such a big sin that my father, mother, brother, and grandfather beat me every day?"

5. Poonam is said to have sent another hand-written letter on or about 25.06.2010 to various authorities including the Commissioner of Police. It was a complaint against her father, grandfather, and maternal uncle in which she alleged that they had locked her in a room and that they could kill her at any time. She reiterated that she had married Jitender as per Hindu rites and customs and that Jitender is her husband. It was also stated that her father and others threaten her that they would murder Jitender.

6. Apparently Poonam again left her house. A fresh case was registered on 05.07.2010 Under Section 363/506 IPC vide FIR No. 177/10 at PS Gandhi Nagar. The present writ petition was filed on 05.07.2010. The petitioner, inter alia, sought a writ of habeas corpus directing the respondents to produce Poonam (respondent No. 2) before this Court and to save her life and then to hand her over to the petitioner (Jitender). Police protection was also sought for the safety of the petitioner, Poonam and other members of his family. It was also prayed that FIR No. 110/2010 under Section 363/376 be quashed. We may point out that on 08.07.2010, when this petition was first listed for hearing; Poonam had also come to court along with the Jitender. When the learned Counsel for the petitioner was asked as to how a prayer for habeas corpus was made when Poonam was with Jitender, we were informed that Poonam came to Jitender's house only subsequently. Anyhow, Poonam indicated that she did not wish to return to her parents, who were also present in court, as she feared for her life. In these circumstances, as an interim measure, we directed that Poonam be sent to Nirmal Chhaya, Nari Niketan for her safety. She has been in Nirmal Chhaya since then. We thought that perhaps she would reconcile with her parents and vice versa and for this we had even directed them to appear before the Delhi High Court Mediation and Conciliation Centre. Unfortunately, the mediation process failed. Her family was not very cooperative and even she was not willing to return to her parents and expressed her desire in no uncertain terms to reside with her husband Jitender. Consequently, we heard arguments of the counsel for the parties on 03.08.2010. Incidentally, Jitender's father and other family members who were present in court have accepted the marriage and have welcomed Poonam as Jitender's wife.

7. On the basis of arguments advanced by the counsel for the parties, several complicated issues of law, societal relations, and human rights have been thrown up because of this burning attraction between Jitender and Poonam. There is the question of validity of their marriage. Then there is the issue of who is entitled to the custody of Poonam? Is it her father or is it her husband (Jitender) or is it someone else? Furthermore, while deciding the custody issue, do the wishes of the minor have to be regarded? If Poonam were to be 'given' in the custody of someone or some institution which she does not accept as her custodian or guardian, would it not amount to a violation of her fundamental right to 'life' and 'liberty' which is guaranteed by Article 21 of the Constitution?

8. T he validity of a marriage is primarily to be adjudged from the stand point of the personal law applicable to the parties to the marriage. The validity of a marriage between Hindus is to be considered in the context of the HMA and the validity of a marriage between Muslims is to be viewed in the light of Muslim personal law and so on. We have already seen that a Hindu marriage in contravention of Clause (iii) of Section 5 of the HMA is not void. But, by virtue of Section 12 of the Prohibition of Child Marriage Act, 2006, which is a secular provision cutting across all religious barriers, a marriage which is not void under the personal laws of the parties to the marriage may yet be void if the circumstances specified therein are attracted. However, the other side of the coin is that where the circumstances listed in Section 12 do not arise, the marriage of a 'minor child' would still be valid unless it is a void marriage under the applicable personal law. So, a Hindu marriage which is not a void marriage under the HMA would continue to be such provided the provisions of Section 12 of the Prohibition of Child marriage Act, 2006 are not attracted. In the case at hand, none of the circumstances specified in the said Section 12 arise. Consequently, the position as obtaining under the HMA, that the marriage between Jitender and Poonam is not void or invalid, would be unaffected by the Prohibition of Child marriage Act, 2006.

9. Returning to the facts of the present case, we find that, merely on account of contravention of Clause (iii) of Section 5 of the HMA, Poonam's marriage with Jitender is neither void under the HMA nor under the Prohibition of Child Marriage Act, 2006. It is, however, voidable, as now all child marriages are, at the option of both Poonam and Jitender, both being covered by the word 'child' at the time of their marriage. But, neither seeks to exercise this option and both want to reinforce and strengthen their marital bond by living together. We also find that stronger punishments for offences under the Prohibition of Child Marriage Act, 2006 have been prescribed and that the offences have also been made cognizable and non-bailable but, this does not in any event have any impact on the validity of the child marriage. This is apparent from the fact that while the legislature brought about these changes on the punitive aspects of child marriages it, at the same time brought about conscious changes to the aspects having a bearing on the validity of child marriages. It made a specific provision for void marriages under certain circumstances but did not render all child marriages void. It also introduced the concept of a voidable child marriage. The flip-side of which clearly indicated that all child marriages were not void.

10. This takes to the next, but equally vexed issue of custody. Poonam is a minor. She is also married and that, too, to a minor. She is at present lodged at Nirmal Chhaya as an interim measure. She cannot be kept there interminably and, in any event, she does not want to stay there. She has refused to live with her parents for fear of her life. In fact, her only desire and wish is that she lives with her husband Jitender.

11. In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her husband. A husband who is a minor can be the guardian of his minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reasons other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam's welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention against her will and would be violative of her rights guaranteed under Article 21 of the Constitution. Neetu Singh's case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.

12. Before we conclude, we would like to point out that the expression 'child marriage' is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? In the former kind, the parents' consent but not the minor who is forced into matrimony whereas in the latter kind of marriage the minor of his or her own accord enters into matrimony, either by running away from home or by keeping the alliance secret. The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life, and liberty. There is a distinction between the problem of child marriages as traditionally understood and child marriages in the mould of teenage marriages of the West. India is both a modern and a tradition bound nation at the same time. The old and evil practices of parents forcing their minor children into matrimony subsist along with the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the West or the effect of movies or because of the independence that the children enjoy in the modern era. Whatever is the reason, the reality must be accepted, and the State must take measures to educate the youth that getting married early places a huge burden on their development. At the same time, when such marriages occur, they may require a different treatment.

13. The sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with habeas corpus petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their 'sin' is that they fell in love.

14. In view of the discussion above, we direct that Poonam is no longer required to be kept at Nirmal Chhaya. She is free to go with her husband Jitender and reside with him in his home. Jitender's father, brother, and sister have assured this Court that they will provide full support to the young couple. FIR No. 110/2010 under Section 363/376 IPC and FIR No. 177/2010 under Section 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and all proceedings pursuant thereto are quashed.

The writ petition stands disposed of.

43. Mohd. Nihal vs. State, W.P. (Cri) No.591/2008, Decided on: 08.07.2008, MANU/DE/0980/2008

Vikramajit Sen, J.

1. A Muslim husband, Mohd. Nihal seeks the custody of his Muslim wife, Mst. Afsana, by means of this habeas corpus petition. Nihal (the Petitioner) asserts that he is 22 years of age and was married to Mst. Afsana on 31.3.2008 in consonance with Muslim rites and ceremonies at Madarasa Alia, Masjid Fatehpuri, and Delhi. The age of Mst. Afsana is the cause of controversy, both factual and forensic. One of the witnesses to this marriage is the husband of the sister of Mst. Afsana who, according to Nihal, had acted as her guardian (Wali). An F.I.R. under Section 363 IPC has been registered on 31.3.2008 at the instance of Mst. Akhatari Begum (mother of Mst. Afsana) who had appeared in these proceedings and had opposed the handing over of her daughter to the Petitioner. Since complex questions of Muslim Law had arisen, and Mst. Akhatari Begum was not financially sound to engage an Advocate, the court had requested Mr. Najmi Waziri, Advocate to act as amicus curiae.

2. We must, at once, clarify that under Muslim law the marriage of a girl who has not attained puberty is nevertheless legitimate provided it has the consent of her Guardian (Wali). In such cases, however, the wife has the option to repudiate the marriage when she reaches puberty. At the very threshold of this Judgment we had recorded the contention of the Petitioner that the brother-in-law of Mst. Afsana was not just a witness to the marriage but had acted as her Guardian/Wali. Remarkably, there is no evidence or material whatsoever reflecting the presence or consent of the father of Mst. Afsana to her marriage. The courts attention was drawn to affidavits submitted by the Petitioner to the Qazi in which his age was stated as 22 years and that of Mst. Afsana as 19 years. If she was in fact 19 years old at the time of her marriage, there would not have been any requirement for the consent of her father. It had been established in these proceedings that the statements in these affidavits are not correct, as Mst. Afsana is much younger than 19 years. On the contrary, it was nebulous and uncertain whether she was even 15 years of age or had actually reached puberty on the date of her so-called marriage. As regards the factum of her Wali having consented to the marriage, it appears to be common to all schools of Muslim Law that the father must perform the rights, duties, and obligations of a Wali. During the lifetime of the father no other relative is competent to function as the Wali. In the absence of the father, the grandfather, the great grandfather, the brother, the uncle or granduncle and the mother, in this sequence, are competent to act as the Wali the uncontroverted position before us is that Mst. Afsana's father, mother, and elder brother, amongst others, are alive and available but were not present when the marriage took place. Accordingly, the marriage could have been legally performed, only if Ms. Afsana had attained puberty or must be presumed to have attained puberty on having reached her 15th birthday.

3. Medical Tests are indeterminate as to whether Ms. Afsana was 15 years of age at the time of her marriage. The Petitioner has not tendered any proof in this connection. The Medical Tests, however, unequivocally indicate that Ms. Afsana is not 19 years of age. It is quite clear that the Petitioner has submitted a false Affidavit pertaining to the age of Mst. Afsana. Since he was a major and Ms. Afsana

was not, the responsibility must weigh heavily on his shoulders alone so far as this mis-declaration was concerned.

4. Ms. Afsana had narrated to us through her mother and lady attendants that the marriage has been consummated. Medical Opinion, however, is to the contrary as her hymen is intact and she, therefore, remains a virgin. One of the reasons why we have mentioned this fact is that it manifests near total lack of knowledge on the part of Ms. Afsana as to biological/physical functions. On previous dates of hearing she was unable to state whether she had started menstruating. The Medical Report confirms that she had during the course of the proceedings started menstruation. However, it was unclear whether she had attained puberty on the date of her marriage. The courts impression is that she had not.

5. In the event, the Petitioner has failed to establish that Mst. Afsana had obtained puberty at the time of marriage, that is, 31.3.2008 and/or that she had reached the age of 15 years. Since her father is alive, only he was competent to act as her Wali for the purposes of her marriage as prima facie she was a minor at that time. Therefore, the purported marriage is batil or void ab initio.

6. We had mentioned at the commencement of this Judgment that there were competing claims for the custody of Ms. Afsana, that is between the Petitioner (as her husband), and her mother. Muslim law stipulates that the mother has primacy so far as claims of custody over her minor daughter are concerned. Since the courts findings for the purposes of this Petition were to the effect that a valid marriage was not performed between the Petitioner and Mst. Afsana, he had no right to claim her custody. Mst. Afsana stated to the court that while she would like to meet the Petitioner, she desired to reside with her mother. It appeared that these habeas corpus proceedings had accelerated her maturity or precociousness. Although she had attained majority as per her personal laws by the last date of hearing, thereby rendering ineffectual and irrelevant her mother's decision as to her custody, the court had no option or reason but to fashion its Judgment as per Ayub decision and reject the claim for conjugal custody.

7. This Petition is accordingly dismissed leaving Mst. Afsana free to decide her own fate and the future.

44. Ms. Neha Bhasin vs. Sanjeev Kumar @ Monu, M.A.T APP 10/2005, Decided On: 23.01.2007, MANU/DE/7061/2007

S. Ravindra Bhat, J.

1. This present appeal under Section 28 of the Hindu Marriage Act (hereafter ``the Act'') is directed against an order dated 22.11.2004 of the Additional District Judge (hereafter ``the trial court'') in H.M. Petition No. 793/2003. The trial court dismissed the appellant's petition under Section 12 of the Act, seeking declaration that her marriage with the respondent husband (hereafter ``the husband'') was void. The respondent was set down ex parte in the trial court; he has not appeared despite service in these proceedings, too, and was set down ex-parte.

2. The Appellant had alleged that on 18.02.03 she was kidnapped by the Respondent in collusion with his family members and taken to an unknown place where she was confined in a room, and not given proper food. She was not allowed to communicate with anybody. She alleged that she was rendered unconscious after being made to consume intoxicated food and fruit juice. She also alleged that she was threatened and her signature was obtained on various papers showing that the marriage was solemnized between her and the respondent on 20.02.2003, at Arya Samaj plot Kamalpur, Delhi-9. The marriage was also registered with the Registrar of Marriages at Ghaziabad, U.P on 21.02.2003.

3. The wife alleged in her pleadings that she was under influence of drugs, and did not understand anything and the marriage between the parties was illegal, as force and fraud was used, and no valid consent was given by her to the marriage. On 20.2.2003 the police officials after an FIR No. 99/03, alleging offences under Section 366 IPC, was lodged, recovered the appellant from the custody of the Respondent; she was produced before the Metropolitan Magistrate on 26.2.2003. The court recorded, after considering her statement that she was under dilemma and not in a position to give any statement. The appellant on 28.02.03 without any coercion deposed before the Link Magistrate that she was under the influence of drugs and had lost her ability to decide. The appellant's custody was handed over to her father.

4. The Appellant had further alleged that on 05.03.2003 she was once again kidnapped by the respondent in the absence of her parents. Her father filed a writ petition in the nature of Habeas corpus before this Court, after which she was produced and her statement under Section 164 Cr.P.C was recorded, where she stated that she was taken to Arya Samaj mandir and threatened that in case the marriage was not solemnized her father would be killed. The marriage was performed in the presence of the Respondent's parents and ``Mausi'' (i.e. maternal aunt). The appellant alleged that after the marriage she was taken to different places. She alleged that she was influenced by Tantric vidhya of the Respondent's mother and she was once taken to a Dargah at Nizamuddin where she was given, asked to wear 2 tabizs at their instance. She also alleged that she was made to sign the papers; and pictures of the alleged marriage were taken when she was under the influence of drugs. According to her the Respondent is an illiterate person, and a drug addict, a history sheeter and was involved in a number of criminal cases. The Respondent was also convicted and sentenced to three years imprisonment for burning his wife. It was also alleged that several other criminal cases were pending against him.

5. The police recorded the appellant's statement in a lawyer's chamber in the presence of the Respondent's mother and uncle and the statement was neither read to her nor was she asked to read it. She was just made to put her signature on blank papers. The Appellant states that while deciding the writ petition the court held that the appellant may be examined by a board of doctors and after receiving the opinion of doctors her statement may again be recorded by the metropolitan magistrate. It was also directed that the Medical Superintendent, G.B.Pant Hospital to constitute a board of three doctors to examine Neha expeditiously as possible and ensure that a report is made available to the concerned SHO before 21.04.03. All parties and their respective counsel suggested that during the interregnum period Neha should stay in the Gita Ashram Temple, FU Block, Pitam Pura, Delhi, where she had already, stayed on earlier occasions. We order accordingly. We direct the state to place a lady constable round the clock for her security during that period and she would not be disturbed by any of the parties.

6. The Appellant stated that she was examined by doctors and her physical and mental state was found to be all right. The Psychometric Assessment test was not conducted, as the hospital did not have the provision, she was further referred to Institute of Human behavior and Allied Sciences .The Appellant alleges that she was not subjected to any Psychometric Assessment Test and on 21.04.2003 her statement was recorded by the Metropolitan Magistrate, she was sent back to the Respondent where she was treated with cruelty by him and his parents. The Appellant further alleges that she was forced to give statement in some case under 376 IPC and on the basis of her statement that criminal case was quashed.

7. The Appellant alleges that on 4.10.2003 she was turned out of the Respondent's house. She had, in the meanwhile, filed a petition for nullity in the trial court. The Respondent was proceeded ex parte as he failed to appear despite service. The Petition was dismissed by the impugned judgment dated 22.11.2004

8. The trial court in the impugned order has held that:

Arguments were heard ex parte on behalf of the petitioner. Earlier also, petitioner has filed a petition under Section 12 of Hindu Marriage Act for declaring her marriage with the respondent a nullity vide HMA No. 231/03. In the present petition, the petitioner has stated that earlier petition was withdrawn on 29.8.2003 whereas in fact the petition was dismissed. Earlier, petition was filed on 26.3.2003. As per the case of the petitioner she was again kidnapped by the respondent on 5.3.2003 as it was in the evening of 4.10.2003 that she was spurned out from the matrimonial home in three wearing clothes. She had the ample time to make a complaint particularly when she had come to the court and had made statement in favoring the respondent in a criminal case under Section 376 IPC against the respondent. Since earlier petition was filed on the basis of some facts which was not prosecuted by the petitioner and it is not permissible for the petitioner to continue agitating the same facts again and again as per her own convenience. In the earlier petition, the petitioner has stated that after being kidnapped for the second time on 5.3.2003, she was living with her parents since 20.2.2003. There was opposite facts stated in the second petition of the petitioner living with her parents since 4.10.2003. As per the facts which had been stated that the petitioner and respondent had lived together from 5.3.2003 to 4.10.2003 when she was allegedly thrown out from the matrimonial home by the respondent. What is the grievance of the petitioner is not clear whether the marriage having been solemnised without her consent, the consent having been taken with force and fraud or the fact of her having been thrown out from the matrimonial home. The petitioner had also co-operated with the respondent in quashing of criminal proceedings under Section 376 IPC which was on the basis of statement made by her and as such, it is difficult to conclude that the consent of the petitioner to the said marriage on 20.2.2003 which was registered with Registrar of Marriages at Ghaziabad, U.P. on 21.02.2003 was obtained with force and fraud. In the circumstances, I hold that petitioner has not been able to prove the ground of her consent having been obtained with force or fraud and as such no ground for declaring the marriage as nullity is made out. The petition under Section 12 of Hindu Marriage Act filed by the petitioner is accordingly dismissed. Decree sheet be prepared accordingly. File was consigned to the record room.

9. It was urged and contended on behalf of the appellant-petitioner that the reasoning of the trial Court cannot be upheld. It was submitted that the earlier petition for annulment was not disposed of on merits but dismissed in default. It was contended that there was no misstatement involved n averring that the previous petition was withdrawn instead of stating that it was dismissed for non-prosecution.

10. The trial Court in this case has proceeded to reject the petition for nullity on two main grounds namely, that the petitioner had approached the Court on an earlier occasion that proceeding had been dismissed. The second ground was that the petitioner had not objected to and was a willing party to quashing of criminal proceedings on allegations of respondent having committed rape on her. It is apparent from the reasoning of the trial Court that the various criminal proceedings to which the respondent was a party and which had been detailed in the materials produced before it and which are also part of the record, were not adverted to or considered by it. Paras 6 to 12, detail the various circumstances that surrounded the marriage, between the parties. This position has been reiterated in the affidavit of the petitioner filed in the Court. The trial Court records also reveal that the FIRs dated 18.2.2003 and 4.3.2003 were part of the record. The circumstance under which the petitioner's custody was obtained by police was also disclosed. Para 8 (of her affidavit evidence) clearly states that the respondent/ husband was convicted on various offences and Paras 10 and 11 of the affidavit states as follows:

That due to fear of criminal case under Section 376 IPC the petitioner/deponent was taken forcibly by the respondent to his house and under undue threat, coercion the petitioner deponent was forced to make statement before the concerned court of law and thereafter the respondent was discharged from the said offences. That now the respondent after release from the said case under Section 376 IPC, has kicked out the petitioner from his house on the night of 4.10.2003 in bare three wearing clothes and since then till date the petitioner is living in the house of her parents.

11. The judgment and order of the trial Court of the learned Additional District Judge in HMA No. 793/2003 is hereby set aside; the petition claiming nullity of marriage between the parties, as prayed for is hereby allowed. Let a decree be drawn up accordingly.

12. The appeal is allowed in the above terms. No costs.

45. Tahra Begum vs. State of Delhi and Ors., W.P. (CRL) 446/2012, Decided on 09.05.2012, MANU/DE/2154/2012

S. Ravindra Bhatt, J.

1. The petitioner seeks a writ of habeas corpus for the production of her daughter (Shumaila). It was alleged that Shumaila was a minor (aged 15)when she was kidnapped by Mehtab on 12.04.2011 along with Rs.1,50,000.The petitioner husband reported the kidnapping to the Gokalpuri policeand on 14.04.2011 got FIR No. 123 of 2011 registered.

2. It is alleged that after the abduction of Shumaila, on 13.03.2012 the petitioner received telephonic threats from Mehtab stating that if the petitioner took any legal action against him, he would kidnap her other daughter; the police were informed of this incident. It is also alleged that on 19.03.2012 the petitioner approached the Deputy Commissioner of Police and requested him to rescue her minor daughter from the illegal detention of the accused. However the police did not take any action and hence the petitioner approached this Court through this petition. The petitioner relies on the birth certificate on record of Shumaila issued by the Delhi Government which shows that her date of birth was 10.06.1996. It is submitted by the petitioner that the age of her daughter at the time of kidnapping was 15 years.

3. After notice was issued, the police traced Shumaila, who appeared before this Court and stated that she voluntarily went away with Mehtab and has married to him; they have been living as husband and wife since then. Shumaila also told the Court on 18th April, 2012 that she did not wish to go back to her parents and that she wanted to continue to stay with her husband. In the meanwhile, Shumaila was kept in Nirmal Chaya; after her production before the Child Welfare Committee, that body, through its order dated 24-4-2012, stated that according to available records, Shumaila's age was 15 years, 10 months and 23 days. The issue to be decided by this Court, in view of these developments is, whether Shumaila should be directed to return to her parental home.

4. This Court notes that according to Mohammedan Law a girl can marry without the consent of her parents once she attains the age of puberty and she has the right to reside with her husband even if she is below the age of 18. The Patna High Court in the case of *Md.Idris vs. State of Bihar & Ors,* 1980 Crl.L.J. 764 observed that,

"Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mahomedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection reference can be made to Artcle 251 of Mulla's Principles of Mahomedan Law which says that every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, In absence of evidence, on completion of the age of 15 years. Even in Tyabji's Muslim Law under Artcle 27 is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Artcle 268 of Mulla's Principles of Mahomedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man of the woman as his wife. Art icle 90 of Tyabji's Muslim Law also says that a marriage Is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian."

This Court, in *Vivek Kumar @Sanju and Anjali @Afsana vs. The State and another,* (Crl.M.C.No. 3073-74 of 2006, decided on 23.02.2007) observed that,

"There is no law which prohibits a girl less than 18 years from falling in love with someone else. Neither falling in love with somebody is an offence under IPC or any other penal law. Desiring to marry her love is also not an offence. A young girl, who is in love has two courses available to her one is that she should marry with the consent of her parents after obtaining the consent of her parents. If her parents do not agree to persuade them or to wait for attaining the age of majority and then exercise her right as a major to marry the person of her own choice. However, this is possible only when the house of her parents where she is living has congenial atmosphere and she is allowed to live in peace in that house and wait for attaining age of majority. This might have been the reason in the mind of petitioner No. 2 when she told her father that she was in love and wanted to marry Sanju, but the response of father when daughter confided in him, created the fear in the mind of petitioner No. 2. Her father slapped her and told that her action would malign the religion and bring danger to the religion. He even threatened to kill her and marry her off to some rich person. When once such a threat is given to a girl around 17 years of age, who is in love, under such circumstances she has a right to protect her person and feelings against such onslaught of her relatives even if the onslaught is from her own parents. Right to life and liberty as guaranteed by the Constitution is equally available to minors. A father has no right to forcibly marry off her d aughter, who is below 18 years against her wishes. Neither he has right to kill her, because she intends to marry out of her religion. If a girl around 17 years of age runs away from her parents house to save herself from the onslaught of her father or relatives and joins her lover or runs away with him, it is no offence either on the part of girl or on the part of boy with whom she ran away and married."

5. In *Shamsuddin vs. State*, (WP(Crl.) 13 of 2009, decided on 15.05.2009) where a similar question about the marriage of a minor Muslim girl arose, in the context of the provisions of the Prohibition of Child marriage Act, 2006 , this Court observed that:

"7. In the present case, the facts are slightly different. Here, we have Mst. Gulshan, who has attained the age of puberty. She has entered into matrimony with Bhura @ Furqan. Though there is no documentary evidence thereof, there is evidence of the fact that they resided as a husband and wife and the presumption of marriage has to be drawn. Nothing has been presented by the petitioner to rebut any such presumption. In fact, Mst. Gushan is in the family way. WP(CRL) 13/2009 Page 6 of 10 Therefore, we can safely come to the conclusion that her marriage with Bhura @ Furqan was not a void marriage.

8. We may also notice certain provisions of the Prohibition of Child Marriage Act, 2006 as also the Guardians and Wards Act, 1890. Under the former Act, a child, if a female, has been defined under Section 2 (a) as being a person who has not attained the age of 18 years. Section 3 (1) of the Prohibition of Child Marriage Act, 2006 stipulates that every child marriage, whether solemnized 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. This clearly indicates that a child marriage even under the secular laws is not void ab initio but voidable at the option of the contracting party who was a child at the time of marriage. Interestingly, this is also in consonance with the principle under Muslim law where a minor has the option of annulment of marriage on her attaining the age of majority / puberty. The principle is well-known and is commonly referred to as the option of puberty or khiyar-ul-bulugh. This clearly indicates that the marriage of a 'child' is not void but voidable.

9. Section 12 may also be noticed where certain marriages are treated as void. However, none of those circumstances mentioned in Section 12 arise in the present case.

10. Section 17 (1) of the Guardians and Wards Act, 1890 specifically stipulates that in appointing or declaring a guardian of a minor, the Court shall, subject to the other provisions of the said Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This makes it clear that while appointing a guardian of a minor, the Court has to consider the personal laws of the minor and more importantly the welfare of the minor. What is more important is Section 17 (5) which says that the Court shall not appoint or declare any person to be guardian against his will. Section 19 is also of great significance insofar as the present case is concerned. It prescribes that nothing in Chapter -II of the said Act authorizes the Court to appoint or declare a guardian of the person of a minor, who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of a person. We may also note that in the case of a minor not being a married female, no guardian can be appointed for such a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of a minor.

11. In the present case, nothing has been pointed out or brought to our notice for us to declare that the Mst. Gulshan's husband, namely, Bhura @ Furqan is unfit to be her guardian of her person. As such the applicability of Section 19 (b) of the said Act which pertains to minors in general whose fathers are living, would not come into play.

12. There is, however, one complication in this case, as pointed out above and that is that Mst. Gulshan's husband Bhura @ Furqan is presently in custody. Mst. Gulshan is present in Court and so are her mother-in-law and father-in-law. She was residing with Bhura @ Furqan at Seema Puri. But, since he is in custody, till such time, he is released from custody; she has expressed her clear desire to reside with her parents-in-law. Her mother-in-law Momina is present in Court and so is her father-in-law Mausam Ali. Both have acknowledged the fact that their son Bhura @ Furqan is legitimately married to Mst. Gulshan. Both of them have expressed their desire and willingness for the return of their daughter-in-law Mst. Gulshan. It may be reiterated that immediately after their marriage Mst. Gulshan and her husband

Bhura @ Furqan first resided with Mausam Ali and Momina at their village Choudhera, Police Station Chhatri, District Bulandsahar, U. P. It is only subsequently that they shifted to Seemapuri, Delhi .

13. In view of the discussion above, we dismiss the writ petition and we direct that Mst. Gulshan is at liberty to reside with her parents-in- law till the release of her husband and thereafter it is up to her as to where she wants to reside with him."

In view of the above judgments, it is clear that a Muslim girl who has attained puberty i.e. 15 years can marry and such a marriage would not be a void marriage. However, she has the option of treating the marriage as voidable, at the time of her attaining the age of majority, i.e 18 years.

6. In view of the above discussion, and also in view of the fact that the girl in this case, Shumaila, clearly expressed her choice of residing with her husband, this Court is of opinion that she ought to be allowed to exercise her option. This Court has today recorded her statement in that regard. We direct the presence of Mehtab, Shumaila and either of her in-laws once in six months, in order to ascertain her well being, till she attains the age of majority before the Child Welfare Committee. The Committee shall take necessary steps including obtaining the necessary undertaking from Mehtab in that regard. Subject to completion of these steps, (which shall be within a week) Shumaila shall be allowed to live with Mehtab, in the matrimonial home.

7. The writ petition is disposed of in terms of the above directions.

GAUHATI

46. Shri Sandeep Kumar Patel Son of Shri Lalan Patel vs. Shri Pulinder Singh Son of Late Baidhnath Singh and Ors., W.P (Cri) No. 7.2011, Decided On: 01.03.2011, MANU/GH/0050/2011

A.K. Goswami, J.

1. By this application under Article 226 of the Constitution of India, the Petitioner had prayed for a Writ in the nature of habeas corpus directing the Respondent Nos. 1 and 2, who are parents of his wife, Smt. Nitu Singh, with a further direction to the Respondent Nos. 3, 4, 5 and 6 to recover and produce her before this Court by liberating her from forceful custody of Respondent Nos. 1 and 2.

2. The case of the Petitioner, in brief, is that both the Petitioner and Smt. Nitu Singh are aged about 27 years. The Petitioner came in contact with Smt. Nitu Singh when they were prosecuting their B. Com. and they had become friends. The friendship blossomed into love over a period of time and after a courtship of about four years, after informing their respective parents, they solemnized their marriage in the year 2009 under the Special Marriage Act, 1984 before the Marriage Officer (M), Kamrup, Guwahati. After the marriage, they started living together as husband and wife along with the parents of the Petitioner.

3. At the time of marriage, Smt. Nitu Singh was prosecuting her Master's Degree. After about 3 / 4 months of living together in the matrimonial house, Smt. Nitu Singh wanted to go and stay with her parents so as to prepare herself for her ensuing M. Com. Final examination and also to be with her parents as her mother was undergoing medical treatment. Her parents were also living in Guwahati. After

completion of her examination, Smt. Nitu Singh requested the Petitioner to allow her to go to Hazipur, Patna with her parents for the purpose of treatment of her mother and accordingly, she had left for Bihar, on 14.3.2010.

4. Though there were telephonic talks in between the Petitioner and his wife till May 2010, she had not come back to the matrimonial house and she had stopped all channels of communication from the month of June 2010. The attitude of the Respondent Nos. 1 and 2 had also changed in the meantime. On one occasion, they abused the Petitioner and told him that their daughter did not want to go back to Guwahati and, therefore, they would not send her back to Guwahati.

5. It was stated by the Petitioner that, subsequently, he managed to have a word with his wife on 13.8.2010 and 14.8.2010 over telephone and he having expressed his willingness to go to Bihar to take her back, Smt. Nitu Singh consented to it but the conversation was snapped as he could realize that someone had snatched away the telephone from his wife. The Petitioner says that his wife was confined in the ancestral house, the address of which is given in the petition.

6. The Petitioner, by filing an application, had approached the learned Family Court, Guwahati, on 20.8.2010, for restitution of conjugal right, and the said application was registered and notices were issued to the Respondents. Coming to know about filing of the case in the Family Court, the family members of Smt. Nitu Singh had threatened the Petitioner over telephone. The Respondent No 1 had come down to Guwahati to meet the parents of the Petitioner and he had sought to impress upon them not to permit their son to proceed with the legal action already initiated. He vowed not to allow the relationship to continue as, while they belong to upper caste, the Petitioner was not, and the marriage is frowned upon in his society. He had also informed him that his daughter is being married off with another person of the same caste before March 2011. Petitioner's wife also told him on 19.12.2010 over telephone that she was being pressurized to give consent to marry another person or face dire consequences. It is the case of the Petitioner that his wife is in distress and she is prevented from coming to Guwahati.

7. It is to be noted that it was the wife of the Petitioner who had, at first, wanted to go to her parent's house, ostensibly for the purpose of preparation for her M. Com examination and also to be able to be with her ailing mother. It was she, who, after the examinations were over, had wanted to go to Hazipur, Patna, for the medical treatment of her mother. The Petitioner had also stated in the petition that his wife had blocked all modes of communication after June 2010. The Petitioner had already initiated a proceeding for restoration of conjugal rights, on 26.8.2010 and that proceeding is still continuing and although the Petitioner had stated that there was some difficulty in effecting service, the same by itself may not be a ground to initiate parallel proceeding in the High Court by seeking a writ of habeas corpus. The Petitioner's apprehension that his wife may be again given in marriage while the present marriage is subsisting, can well be taken care of in the ordinary course of law. The Petitioner is also not remediless with regard to his contention that his wife is being wrongfully confined.

8. We find that the factual matrix of the case is a bit hazy and not very clear. We hasten to add that we are not expressing any opinion about the veracity or otherwise of the statements made by the Petitioner. In a given case, if the circumstances of the case would have so demanded, we may have ordered an enquiry into the facts of the case as the Court is not prohibited from ordering an enquiry in a habeas corpus

proceeding. However, we do not think that this is a case where, in view of certain grey areas in the facts, we should order an enquiry to investigate the facts alleged, to satisfy us before invoking our extraordinary powers under Article 226 of the Constitution.

9. In view of the aforesaid discussions, we find no merit in the application and, accordingly, the writ is refused. The Petitioner may take such steps as may be available to him in law for redressal of his grievances.

GUJARAT

47. Pavan Kumar Sharma vs. State of Gujarat and Ors, 1(2011) DMC124.

A.M. Kapadia and Bankim N. Mehta, JJ.

1. By means of filing instant petition under Article 226 of the Constitution of India the Petitioner prayed to issue a writ of habeas corpus directing the Respondent No. 1 to take custody of the corpus 'Kavita' who is legally wedded wife of the Petitioner and is in illegal detention of the Respondent No. 2, her father and to reunite her with the Petitioner. It was also prayed to issue direction to Respondent No. 6 to initiate investigation into the illegal confinement of the Petitioner along with his wife by the Respondent Nos. 3 to 5.

2. As per the averments made in the petition, the marriage of the Petitioner with the corpus Kavita was solemnized on 14.7.2010 at Rajkot. The Petitioner belongs to different caste, the marriage between the Petitioner and corpus Kavita has not been approved by her father. It is further averred in the petition that, though, it was against the wishes of the father of corpus Kavita, the marriage ceremony of the Petitioner with corpus 'Kavita' was performed.

2.1 It is further averred in the petition that the Police Officers from Rajasthan have tried to contact the present Petitioner and therefore he apprehended that the father of Kavita may take his wife forcibly, the Petitioner and corpus Kavita went to Mahila Police Station along with Kavita. As the Petitioner was staying at Rajkot, they asked Kavita to lodge a complaint in Rajkot. When they were leaving the Mahila Police Station, both the Petitioner as well as his wife Kavita were intercepted by Rajasthan Police and were taken away to Rajasthan.

2.2 It is further alleged in the petition that the Petitioner along with his wife Kavita were taken to local police station in Rajasthan and kept there for more than 48 hours without any complaint or legal process and thereafter custody of Kavita was forcibly taken from him and handed over to her father. The Petitioner therefore, suspects that the corpus 'Kavita' might be the victim of

"honor" killing at the hands of her father and other family members. It was therefore prayed for the reliefs to which the reference is made in earlier paragraph of the judgment.

3. This Court, vide order dated 29.10.2010, issued Notice to the Respondents which was made returnable on 16.11.2010 on condition that the Petitioner shall deposit Rs. 10,000 to show his bona fide with the Registry of this Court on or before 3.11.2010. The order further stipulates that the Respondent No. 7 Police Inspector, Sarkhej Police Station, Ahmedabad, was directed to trace out the corpus Kavita who is allegedly in illegal detention of Respondent No. 2 Brijlal Dhaka and produce her before the Court on the returnable date.

4. On the returnable date, the matter was adjourned and the court directed the DSP, Ahmedabad (Rural) to personally remain present before the Court and to explain as to why the Order passed by this Court has not been taken seriously by not obeying the same.

5. Today when the matter is called out, Mr. L.B. Dabhi, learned APP, fo r the Respondent No. 1 State of Gujarat, upon instructions received from Respondent No. 4 Inderkumar Sharma, ASI, Nohar Police Station, Nohar, District Hanumangarh, states that corpus Kavita has been traced out from the custody of Respondent No. 2 and heh as brought the corpus with the assistance of Respondent No. 5 -Savitri Devi, Woman Constable of Nohar Police Station, Nohar, District Hanumangarh and wants to produce the corpus before the Court. Therefore, we have permitted to produce the corpus before us.

6. We have ascertained the wish and willingness of the corpus Kavita and also enquired from her that as to whether she is in illegal custody of Respondent No. 2 her father. She has in unequivocal terms stated before us that, it is true that, her marriage with the Petitioner has been solemnized on 14.7.2010, however, the said marriage was solemnized with the Petitioner under duress and coercion and against the willingness of her family members. We have also enquired from her that how she has gone to Rajasthan from Rajkot. She has stated that she has gone to Rajasthan with her parents as her parents came from Rajasthan to take her back to Rajasthan. Therefore, when she got a chance in the absence of the Petitioner, she along with her parents went to Rajasthan at her parental home. She has been brought in the Court by the police officers of Rajasthan along with her parents from her parental home. So far as her stay is concerned, she has stated that she is very happy at her parental home and she wants to permanently stay with her parents. We have also ascertained her age. There is no dispute about her age by either sides that she is more than 18 years age. Therefore, she is sui juris and, hence, no fetter can be placed upon her choice of person with whom she wants to reside. She has also stated that as her marriage has been solemnized with the Petitioner under duress and coercion and against the willingness of her family members, she wants to take divorce from the Petitioner by filing a joint petition under Section 13B of the Hindu Marriage Act before the concerned Court having territorial jurisdiction, if the Petitioner also agrees to take divorce from her..

7. So far as her age is concerned, she was above 18 years of age. Therefore, she is sui juris and, therefore, no fetter can be placed upon her choice of person with whom she wants to reside. She has in unequivocal terms stated that her marriage with the Petitioner was solemnized under duress and coercion and against the willingness of her family members, she wants to take divorce from the Petitioner by filing a petition under Section 13B of the Hindu Marriage Act before the concerned Court having territorial jurisdiction, if

the Petitioner also agrees to the same. At present she is, as per her statement, not in illegal detention of the Respondent No. 2 her father as she is staying with her parents on her own will. Therefore, the court permitted her to go with the Respondent No. 2 her father.

8. In view of this, corpus Kavita, though, legally wedded wife of the Petitioner, it cannot be said that she is in illegal detention of Respondent No. 2 her father.

9. Seen in the above context the instant habeas corpus petition lacks merit and deserves to be rejected. 14. Hence, leave to withdraw the petition is granted. The petition stands rejected as it is withdrawn. Notice is discharged.

48. Jayeshkumar Ramanlal Patel Vs State of Gujarat and 2 Ors, Spl. Cri. App. No. 2446/2010, Decided On: 21.12.2010, MANU/GJ/1174/2010.

A.M. Kapadia, J.

1. By filing instant petition under Article 226 of the Constitution of India, the Petitioner had prayed to issue writ of Habeas Corpus or any other appropriate writ, direction and/or order directing Respondent No. 2 to produce corpus Prakruti - daughter of the Petitioner, who was allegedly in illegal and wrongful confinement/detention of Respondent No. 3 -Rahul Suvarnasinh Thakur and hand over her custody to him.

2. As per the averments made in the petition, the Petitioner has two daughters, out of which, eldest is Prakruti and she was studying in the First Year MBA of Dalia Institute of Management, Kanera. Respondent No. 3 -Rahul Suvarnasinh Thakur was a young boy of 19 years and he belongs to the dreaded Fracture Gang of Odhav area and his associates are involved in serious criminal activities of threatening vulnerable businessmen with dire consequences of inflicting fractures for extortion of money. The father of the Respondent No. 3 is a poor newspaper vendor and it appears that the Respondent No. 3 has no fear of law.

> 2.1 It is further averred that on 27.11.2010 at 4 o'clock early in the morning, the Petitioner came to know that his daughter Prakruti was missing from her room and her clothes and books were also missing. He therefore, started search of his daughter, but he came to know from friends of his daughter and some neighbourhood boys that Prakruti might have been abducted by the Respondent No. 3 since they had come to know that Respondent No. 3 was trying to get close to Prakruti. However, the Petitioner could not trace out his daughter.
>
> 2.2 It is further averred that thereafter, the Petitioner lodged the complaint before the Respondent No. 2 on 27.11.2010 at 5:30 p.m. Thereafter, the Petitioner continued his search and received information that corpus Prakruti has been abducted by Respondent No. 3 -Rahul Suvarnasinh

Thakur along with his associates for forcing her to marry Respondent No. 3 -Rahul Suvarnasinh Thakur against her wish by giving threats of his association with fracture gang and that if she does not marry the Respondent No. 3, the member of the fracture gang will attack upon the Petitioner.

2.3 It is further averred that the Petitioner therefore, informed the Respondent No. 2 to take necessary legal action including lodging of the FIR against all the concerned accused involved in the offence and try to obtain custody of corpus Prakruti from the abductors and set her free.

2.4 It is also alleged that the Respondent No. 2 told the Petitioner to find out corpus Prakruti himself and inform him so that he can reach the spot in police jeep to catch the accused. The attitude of the Respondent appears careless and negligent and it appears that he has no concern for human life.

2.5 It is further averred in the petition that as per the information of the Petitioner, corpus Prakruti was having mobile No. 9662263048 and Respondent No. 3 is having mobile No. 9558199691 and the Respondent No. 3 is in touch with his brother Kunjal who is having mobile No. 9374473301. The Petitioner has received authentic information that lastly, the Respondent No. 3 was moving in the Koraj Khodiyar Adalajarea of Dascroi taluka and Respondent No. 2 could have kept the aforesaid three mobile phones in surveillance to nab the accused along with corpus Prakruti.

2.6 The Petitioner further averred that life of corpus Prakruti was in serious danger and she might be killed or she might be compelled to marry even though the Respondent No. 3 was only 19 years of age was not having legally valid marriageable age under the Hindu Marriage Act, apart from the consent of the corpus Prakruti. The date of birth of Respondent No. 3 as per school records of Navrang School, Odhav was 4.2.1991 and therefore, at that instant, the Respondent No. 3 was aged about 19 years and few months, whereas corpus Prakruti was older than the Respondent No. 3 Rahul Suvarnasinh Thakur and her birth date is 27.7.1990. Therefore, Respondent No. 3 was putting fear of life on the corpus Prakruti to marry him illegally and against her wish.

3. This Court vide order dated 8.12.2010 issued Notice to Respondents, which was made returnable on 21.12.2010 on condition that the Applicant would deposit Rs. 5000/-as a cost, to show his bona fide, on or before 9.12.2010 before the Registry of this Court.

4. We have ascertained wish and willingness of corpus Prakruti. She had in unequivocally terms stated before the court that she had come from the house of Respondent No. 3 Rahul Suvarnasinh Thakur with whom she wanted to stay, who had produced her before the Court. She further stated that she was not in illegal detention of Respondent No. 3Rahul Suvarnasinh Thakur. She stated that she, at her own will, voluntarily, accompanied Respondent No. 3 Rahul Suvarnasinh Thakur. She stated that she had married Respondent No. 3 Rahul Suvarnasinh Thakur. She further stated that her birth date is 27.7.1990. Therefore, as on the day of the hearing, she was more than 18 years of age. She had also stated before the Court that age of Respondent No. 3 Rahul Suvarnasinh Thakur is above 19 years. She categorically stated

that she does not want to go with her father - the Petitioner, who was personally present before the Court, at her parental home.

5. On the facts and circumstances emerging from the record of the case and more particularly in view of the statement made by corpus Prakruti before the Court that she was not in illegal detention as well as she does not want to reside with her father - Petitioner, who is personally present before the Court so also in view of the reported decision of the Supreme Court as referred to herein above, since the corpus Prakruti was more than 18 years of age, she is sui juris and hence, no fetters can be placed upon her choice of the person with whom she has to stay. We have therefore, permitted her to go wherever she wants to go. 9. Seen in the above context, the Habeas Corpus petition lacked merit and deserves to be rejected.

49. ***Kapilkumar Bharatbhai Thakkar Vs State of Gujarat and 2 Ors, Spl. Cri. App. No. 2435/2010, Decided On: 20.12.2010, MANU/GJ/1285/2010.***

A.M. Kapadia, J.

1. By filing instant petition under Article 226 of the Constitution of India, the Petitioner has prayed to issue writ of Habeas Corpus or any other appropriate writ, direction and/or order directing Respondent Nos. 2 and 3 to produce wife of the Petitioner namely 'Dharti', who is allegedly in illegal detention of her father Respondent No. 3 Chhanalal Keshavlal Thakkar and to hand over her custody to him.

2. As per the averments made in the petition, the Petitioner and Respondent No. 3 belong to the same caste and community. The Petitioner and Dhartiben carried out marital rites and rituals as per Hindu religion in presence of Purohit Dilipkumar Trivedi in the sim of Deodar Gram Panchayat on 16.6.2010 and the same marriage has been registered on 25.8.2010 before the Marriage Registrar, Gram Panchayat, Tal: Deodar, Dist: Banaskantha.

> 2.1 It is further averred in the petition that on 11.11.2010, Nikunjkumar Thakkar, brother of the present Petitioner made a written complaint before the PSI, Deodar Police Station against Respondent No. 3 - Chhanalal Keshavlal Thakkar as he has created trouble and harassment to him and his family. Respondent No. 3 therefore, accompanied with people of their community, turned up with the assurance that he is taking Dhartiben - wife of the Petitioner for only4 -5 days at his residence and would surely send her back, but till date, he has not sent Dhartiben, instead he is not even permitting the Petitioner to either talk or meet his wife.

2.2. It is further averred in the petition that the Petitioner as well as his wife Dhartiben were majors at the time and have every right to take their own decision and so, their step of marriage is not illegal. Both of them have not done out caste marriage; in fact have married in the same caste and community. The Petitioner is doing retail business and so was earning good enough to carry out basic livelihood, necessities and keep his wife happy. Both were happily married and were leading prosperous life, but Respondent No. 3 came in between to satisfy his own ego and had taken his wife at his residence and was not ready to set her free. The Petitioner therefore, filed instant petition seeking writ of Habeas Corpus and prayed for the relief to which the reference has been made in the earlier paragraph of this judgment.

3. This Court vide order dated 6.12.2010 issued Notice to Respondents, which was made returnable on 20.12.2010 on condition that the applicant shall deposit Rs.10,000/- as a cost, to show his bona fide, on or before 8.12.2010 before the Registry of this Court.

4. Notwithstanding the aforesaid order passed by this Court, Mr. Alpesh Dodia, learned advocate appeared before this Court on 9.12.2010 and stated that he has received instructions to appear on behalf of Respondent No. 3 - Chhanalal Keshavlal Thakkar - father of corpus Dhartiben, as he came to know about issuance of notice by this Court. He had also stated that Respondent No. 3 had also brought his daughter corpus Dhartiben with him. We had therefore, ascertained will and willingness of corpus Dhartiben on that day. She had stated that it is true that she solemnized her marriage with the Petitioner - Kapilkumar Bharatkumar Thakar, but, now she does not want to stay with the Petitioner and wants to stay with Respondent No. 3 Chhanalal Keshavlal Thakkar - her father at parental home. Since the Petitioner had not deposited the cost and the matter was not fixed for hearing on that day, the Court adjourned the matter and interim custody of corpus Dhartiben was handed over to Respondent No. 3 Chhanalal Keshavlal Thakkar with the direction to produce her on the next date.

5. On the facts and circumstances emerging from the record, more particularly, in view of the statement made by corpus Dhartiben to the effect that she does not want to stay with the Petitioner and want to stay with her father - Respondent No. 3 Chhanalal Keshavlal Thakkar and she is not in illegal detention of her father Respondent No. 3 - Chhanalal Keshavlal Thakkar, therefore, we have permitted corpus Dhartiben to go with her father Respondent No. 3 Chhanalal Keshavlal Thakkar.

6. Seen in the above context, the Habeas Corpus petition lacks merit and therefore, deserves to be dismissed.

7. At this stage, Mr. Ankit Bachani, learned advocate for the Petitioner did not press this petition and seek leave to withdraw the same with a prayer that the amount of Rs. 10000/- deposited by the Petitioner, as a condition precedent for issuance of notice, may be paid back to the Petitioner, in view of the fact that corpus Dhartiben admitted that she had solemnized the marriage with the Petitioner. Therefore, it is the right of the Petitioner to know her wish and willingness.

8. Mr. LB Dabhi learned APP for the Respondent - State of Gujarat as well as Mr. Alpesh Dodia, learned advocate for Respondent No. 3 had no objection if leave as prayed for be granted and also the amount of Rs. 10000/- be paid back to the Petitioner.

9. In view of this, this Habeas Corpus petition is disposed of as it was withdrawn. Rule is discharged.

10. Registry is directed to pay back the amount of Rs. 10000/- to the Petitioner upon due verification.

JAMMU & KASHIMIR

50. Nusrat Jan and Anr. Vs. State of J and K and Ors., Decided on 08.06.2007, 2007(2)JKJ509.

Hakim Imtiyaz Hussain, J.

1. On 24.10.2006 Respondent Mohammad Bakir Malik S/o Gh. Hussani Malik R/o Gangoo Pulwama Tehsil and District Pulwama filed a report with the Police Station, Pulwama stating therein that on 22.10.2006 his daughter namely Nusrat Jan @ Nuzhat Jan was abducted by one Gulzar Ahmed Reshi S/o Gh. Ahmad Reshi R/o Drusoo Pulwama Tehsil & District Pulwama (Petitioner No. 2). He prayed for an action in the matter and also for the recovery of the girl. On this report FIR No. 383/06 was registered in the Police Station, Pulwama under Section 366 RPC and the investigation started which was assigned to Head Constable Gh. Rasool.

2. The petitioners have through the medium of the present petition prayed for quashment of the said FIR on the ground that they, being major have out of their free will married and that it being inter-caste marriage relatives of the petitioners, are harassing them with the aid of the local police. In support they have placed on file a copy of the "Nikahnama" alleged to have been executed by them. They have also placed on file a copy of the interim direction passed by Munsiff, Pulwama in a Civil Suit title Nusrat Jan v. Mohd. Baqir Malik and Ors. dated 07.02.2007 filed by them in the said Court. A copy of the bail order in favour of the petitioner No. 2 granted by Judicial Magistrate 1st Class, Pulwama has also been placed or. file to show that the Police concerned has implicated father of petitioner No. 2 namely Gh. Ahmed Reshi as accused in the case.

3. On 07.05.2007 when this case was taken up for consideration the Court directed stay of proceedings till further orders.

4. Respondent No. 4 has vide CMP No. 97/07 prayed for vacation of the interim order on the ground that the case is under investigation and that the petitioner No. 1 has been kept in wrongful confinement by petitioner No. 2. He has further stated that the petitioner No. 1 was suffering from serious mental problem at the time she was abducted by petitioner No. 2.

5. The respondents have not, however, filed separate objections but have vehemently resisted this petition when it was taken up for consideration.

6. The police has registered a case and initiated investigation in the matter. Perusal of the report lodged by the respondent: 4 shows prima facie a cognizable offence is made out. The proper course was to allow the

police to proceed in the matter and find out whether the removal of the girl was against her will or with her consent. Whether the parties have married and whether the parties have voluntarily entered into a valid marriage contract are the issues which the investigating officer is required to look into. This Court cannot step into the shoes of the investigating officer to find out whether any offence was made out against the accused or not. The petitioner No. 2 had obtained an interim bail from Principal District & Session's Judge, Pulwama on the condition that he will co-operative with the investigation, instead of doing so the petitioners have fled to Jammu and are residing there. This fact is evident from Annexure-D special power of attorney executed by the petitioners at Jammu.

7. In such circumstances I find the Court cannot interfere with the process of investigation at this stage. Petition is as such dismissed. Let the girl be produced before the Police concerned for recording her statement. In case she applied to the police she was to be given proper security as required in the circumstances of the case.

Order accordingly.

JHARKHAND

51. Ranjana Verma Vs State of Jharkhand and Ors. Decided on 07.09.2006, 2007CriLJ663.

M.Y. Eqbal, J.

1. In the instant writ application under Articles 226 and 227 of the Constitution of India the petitioner has prayed for issuance of a writ of certiorari for quashing the order dated 16.6.2006 passed in C.P. Case No. 601/06 whereby the Sub-divisional Judicial Magistrate, Dhanbad, after holding that petitioner is a minor, directed her release in favour of her father respondent No. 4.

2. The facts of the case lie in a narrow compass:

Petitioner's case is that she married respondent No. 5, Shyam Kumar Verma, on 17.2.2006 out of her own free will and the marriage was registered with the Marriage Officer, Dhanbad and a certificate to that effect was issued. According to the petitioner, she was major on the date of marriage as her date of birth is 5.1.1988. On the same day, petitioner and respondent No. 5 performed their marriage in Bhiphor Shankar Math and a certificate to that effect was also granted by the Secretary of the said Math. Information

regarding their marriage was also given to the Superintendent of Police, Dhanbad and the Officer-in-Charge, Dhanbad Police Station. In the meantime, respondent No. 4, who is father of the petitioner, after knowing solemnization of marriage, filed a complaint in the court of Chief Judicial Magistrate, Dhanbad under Sections 364, 364A, 385, 365, 366, 494, 498A and Section 4 of the Dowry Prohibition Act which was registered as C.P. Case No. 601/06. Respondent No. 4 also filed application for recovery of his daughter and for giving custody of the petitioner on the ground that petitioner was minor on the relevant date of marriage. Petitioner was kept in Nari Niketan, Deoghar. Respondent No. 4 then filed application in the aforementioned case before the Chief Judicial Magistrate, Dhanbad for handing over the petitioner to him. Thereafter, the Sub-divisional Judicial Magistrate, vide order dated 20.5.2006, released the petitioner in favour of her husband respondent No. 5 where she lived for about 15 days. Against the said order, respondent No. 4 preferred revision before this Court being Cr. Revision No. 374 of 2006. Learned Single Judge of this Court, after hearing the petitioner, set aside the order dated 20.5.2006 passed by the Sub-divisional Judicial Magistrate and remanded the matter back to him for passing a fresh order. After the order of remand passed by this Court the matter was again heard by the Sub-divisional Judicial Magistrate and the impugned order dated 16.6.2006 was passed whereby it was held that petitioner was minor on the date of marriage and accordingly custody of the petitioner be given to her father respondent No. 4. Respondent No. 5, husband of the petitioner aggrieved by the said order filed writ petition before this Court being W.P.Cr.(HB) No. 122 of 2006 seeking issuance of a writ of Habeas -Corpus for the custody of his wife-petitioner. R espondent No. 5 also prayed for quashing the impugned order dated 16.6.2006 passed by Sub-divisional Judicial Magistrate, Dhanbad whereby the custody of the petitioner was given to respondent No. 4. The aforementioned Writ Petition (Cr.) was heard by a Div ision Bench of this Court. The Division Bench, held that the writ petition is not maintainable against the impugned order dated 16.6.2006 and the appropriate remedy available to the writ petitioner is to challenge the said order under Section 482 Cr.P.C.

3. Now the instant writ application has been filed by the petitioner, namely, Ranjana Verma under Articles 226 and 227 of the Constitution of India challenging the impugned order dated 16.6.2006 passed by Sub-divisional Judicial Magistrate, Dhanbad in C.P.C ase No. 601/06.

4. A counter affidavit has been filed by respondent No. 4, father of the petitioner stating, inter alia, that the instant writ petition filed under Articles 226 and 227 of the Constitution of India against the order dated 16.6.2006 passedb y Sub-divisional Judicial Magistrate, Dhanbad is not maintainable. It is stated that. Sub-divisional Judicial Magistrate, Dhanbad, after considering the entire facts of the case, has recorded a finding that petitioner was minor and the said order needs no interference by this Court.

5. This writ application was first placed before the learned Single Judge of this Court on 9.8.2006 and the learned Single Judge, after considering the points involved in the writ application and the order passed by the Division Bench in W.P.Cr. (HB) No. 122 of 2006, referred the matter to the Division Bench for hearing. Hence this writ application was presented before this Court.

6. As noticed above, the Division Bench dismissed the writ petition as being not maintainable after holding that the impugned order passed by the Sub divisional Judicial Magistrate can be challenged only under Section 482 Cr.P.C .

7. The Division Bench held that order passed by the Judicial Magistrate is amenable only to the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure. Now the question that needs consideration is whether the decision rendered by the Division Bench in the aforesaid case is per incuriam. A judgment per incuriam is one which has been rendered inadvertently due to obvious inadvertence and also on account of the fact that the decisions of the Supreme Court have not been brought to the notice of the Court.

8…as noticed above, the petitioner, Ranjana Verma, married respondent No. 5, Shyam Kumar Verma on 17.2.2006 out of her own free will. The marriage was registered by the Marriage Officer, Dhanbad. According to the petitioner she was major on the date of marriage as her date of birth is 5.1.1988. Subsequently the marriage was also performed in Bhiphor Shankar Math and, thereafter, it was intimated to the Officer In-charge, Dhanbad Police Station and also the Chief Judicial Magistrate, Dhanbad. When respondent No. 4 (father of the petitioner) came to know about the said marriage, he lodged a complaint in the court of the Chief Judicial Magistrate, Dhanbad which was registered under different sections including Section 498A I.P.C. Respondent No. 4 then filed an application for issuance of search warrant for recovery of the petitioner. Accordingly the petitioner was recovered from the custody of her husband, respondent No. 5 and under the order of the court the petitioner was sent to Nari Niketan Deoghar on 26.4.2006. Thereafter, respondent No. 4 filed an application in the court below praying therein to handover the victim girl (petitioner) to him which was objected to by the husband of the petitioner (respondent No. 5) on the ground that the petitioner is major and she has married out of her own free will. In support of her age a registration card (admit card) showing the date of birth of the petitioner as 5.1.1988 issued by the Council for Indian School Examination, New Delhi was filed. The said certificate was not disputed by the father of the petitioner. However, on the date of hearing, respondent No. 4, father of the petitioner, produced a birth certificate showing the date of birth of the petitioner as 5.12.1989. The Sub-divisional Judicial Magistrate, after considering the entire facts of the case and the documents relating to date of birth of the petitioner, held that the petitioner was major and she was at liberty to go to any place as per her own wish. Accordingly, the petitioner was ordered to be released.

9. Respondent No. 4, the father of the petitioner, challenged the said order before this Court in Criminal Revision No. 374/2006 on the ground that though in the registration card issued by the Council for Indian School Examination, the date of birth of the petitioner was recorded as 5.1.1988 but, in fact, the date of birth of the petitioner is 5.12.1989 and in support of that a certificate under the Birth and Death Registration Act was filed. A Bench of this Court, taking into consideration the statement of the father that since the petitioner was genius in study, her year of birth in the school register was mentioned as 5.1.1988, allowed the revision application and set aside the order dated 20.5.2006 passed by the Sub-divisional Judicial Magistrate, Dhanbad and remanded the matter back to him for giving a fresh finding. After remand the matter was again heard by the Sub-divisional Judicial Magistrate and after hearing the parties the impugned order dated 16.6.2006 was passed directing release of the petitioner in favour of her father, respondent No. 5. In the impugned order the Sub-divisional Judicial Magistrate took the view that in case of determination of date of birth the best evidence is the evidence of the father and mother. Relying upon the statement of the father and ignoring the certificate issued by the Council for Indian School Examination, the learned Single Judge came to the conclusion that the petitioner was minor.

10. As noticed above, according to the petitioner she was born on 5.1.1988 and she was major on the date she was married with respondent No. 5. On the other hand, according to the statement of the father given in the court the petitioner was born on 5.12.1989 and therefore, she was minor i.e. she was 16 years 2 months 12 days. We fail to understand as to how the court below ignored the undisputed registration certificate issued by the Council for Indian School Examination, according to which she was major, and relied upon a birth certificate produced by the father on the date of hearing issued on the same date. The father of the petitioner got the date of birth entered in the register maintained by the authorities on the same date when the certificate was issued. Obviously this birth certificate was procured by the father to show the petitioner as minor.

11. Besides the above, the petitioner married respondent No. 5 out of her own sweet will and she is still ready to live with her husband by leading a happy marital life. In the aforesaid premises, we are of the view that the petitioner must be treated as major and considering the constitutional right of liberty given to her in the Constitution, she is at liberty to live with her husband.

12. For the aforesaid reasons, this writ application is allowed and the impugned order dated 16.6.2006 passed by the Sub Divisional Judicial Magistrate, Dhanbad in C.P. Case No. 601 of 2006 is set aside. Consequently, the entire criminal proceedings initiated against respondent No. 5, namely the husband of the petitioner, are also quashed.

KERALA

52. Sasidharan Nair, aged 50 years, s/ov s. Superintendent of Police and Ors., WP (Crl.).No. 337 of 2010(S), Decided On: 06.09.2010[5].

Basant J.

1. The petitioner has approached this Court again with this petition for issue of a writ of habeas corpus directing the respondents to produce his daughter - Sasikala S, aged 25 years (date of birth 27.9.1984). The petitioner had come to this Court earlier with an identical petition and the same was disposed of by judgment dated 18.5.2010, a copy of which is produced in court. That disposal was on the basis of agreement/ settlement of the parties.

[5] http://www.indiankanoon.org/doc/170046/

2. The present grievance of the petitioner is that the alleged detenue, his daughter, who had returned along with him, as per judgment on 18.5.2010 and who was residing with him till 10.8.2010, is again missing from 10.8.2010. According to him, the alleged detenue was being detained by the third respondent. 7. In our interactions with the alleged detenue, the alleged detenue stated that though she had returned along with the petitioner on the strength of previously passed judgment, she does not want to continue residence along with her father - the petitioner. She adamantly asserts that she does not want to return with her father. It is her version in the affidavit that she has joined for M.B.L course. She is residing along with a friend of hers at Bangalore. She intended to join a hostel and she wants to continue her studies. In as much as she is not under any illegal detention or confinement, she prays that this writ petition may be dismissed.

3. The petitioner and his counsel assert that the alleged detenue is not living along with any friend. She does not really intend to continue her education. She is living along with the third respondent and it is the third respondent who brought her to this Court, this morning, asserts the petitioner.

4. In a petition for issue of a writ of habeas corpus, the court is primarily concerned with the question whether the alleged detenue is under any illegal confinement or detention. In this case, we are conscious of the fact that we are dealing with an adult major woman, aged 26 years. She is an advocate and she is aware of her rights. She can be presumed to be aware of her responsibilities. She is competent to take a decision affecting her future. The third respondent is admittedly a married person. He has another wife. It is submitted that he has already filed an application for divorce and same is pending. The wife of the third respondent has not agreed for divorce and therefore the petition pending is not one for divorce by mutual consent, submits the alleged detenue.

5. We seet he unfortunate plight of the petitioner. The petitioner submits that he had done everything possible to make the stay of the alleged detenue with him comfortable and happy. He had also taken steps to obtain a Visa for the alleged detenue and he had invested necessary amounts to send her to England to continue her studies, as desired by her. She now states that she does not want to go with the petitioner. She asserts that she has no improper relationship with the third respondent.

6. We find reason to feel that the assertions of the petitioner are correct. Be that as it may, we must respect the decisional autonomy of the alleged detenue; an adult major woman aged about 25 years and an advocate by profession. We accept her assertion that she is not under any illegal confinement or detention. In this jurisdiction under Article 226 of the Constitution, we are not to preside over the morality of the course chosen by the alleged detenue. The petitioner can have the satisfaction that he had made all possible efforts, prior to Ext.P2 and thereafter to ensure that his daughter is saved from having an improper relationship with a person already in valid matrimony. We are not persuaded to agree that any direction need be issued in this writ petition.

7. in the result:

(a) This petition is dismissed.

(b) We accept the submission of the alleged detenue that she may be permitted to leave this court alone on her own and permit her to choose to follow whatever course that she wants to.

53. Sreedevi Amma, w/o. Late Gangadharan vs. Sub-Inspector of Police, Nooranad, and another, WP (Crl.).No. 282 of 2010(S), Decided On: 21.07.2010.

Basan J.

1. These petitions have been filed by two women who are respectively mothers of two alleged detenues i.e., Sajira - the daughter of the petitioner in W.P.(Cri) No. 220/10 and Sajan Babu - the son of the petitioner in W.P.(Cri) No. 128/10.

2. The respective petitioners allege in their petitions that their daughter/son are detained by the son/daughter of the other petitioner. The petitioner - Sreedevi, alleges in W.P.(Cri) No. 128/10 that her son - a person aged about 23 years, is being illegally detained by the 6th respondent - Sajira - a woman much elder to him who has already married and has two children. In the petition filed by Subaida, she alleges that her daughter Sajira is illegally detained and confined by Sajan Babu and his mother Sreedevi.

3. These petitions were filed on 5/4/10 (W.P. (Cri) No. 128/10) and 10/6/10 (W.P. (Cri) No. 220/10). This judgment must be read in continuation of the earlier orders passed by us in these writ petitions.

4. Today, when the case came up for hearing, the alleged detenues are both present. The petitioner in W.P. (Cri) No. 128/10 is present personally. The petitioner in W.P . (Cri) No. 220/10 is not present. She is laid up, it is submitted. Both the petitioners are represented by their counsel.

5. We interacted with the alleged detenues - alone initially and together later. Both submit that they are not under any illegal detention or custody. Sajira, the alleged detenue in W.P.(Cri) No. 220/10, states that she wants to go along with the 5th respondent therein i.e., Sajan Babu. Sajan Babu, the alleged detenu in W.P. (Cri) No. 128/10, submits that he wants both his mother and the alleged detenue and that he cannot now leave the alleged detenue - Sajira. He wants to return from the Court along with the said Sajira. He states that he has the responsibility of giving his younger sister in marriage. After discharging that responsibility, he will think of getting married to Sajira, if such marriage can legally be performed.

6. The learned Counsel for the writ petitioner in W.P. (Cri) No. 220/10 submits that the alleged detenue Sajira still remains validly married and that her marriage has not been dissolved. Sajira makes assertions to the contrary. According to her, she has been divorced.

7. In these petitions filed for issue of a writ of habeas corpus, we are primarily concerned with the question whether the alleged detenues are under illegal confinement or detention. We are satisfied that they are not. We are, in these circumstances, of the opinion that no further directions are necessary in these writ petitions. We take note of the agony of the petitioners in these writ petitions. The petitioner in W.P. (Cri) No. 220/10 submits that her daughter - the alleged detenue is legally married to another person and that she has two children in the wed-lock who have been left with the petitioner i.e., the grandmother of the minor children. The petitioner in W.P.(Cri) No. 12 8/10 narrates her difficulties and agony as the alleged detenu Sajan Babu is the only person for the widowed petitioner to look-after her and her younger daughter.

8. We do not think it proper or necessary to sit in judgment over the morality, ethicality and propriety of the conduct resorted to by the alleged detenues. They are adult persons - both having crossed the age of 21 years. We are, in these circumstances, satisfied that no further directions are necessary in this matter we having satisfied ourselves from the statements given by the alleged detenues before us that they are not under any illegal confinement or detention and that they are now together as per their voluntary and personal decisions.

9. These writ petitions are, in these circumstances, dismissed. The alleged detenues are informed that they are at liberty and can choose to follow whatever course is, according to them, the best and proper for them. We are informed that both the alleged detenues were produced before the learned Magistrate earlier and that the learned Magistrate had left them free.

54. Vasumathy and Baburaj vs. The Deputy Superintendent of Police and Ors, W.P (Cri) No. 425/2010, Decided On: 11.11.2010, MANU/KE/1637/2010.

R. Basant, J.

1. The petitioners have come before this Court with this petition for issue of a writ of habeas corpus to search for, trace and produce Priya, a woman, aged about 39 years (date of birth - 14.11.1971), who is daughter of the 1st petitioner and the wife of the 2nd petitioner.

2. The 2nd petitioner is employed abroad. The 2nd petitioner and the alleged detenue Priya have been married for a long period of time. Their marriage was solemnized on 20.03.1993. Two children- both boys, aged 14 and 10 years respectively, are born in the wedlock. In connection with his employment, the 2nd petitioner resides abroad. The 1st petitioner resides at her native place. The alleged detenue is a D. Pharm Diploma holder. She runs a medical shop. She was residing in a house belonging to her husband, the 2nd petitioner. While so, the alleged detenue was found missing from 17.09.2010. A complaint was lodged before the police. The alleged detenue was brought back to the house of the 1st petitioner, her mother on 19.09.2010. Till 06.10.2010, she resided with her mother. But from 06.10.2010, she was found missing. On the complaint of the 1st petitioner, the mother of the alleged detenue, Crime 486 of 2010 was registered at the Kattoor Police Station. The alleged detenue was not traced by the police. It is, in these circumstances, that the petitioners came to this Court with this petition on 02.11.2010.

3. On 10.11.2010, the learned Government Pleader prayed for time for the police to trace the alleged detenue…

4. The learned Government Pleader submitted before Court that the alleged detenue has been traced and has agreed to appear before this Court…

5. We interacted with the alleged detenue for some time in the Chamber. She is aged about 39 years. She states categorically and unambiguously before us that she is in love with the 3rd respondent and has gone with the 3rd respondent on her own. She does not want to return to the petitioners. She wants to live with the 3rd respondent. Her children are now residing with the 1st petitioner. She has no objection in the children continuing to reside with her mother. She asserts that she may be permitted to have interactions with the children. She stated before us categorically that she is not under the illegal detention or confinement of anyone. She has gone with the 3rd respondent Lenin with her free consent. She prays that she may be permitted to leave the Court and continue residence with Sri. Lenin.

6. The petitioners stated before us that the alleged detenue is not taking an informed, considered, or prudent decision. The 2nd petitioner stated that if the alleged detenue wants to leave him and get married to the 3rd respondent, he has no objection in agreeing to a divorce by mutual consent. But he asserts that the alleged detenue shall not be permitted to see the children unless the children want to meet their mother.

7. Though we attempted to persuade the alleged detenue to remain for some time in a hostel and to think, contemplate and take decision for her after sufficient forethought, she asserts that she has already thought about the matter and she does not need any further time. Our attempts to persuade her to accept the suggestion did not unfortunately succeed. She is also willing to apply for divorce by mutual consent. Her right to claim custody/visitor rights in respect of her children may be left unfettered. She may be permitted to leave the Court and pursue her chosen course of going with the 3rd respondent, she asserts.

8. In a petition for issue of a writ of habeas corpus, we are primarily concerned with the question whether the alleged detenue is under any illegal confinement or detention. We are satisfied that the alleged detenue is not under any confinement or detention. We are satisfied that the alleged detenue has taken a voluntary decision on her own to leave the petitioners and go with the 3rd respondent. The 3rd respondent, it is admitted by all, is a young man, aged about 25 years only. We may state that in a petition for issue of a writ of habeas corpus, we are not concerned with the prudence, correctness or morality of the decision of the alleged detenue. We need only ascertain whether the decision is taken voluntarily by her. We are satisfied after our long interactions with the alleged detenue in the presence of the petitioners that she has taken the voluntary decision on her own to leave the petitioners and join the 3rd respondent. We respect her decisional autonomy. She has the right to take decisions which may ultimately turn out to be correct or incorrect. We are satisfied that no further directions are necessary in this Writ Petition.

9. However, we take note of the agreement between the 2nd petitioner and the alleged detenue that they can present a petition for divorce by mutual consent immediately. There have been discussions between the counsel and it is agreed that the joint petition for divorce under Section 13B of the Hindu Marriage

Act can be filed before the Family Court, Trichur, immediately. We record that submission of the alleged detenue and the 2nd petitioner in the presence of their counsel.

10. The 3rd respondent Lenin is not present. The alleged detenue and her counsel submit that the said Lenin is willing to take the alleged detenue with him at any time. It is agreed that on account of this episode, there shall be no vindictive action or harassment to each other by the petitioners on the one hand and the alleged detenue and the 3rd respondent on the other…

11. in the result:

a) This Writ Petition is dismissed;

b) The alleged detenue Priya, a woman aged about 39 years, is permitted to leave Court on her own as desired by her. We make it clear that she shall be at liberty to pursue whatever course she thinks is best for her. We record her submission that she wants to leave and live with the 3rd respondent.

12. We have heard the learned Government Pleader. The learned Government Pleader also submits that at the moment and with the available inputs, the police are not satisfied that there is any element of illegal detention or confinement. However, the police are making every effort to trace the alleged detenue. The learned Government Pleader prays that 10 days' further time may be granted for the police to trace the alleged detenue and ascertain from her mouth whether she is under detention or not. We grant the learned Government Pleader time as prayed for.

13. Heard the learned Counsel for the petitioners. The grievance is that the alleged detenue, an adult major woman, aged about 38 years, is kidnapped by the 3rd respondent. Consideration of the submissions made at the Bar and perusal of the petition clearly reveal that the alleged detenue, a married woman, whose marriage took place on 20.03.93 and who has got two children in that wedlock, had left the house of the petitioners on 17.09.2010. A complaint was made before the police and she was brought back on 19.09.2010 without any legal or proper action being taken on the complaint. Subsequently she is again found to be missing from 06.10.2010. On the very next day, a complaint has been filed and a crime has been registered as Crime 486 of 2010 of Kattoor Police Station. Investigation is pending. She has not been traced so far. The F.I statement reveals that after the alleged detenue was taken back to the house of the petitioners, she had attempted to commit suicide also. It is evident that she was prevailed upon to lodge a complaint against the 3rd respondent, with whom she is now alleged to have disappeared.

14. Having considered all the relevant inputs, we must say that we are unable to perceive any elements of illegal detention or confinement. The learned Counsel for the petitioner is permitted to place any further material before this Court to satisfy us that there are any elements of illegal detention or confinement. Inasmuch as a crime has already been registered, the court directed the learned Government Pleader to take instructions and make submissions on the next date of posting to enable the court to decide on the question of admission.

55. Biju. V.J. aged 36 years vs. District Superintendent of Police and others, WP(Crl.).No. 303 of 2009(S), Decided On: 05.08.2009[6].

R. Basant, J.

1. The petitioner - a young man aged 36 years, has come to this Court with this petition under Art.226 of the Constitution for issue of writ of habeas corpus to search for, trace and produce the alleged detenue Smt. Sujeetha - a woman aged about 35 years and her two children Sujith and Surabhi, aged 10 years and 6 years respectively, who he claims, are the children born to her by him. According to him, the alleged detenue Smt. Sujeetha and her two children are under the illegal detention and confinement of respondents 3 to 5 who are the father, brother and brother-in-law of the said Sujeetha.

2. The version narrated by the petitioner sounds more like fiction. According to him, he had gone to the house of the 3rd respondent as an employee/driver. While he was working there, he had fallen in love with the alleged detenue. Intimacy developed and this led to physical relationship. It is his case that twice the alleged detenue had become pregnant and those pregnancies were aborted to protect the family name and honour.Respondents 3 to 5 allegedly ensured that the alleged detenue contracted a marriage with one Sukumaran Nair. According to the petitioner, though such a marriage was contracted, that relationship did not last and the alleged detenue was continuing in the house of the 3rd respondent – her father. The petitioner was also continuing as an employee with the 3rd respondent and according to him, he continued his relationship with the alleged detenue to the knowledge of respondents 3 to 5 as also her legally wedded husband - the said Sukumaran Nair. They continued their physical intimacy also. Two children - Sujith and Surabhi referred above, were born in such physical intimacy between the petitioner and the alleged detenue. It is the case of the petitioner that respondents 3 to 5 as also all others known to them accepted the relationship between the petitioner and the alleged detenue and also the fact that the children were born to the alleged detenue in the petitioner and not in her legally wedded husband.

3. It is the case of the petitioner that though the husband was willing to divorce the alleged detenue, respondents 3 to 5 in the name of family honour did not permit him to do so and therefore the relationship between the petitioner and the alleged detenue continued on the sly. According to the petitioner, the alleged detenue had come to his parental home in May, 2009 along with the children and the alleged detenue along with the children were residing along with the petitioner at his prenatal home. The two children were admitted to a school near the house of the petitioner.

4. While they were so residing, the petitioner alleges that on 12/6/09 the alleged detenue was called to the Police Stationon the plea that the matters have to be talked over and settled.On 13/6/09, she went to the Police Station and from the Police Station on the promise that the disputes would be settled, she was sent along with her father - the 3rd respondent. According to the petitioner, the alleged detenue was thereafter detained and confined in the house of the 3rd respondent by respondents 3 to 5. It is his further case that the alleged detenue was assaulted and injuries were caused to her by respondents 3 to 5.

[6] http://judis.nic.in/judis_kerala/Chrseq.aspx

5. It is, in these circumstances, that the petitioner came to this Court with this petition on 29/7/09. This petition was admitted on 30/7/09 and notice was ordered to the respondents.

6. Today, when the matter came up for hearing, the petitioner and his counsel are present. Respondents 3 to 5 are represented by a counsel. The 4th respondent has appeared in person.The alleged detenue along with the two childrena re produced by the police.The learned Government Pleader submits that after the filing of this case, the police had traced the alleged detenue in the house of the 3rd respondent and she was taken into the protective custody and produced before the learned Magistrate on 2/8/09. Before the learned Magistratethe alleged detenue expressed her desire that she be permitted to go with the petitioner. She complained before the learned Magistrate that she was subjected to physical abuse in the house of the 3rd respondent by respondents 3 to 5. She stated before the learned Magistrate that her life was in danger. The learned Government Pleader submits that, in these circumstances, the learned Magistrate had sent the alleged detenue to the Mahila Mandir from where the police have produced her before this Court today.

7. We allowed the alleged detenue and her two children to remain in the Chamber without being influenced by any one.After lunch we interacted with the alleged detenue in the Chamber. We later interacted with the petitioner and the 4th respondent as also their counsel. The learned Government Pleader was also present.

8. The alleged detenue asserts unambiguously that though she is married to the said Sukumaran Nair, there has been no relationship as such between them except for the first 15 days of marriage. According to her, she had become pregnant on four occasions. Two earlier pregnancies were aborted.Her two children Sujith and Surabhi were born in her relationship with the petitioner and not with the said Sukumaran Nair - her legally wedded husband. She states categorically that she does not want to return to respondents 3 to 5 or her husband Sukumaran Nair; but wants to go along with the petitioner herein.

9. The learned counsel for the 4th respondent submits that an earlier application under Sec.97 of the Cr.P.C. was dismissed by the learned JMFC-I, Kasaragod, as per the order in C.M.P.No.1493/09 without and before ascertaining the response of the alleged detenue.A copy of that order has been placed before us.That order shows that the learned Magistrated dismissed the petition on the ground that the alleged detenue is a married woman and the petitioner's claim for relationship with her is not founded on good moral grounds. The 4th respondent who is present before Court prays that the alleged detenue may either be sent along with him to his house or to the Mahila Mandir or any other place; but she may not be permitted to accompany the petitioner herein.He denies all allegations ofthe alleged torture etc., inflicted on the alleged detenue at thehouse of respondents 3 to 5. The learned counsel for respondents 3 to 5 denies all the allegations raised against respondents 3 to 5 in this petition.

10. This application is filed under Art.226 of the Constitution for issue of a writ of habeas corpus on the allegationthat the alleged detenue is illegally detained and is subjected totorture. The learned Government Pleader submits that as any as three crimes between the parties have been registered and intwo of them, final reports have already been filed. The learned Government Pleader submits that on the present allegationsraised by the alleged detenue before the police, appropriateaction shall be taken by the police in accordance with law.

11. The alleged detenue has made the position clear thatshe does not want to return to the house of respondents 3 to 5 where she apprehends physical danger to herself as also illegalconfinement and detention.Her husband has not appeared before Court. She has unambiguously expressed her desire not to return to respondents 3 to 5 or her legally wedded husband Sukumaran Nair. Her preference is made very clear - that she wants to go along with the petitioner herein.

12. In this petition for issue of a writ of habeas corpus, we are not concerned with the morality, propriety, wisdom or prudence of the decision of the alleged detenue. We are convinced that she was restrained and detained against her wishes by respondents 3 to 5. On the basis of the statement made by the alleged detenue, that conclusion appears to irresistible. She, though a married woman, is entitled under law to all her rights for personal liberty.An adult woman cannot be physically detained or restrained against her wishes by any one including her parents, brother, relatives or even her husband.We have to respect the wishes of the allegedd etenue- an adult major woman. In response to our specific questions,the alleged detenue requests that she may be set at liberty andpermitted to exercise her choice to go with the petitioner.

13. We do not want to grant her any permission to go with the petitioner; but we make it clear that she as a free individual has a liberty to act according to her wishes. She has made it clear that she wants to go with the petitioner. Her wishes will have to be respected.

14. This writ petition is, in these circumstances, allowed.The alleged detenue who has been produced before this Court along with her two children is permitted to go along with her two children as a free person enjoying of all her liberties from this Court. The police shall ensure that her wishes are respected andthere is no hindrance or obstruction to the free exercise of her wishes.

15. We make it clear that this judgment will not in any wayfetter the rights of the husband of the alleged detenue to take appropriate action for the indiscretion/contumacious behaviour, if any, on the part of the alleged detenue or the petitioner. We make it further clear that we have not come to any final conclusions on the allegations raised in this petition also Parties concerned shall have the liberty to raise appropriatecontentions before the appropriate fora where the matter comes up later.

16. Hand over a copy of this judgment to the learned Government Pleader. Hand over another copy of this judgment to the learned counsel for the petitioner.

56. Rajmohan, M.S. vs. State of Kerala and Ors. W.P (Cri) No. 373/2009, Decided On: 15.10.2009, MANU/KE/1290/2009.

R. Basant, J.

1. Ms. Shamnamol, daughter of the 6th Respondent, is an adult major woman, she having attained the age of majority, i.e., 18 years. She was born on 20-12-1989. The Petitioner herein is a young man aged above

21 years, he having been born on 18-6-1988. The Petitioner and the said Shamnamol (hereinafter referred to as the 'alleged detenue') were friendly from very early days. The Petitioner is a Hindu by religion whereas the alleged detenue is a Muslim. While she was a plus one student, she allegedly had fallen in love with the Petitioner and her parents, on coming to know of that relationship, had taken her away to Shaijah, where the 6th Respondent is employed. After completing her plus two course there, she came back to India and joined B.Sc.(Mathematics) course at the T.K.M College, Kollam. She was a first year student of B.Sc. (Maths) in that College. She was residing in the women's hostel. The alleged detenue and the Petitioner continued their relationship secretly. The parents of the alleged detenue were not aware of such relationship. They happened to come to know of that relationship and thereafter apprehending that the alleged detenue may forcibly be given away in marriage to someone, the alleged detenue eloped from her house with the Petitioner on 29-8-2009. A complaint was filed and Crime No. 511 of 2009 was registered at the Kilimanoor Police Station under the caption "woman missing". The Petitioner and the alleged detenue went away to some place secretly and it is alleged that marriage was performed and solemnised between them on 1-9-2009. It is stated that the marriage took place in a temple in Tamil Nadu. Though they allegedly wanted to get their marriage registered, they could not, for various reasons, get their marriage registered.

2. The chase became hot and the Petitioner and the alleged detenue realised the need to appear before the police. Accordingly, on 2 -9-2009, they surrendered before the police. On3 -9-2009, the alleged detenue was produced before the Magistrate. The learned Magistrate evidently, after satisfying himself that there was no element of illegal detention, allowed the alleged detenue to go freely from the Court and she allegedly went along with the Petitioner. The Petitioner and the alleged detenue started residence together.

3. On 5 -9-2009, the Petitioner and the alleged detenue gave notice before the Marriage Officer, to get their marriage registered/solemnised under the Special Marriage Act. According to the Petitioner, the alleged detenue and the Petitioner were thus living together at his family house along with his parents till 9-9-2009.

4. On 9 -9-2009, it is alleged that the 6th Respondent along with some others under the cover of darkness allegedly took away the alleged detenue by use of force from the house of the Petitioner. A complaint was promptly lodged before the Kilimanoor Police Station on 9 -9-2009 by the father of the Petitioner and Crime No. 526 of 2009 was registered at the said police station. Investigation into that crime is proceeding. The police have reported to this Court that they are satisfied that offences alleged in that crime have been committed and they are taking necessary steps to trace the alleged detenue as also the 6th Respondent. Their attempt has not been successful so far. They have already addressed the Passport Officer and are leaving no stone unturned to ensure that the alleged detenue and the 6th Respondent are traced and brought before Court, submits the learned Government Pleader.

5. As the said efforts did not fructify, the Petitioner on 14 -9-2009 filed this petition for issue of a writ of habeas corpus to search for, trace and produce the alleged detenue. This petition was admitted on 15-9-2009 and the case was posted to 22-9-2009.

6. At this juncture, as per the report of the police, the alleged detenue was taken away by the 6th Respondent to his place of employment at Sharjah. The report of the police shows that the alleged detenue was taken away on 17-9-2009 by flight by the 6th Respondent from the Calicut Air Port.

7. When the case came up for hearing on 22-9-2009, the 6th Respondent entered appearance through a counsel and prayed for time to file counter statement The Division Bench which dealt with the matter on that day granted time for filing counter; but posted the case to 5-10-2009 with directions to the 6th Respondent to produce the alleged detenue on 5-10-2009.

8. On 5-10-2009, when the case came up for hearing, the alleged detenue was not produced. The learned Counsel for the 6th Respondent prayed for 10 days' time to produce the child. We took note of the sequence of events and we were not satisfied about the bona fides of the request of the 6th Respondent. We directed the p olice to take all necessary steps to ensure that the alleged detenue is produced before this Court on the next date of posting i.e., on 12-10-2009. At the same time, we granted time to the 6th Respondent to produce the alleged detenue by then, i.e., on 12-10-2009.

9. On 12-10-2009, when the matter came up for hearing, police filed a detailed statement about the stage of investigation. They expressed before Court their inability to immediately produce the alleged detenue and their inability to reach the 6th Respondent. The 6th Respondent at that stage through his counsel raised a contention that, this petition under Article 226 of the Constitution of India for issue of a writ of habeas corpus is not maintainable. Various contentions were raised, to which we shall presently refer to. A counter-affidavit of the 6th Respondent was also filed. The case was posted to 14-10-2009 and on the submission of the Petitioner that certain applications have been filed, after hearing the counsel on the question of maintainability, the case was posted to this day.

10. Today, when the case came up for hearing, the learned Counsel for the 6th Respondent has filed I.A. No. 12724/09 seeking leave of the Court to produce an affidavit allegedly sworn to by the alleged detenue before the Assistant Consular, Consulate General of India, Dubai (UAE).

11. Coming back to the facts of the case, we have no hesitation to agree that it is necessary that the alleged detenue must be brought before Court so that this Court can satisfy itself that the alleged detenue is not under improper restraint, confinement or detention. The sequence of events is really shocking. After the alleged detenue was produced before the learned Magistrate and the learned Magistrate allegedly permitted her to go along with the Petitioner and the Petitioner and the alleged detenue started residence together, in flagrant violation of all refined and civilised norms of justice, force has been employed to take away the alleged detenue. The fact that this alleged act is being done by the father, the 6th Respondent will not in any way militate against the gravity of the alleged contumacious conduct, nor shall it justify such improper and culpable conduct. The Petitioner and the alleged detenue are adult persons to whom law concedes the right to get married in accordance with law and live together. The option of the 6th Respondent to counsel, advice and guide his daughter notwithstanding, he has no business to take law into his own hands to take away the alleged detenue by use of force. The conduct of the 6th Respondent, it appears, is an affront to the rule of law. After the filing of this petition and after it was admitted to file the records reveal that the alleged detenue was taken away to keep her beyond the immediate reach of this

Court. We are satisfied prima facie that there is improper "custody", objectionable restraint and negation of rule of law in the conduct of the 6th Respondent keeping the alleged detenue.

12. The conduct of the 6th Respondent is reprehensible and deserves to be frowned upon. We are satisfied that this is not a case where the extraordinary constitutional jurisdiction under Article 226 of the Constitution can be abdicated on the basis of the alleged theory of parental authority of the 6th Respondent who has flouted all norms and notions of refined and civilised justice. Both Prasadhkumar and Sreekesh's case also recognise and accept the jurisdiction of this Court to act under Article 226 in the peculiar facts like the instant one.

13. We do not, in these circumstances, accept the contention of the learned Counsel for the 6th Respondent that the petition is not maintainable and proceedings deserve to be discontinued. Proceedings will have to continue. The presence of the alleged detenue will have to be secured. It will have to be ascertained whether she is in illegal detention, confinement, or improper restraint.

14. We are satisfied, in these circumstances that a writ of habeas corpus must be issued to produce the alleged detenue before this Court. After her presence is secured and after her responses are ascertained, further course of action shall be decided. At any rate, we find no reason to discontinue the proceedings at this juncture.

15. As per the order in I.A. No. 12668/09, additional Respondents 7 and 8 have been impleaded. They are the Consulate General of India, Sharjah and the Union of India, represented by the General Secretary, Department of External Affairs, New Delhi. The learned Assistant Solicitor General of India has taken notice on their behalf. The learned ASGI undertakes to get instructions, but prays that simultaneously notice may be issued to Respondent Nos. 7 and 8.

16. It is hence directed that notice shall be issued to Respondent Nos. 7 and 8 directly. Simultaneously, the learned ASGI is directed to take instructions from Respondent Nos. 7 and 8 and to immediately ensure that the alleged detenue and the 6th Respondent are sent back to India by initiating appropriate steps in accordance with law. If the 6th Respondent does not return to India forthwith with the alleged detenue and appear before this Court, the 7th and 8th Respondents must take necessary action to impound their passports, cancel their visas and repatriate them to India. Respondent Nos. 7 and 8 shall co-operate with Respondent Nos. 1 to 5 to immediately secure repatriation of the alleged detenue and the 6th Respondent.

17. The needful shall be done by Respondent Nos. 1 to 5 and Respondent Nos. 7 and 8 by the next date of posting and it shall be ensured that the alleged detenue is produced before this Court on the next date of posting. Considering the nature of the case, we deem it necessary and direct the 2nd and 3rd Respondents to personally monitor and oversee the investigation and ensure that the alleged detenue is produced before this Court on 16-11-2009. The learned Government Pleader shall communicate this direction to Respondent Nos. 2 and 3.

18. Call this petition again on 16-11-2009. If in the meantime the alleged detenue is traced, she shall be produced before the learned Magistrate having jurisdiction and the learned Magistrate shall pass appropriate orders with specific directions to the alleged detenue to appear before this Court on such date

of posting. On 16-11-2009, Respondent Nos. 2 and 7 shall file statements before this Court showing in detail the action taken by them in pursuance of these directions.

57. K.J.Vijayan, aged 57 vs. Sub Inspector of Police, Panangad and Another, WP (Crl) No. 26 of 2008(S), Decided On: 30.01.2008[7].

P.R. Raman, J.

1.The petitioner who is the father of one Asha Vijayan, the alleged detenue admittedly 23 year old and hence a major, has filed this writ of habeas corpus alleging that his daughter who was studying in the final year B.Sc. Physiotherapy in the School of Medical education at Thevara, was found missing from 19-11-2007. Though as usual she left the house to school, thereafter she never returned to the house. Complaints were made to the police, but no effective enquiry was conducted by them to find out the whereabouts of the alleged detenue. On further enquiry it would reveal that the alleged detenue was under illegal custody of the 2nd respondent who was stated to be an accused in several crimes.

2. We issued notice to the 2nd respondent by special messenger but notice was returned as the 2nd respondent was not available in the given address.

3. The learned Government Pleader appearing on behalf of the State, however, submitted on instruction that: investigation so far conducted reveals that the alleged detenue had contacted the Station House Officer and informed the officer that she was in love with Sri Reji Daniel and they got married on 5-1-2008 before the Puthuppally Sub Registrar's Office and they are at present in New Delhi. Photo copy of the certificate of marriage is also produced for perusal. The said certificate is seen issued under section 13 of the Special Marriage Act showing that on 5-1-2008, Reji Daniel Mathew, son of Daniel Mathew and Asha Vijayan and the alleged detenue got married under the said Act.

In the circumstances, leaving open the right of the petitioner to seek other remedies before other forums, this writ of habeas corpus is closed.

[7] http://judis.nic.in/judis_kerala/Chrseq.aspx

MADHYA PRADESH

58. Latori Chamar vs. State of M.P. and Ors., Decided on 10.01.2007, 2007(1) MPLJ405.

Dipak Misra, J.

1. The petitioner, the father of Tejabai, a minor, has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India for issue of a writ in the nature of 'habeas corpus' for production of the said Tejabai in Court and for grant of exemplary compensation for her detention by the respondent No. 5, Moolchand, in an illegal manner.

2. The facts which are necessitous to be exposited for adjudication of the case are that the petitioner is an illiterate villager of Village, Khakariya, Tehsil, and Deori in the District of Sagar and belongs to Scheduled Caste. The respondent No. 6, Nirmal Panda, who is engaged in curing people by alternative method of treatment by reading 'Mantras' treated Tejabai who was suffering from headache and on the date of such visit he impressed upon the wife of the petitioner that Tejabai should marry Moolchand, son of Hariruia Chambar otherwise the family will pave on the path of ruination but the petitioner and his wife did not accede to such a suggestion, as a consequence of which on 31-7-2006 in the midnight the daughter of the petitioner was abducted by the respondent Nos. 5 and 6 with the help of other co-accused persons. As set forth the petitioner lodged a FIR at the Police Station, Maharajpur, Tehsil, Deori in quite promptitude and orally informed the police that the respondent No. 5, Moolchand and respondent No. 6, Nirmal Panda had colluded and abducted his minor daughter aged about 16 years and thereafter a written complaint was given in that regard. Despite receipt of the complaint by the petitioner no action was taken against the private respondents which compelled the petitioner to submit a written complaint to the Deputy Inspector General of Police, Sagar, Superintendent of Police, Sagar and the Station House Officer, Manila Thana, Gopalganj, Sagar on 6-8-2006. Despite such action being taken by the petitioner, sphinx like silence was maintained by the authorities which resulted in the agonised suffering of the petitioner.

3. It is contended in the writ petition that though the time rolled, no action was taken and the said inaction emboldened the respondent Nos. 5 and 6 to threaten the petitioner that he would visit with dire consequences. Under these circumstances the petitioner was compelled to approach this Court for the reliefs that have been mentioned hereinabove. It is urged in the petition that the respondents are influential persons having a political base and, therefore, the authorities have become oblivious of the allegations made against them and have not turned a Nelson's eye to the complaint made by the petitioner.

4. A counter affidavit has been filed by the respondents' No. 1, 2 and 4 contending, inter alia, that they have instituted a Crime No. 104/06 on the basis of the FIR lodged by the petitioner and they have taken all steps to rescue Tejabai. It was put forth that they have affixed photographs and pamphlets on the train and pasted the same behind buses and other conspicuous places. Be it noted, an additional reply was filed by the respondent No. 4 contending, inter alia, that In the investigation it was found out that Moolchand, respondent No. 5, had abducted the daughter of the petitioner and on that basis a criminal case has been registered and steps are being (sic) had eloped because of the relationship that had been established between them and hence, the investigating agency is not getting any cooperation from them and as they

must be living somewhere out of the State as husband and wife which has made it to find out their whereabouts.

5. This Court on 7-11-2006 while entertaining the petition had directed the respondent Nos. 1 to 4 to make all attempts to produce the said Tejabai before this Court. Thereafter a direction was issued to make news publication along with photograph of Tejabai and to send her photographs to various police stations so that she can be made available before the respondent Nos. 1 to 4 and ultimately produce before this Court.

6. On 2-1-2007 Tejbai was produced before this Court and the learned Additional Advocate General for the State made a statement that the respondent No. 5, Moolchand, has been taken into custody pursuant to registration of crime against him for the offences punishable under Sections 363 and 366 of the Indian Penal Code. Be it placed on record, an affidavit was filed on behalf of the respondent No. 6 to which we shall revert to at a later stage.

7. Tejabai, the daughter of the petitioner after being recovered was kept in the "Alp Nari Niketan" at Jabalpur. She expressed her opinion in an unequivocal manner that she does not intend to go with her parents. On that day without expressing any opinion, it was directed that Tejabai be kept in the "Alp Nari Niketan" till 4-1-2007. The learned Additional Advocate General for the State agreed to make arrangement for her stay in the said Nari Niketan which is a shelter home run by the State Government.

8. The matter was finally heard and on that day i.e. 4-1-2007 on a query being made Tejabai submitted that her date of birth is 30-1-1989. She refused in a categorical manner to go back with her father. It was further stated by her that her marriage with Moolchand has been solemnised and in the wedlock a female child has been born. She insisted that she would like to stay with the parents of Moolchand. The respondent No. 5, Moolchand, who was produced in custody stated about the marriage and submitted that he would keep Tejabai and the child with him. Parents of Moolchand, namely, Hariram Chamar and Shayamabai submitted that they would keep Tejabai with them. At that juncture, Mr. Greeshm Jain, learned Counsel for the respondent No. 6 invited our attention to the affidavit filed by the said respondent wherein certain allegations have been made against one Leeladhar Yadav. This Court keeping in view the obtaining factual matrix and the totality of the circumstances directed that Tejabai be retained, in the 'Alp Nari Niketan', the shelter home,

9. Before we advert to other facets it is apposite to advert to the affidavit filed by the respondent No. 6. It is contended that the family of the petitioner and that of the respondent No. 6 reside in close proximity and there had been no cavil between them. At that juncture, everyone in the village had knowledge that Tejabai was in love with Moolchand and Moolchand had good relationship with the respondent No, 6 and all this was known to the petitioner. The respondent No. 6 has disputed about his having any kind of political influence and has stated that he is making his livelihood as a labourer. Allegations have been made against one Leeladhar Yadav son of Roopchand Yadav, Village, Samnapur, Tehsil, Deori, District, and Sagar. The said Leeladhar Yadav describing himself as a counsel had deceived many persons and had influenced the petitioner to implead the said respondent as a party, despite the fact that he has nothing to do in this litigation and at no point of time he had pretended/persuaded Tejabai. It has been further asserted that the said Leeladhar Yadav has taken Rs. 3,500/- from him to affect a compromise so that he

would be unaffected any way by the present writ petition. It is urged that certain signatures were taken on blank papers to affect the compromise.

10. The second aspect that requires to be addressed is the interest of Tejabai and the child born to her. As admitted by Tejabai and Moolchand the child has been born to them because of their relationship. There is no disputation. In course of hearing, be it noted, the petitioner has stated that Tejabai had taken some jewellery and clothes withh er. He has admitted before this Court that the value of the same would not exceed Rs. 2,000/-. The parents of Moolchand have submitted that they would keep Tejabai with them as their son, Moolchand has married to her and they would take care of the child born in the wedlock, as they stand committed to the relationship that has been established by their son with Tejabai. It is submitted by Mr. Ruprah that Moolchand has shown immense loyalty, a great attribute which has arisen spontaneously and his parents have realized that the voyage of love of their son is better and sweeter than being a Captain in the Army. The learned Additional Advocate General submitted that in all fairness Tejabai should be allowed to stay with the parents of Moolchand.

11. We are conscious; Tejabai had not yet become a major. She is going to become major soon. Her father has raised enormous complaint that she had gone away from the house with jewellery and clothes worth Rs. 2,000/- approximately. She has been blessed with a child. A ch ild cannot be denied protection as enshrined under Article 21 of the Constitution of India. She has to be allowed to live in an acceptable dignified atmosphere. She cannot be permitted to live in an atmosphere which is alien and the person living therein would not like to have her. Not for nothing, it has been said that when a child is born face of human race glows with lustre. This Court cannot be oblivious of the fact the child born to Tejabai and the respondent No. 5 should not be compelled to live, because of her innocence and silence in a way, in an unacceptable atmosphere, for every human being a child or a grown-up has a desire to be wanted. The said privilege cannot be denied to her.

12. In view of our foregoing analysis, we are inclined to direct that Tejabai should be released from 'Alp Nari Niketan', Jabalpur and be allowed to go to the parents of the respondent No. 5. The Superintendent of Jabalpur shall make necessary arrangement for her safety travel to the home of the respondent No. 5.

13. As far as allegations against Leeladhar Yadav is concerned, the affidavit preferred by the respondent No. 6 before this Court should be treated as an FIR by the Superintendent of Police, Sagar and investigation be made in accordance with law.

14. The writ petition is accordingly disposed of.

MADRAS

59. Bala @ Balasubramaniam vs. State represented by the Sub Inspector of Police, H.C. Pet. (MD) No. 912/2008, Decided On: 22.12.2008, MANU/TN/1720/2008.

R. Regupathi, J.

1. The petitioner claiming himself as the husband of the detenue by name Mumtaj Begum, aged about 17 years preferred the Habeas Corpus Petition.

2. In the affidavit, it has been stated that there was love affair with the detenue and their marriage was performed on 26.07.2008. Subsequently, they lived together as husband and wife and she became pregnant. The marriage was objected by the parents of the detenue and in the meantime, the mother of the detenue preferred a complaint with the respondent police. During investigation, she was rescued and sent to the custody of the mother. However, the mother made an attempt to terminate her pregnancy and when this was informed to the learned Magistrate; she was entrusted with the custody of the Muthukuviyal Home, a Non-Governmental Organisation by the orders of the learned Magistrate.

3. Learned Additional Public Prosecutor submits that initially, the detenue found missing from 26.07.2008 and a complaint was given to the respondent police on 27.08.2008 and a case in Crime No. 649 of 2008 for an offence punishable under Section 366(A) IPC was registered and during investigation, the girl/detenue was secured on 27.08.2008 and the petitioner was arrested on the same day. Both of them were produced before the learned Judicial Magistrate No. I, Tuticorin. Since, the detenue is a minor her custody has been entrusted with the mother and the petitioner was remanded to judicial custody by an order dated 06.09.2008. When the detenue was in the custody of the mother, she made an attempt to terminate her pregnancy and it has been complained to the learned Magistrate on 14.09.2008. The learned Magistrate directed the respondent police to register a case against the mother of the detenue and accordingly a case in Crime No. 886 of 2008 for an offence punishable under Section 313 IPC has been registered and the investigation is pending.

4. In such circumstances, the girl has been forwarded to the custody of the Muthukkuviyal Home, Tuticorin and has been produced before this Court. On enquiry, she submitted that she is in the advanced stage of pregnancy by six months and expressed her willingness to join with her husband. The Date of Birth, dated 15.03.1992, was given by the School Authorities were incorrect and further stated that she is a major and correct Date of Birth was not given, when she was admitted in the School.

5. A certificate issued by the School Authorities would go to show that the Date of Birth is 15.03.1992 and the statement given by the detenueis that she is a major aged more than 18 years. By physical appearance the we are of the view that there is scope of suspicion regarding her age. Therefore, the Dean, Medical College Hospital, Tuticorin is directed to subject the girl/detenue for ossification test to ascertain her real age and issue a certificate in this regard. The respondent is directed to produce the girl before the Medical Officer to receive the certificate before the 10th December 2008.

…Dr. A. Jasmine Punitha, Assistant Surgeon, attached to the Government Medical College Hospital, Thoothukudi, examined her and issued a Letter dated 12.12.2008, which reads as follows:

‘ I do hereby having to your final notice that, the Mumtaj Begum was brought to me for examination on 29.8.2008 X-ray could not be taken, since she was pregnant at the time of examination. So, I conclude that by appearance and by her own statement she may be around 17 to 18 years. ’

6. The detenue is produced before this Court. On enquiry, she expressed her willingness to join with her mother and further made a request that a visitation right must be given to her husband and the family members when she stays with her parents.

7. In view of the desire expressed by the detenue, who is in advance stage of pregnancy, to join with her mother, the bench had no other option but to allow her to join with her mother, who is the natural custodian. Since there is an assertion for conducting marriage between the detenue and the petitioner and since the detenue is in advance stage of pregnancy, we allow the petitioner to visit the detenue twice in a week while she is under the care and custody of her mother and accordingly, it is ordered.

8. The respondent police is directed to entrust the custody of the detenue to her parents.

9. With the above observation, the Habeas Corpus Petition is closed.

60. Muthumani vs. The Inspector of Police and Sundar, H.C. Pet. No. 65/2006, Decided On: 20.02.2006, MANU/TN/8354/2006.

P. Sathasivam, J**.**

1. The petitioner, mother of the detenue Manonmani, has filed this petition for production of her daughter before this Court.

2. Pursuant to the direction of this Court, the said Manonmani appeared before us. According to her, she is a major, her date of birth being 10.03.1986. She also informed us that on 22.12.2005, she married on Sathish of Vellore and from that date onwards she is living with him. We also enquired her parents and they are agreeable to take back her daughter alone. In the light of the information that she being a major; married to one Sathish on 22.12.2005 and living together for last two months, we are not inclined to accede to the request of the petitioner. In as much as the detenue being a major and has married the said Sathish, it is for her to decide her future.

3. Learned Government Advocate informs this Court that the second respondent Sunder has nothing to do with the detenue. The above statement is hereby recorded.

In the light of the above information, we hold that the detenue is not under the illegal detention of anyone. Accordingly, no further adjudication is required in this petition and the same is closed.

PATNA

61. Md. Idris vs. State of Bihar and Ors, Decided on 09.01.1980, 1980CriLJ764.

Nagendra Prasad Singh, J

1. This writ application has been filed on behalf of the petitioner, who is the father of respondent No. 5, for quashing an order passed by the learned Sessions Judge directing release of respondent No. 5 in order that she may live with respondent No. 4 with whom she claims to have married. The facts of this case present a typical case where the dispute in connection with matrimonial relationship has been brought before different courts for adjudication of the question as to with whom respondent No. 5 should remain, whether with her father the petitioner, or with her husband respondentt No. 4.

2. It appears that on 13-12-1979 this petitioner filed a petition of complaint before the Chief Judicial Magistrate, Hajipur alleging therein that on 9-12-1979 in the evening Shahnaz Begum (respondent No. 5) went out from his house and she was enticed away by respondent No. 4 who wanted to forcibly marry her. It was further stated that although she was aged about 14 years still the complainant had learnt that she had appeared before a Magistrate and sworn an affidavit that she had married respondent No. 4. The Chief Judicial Magistrate forwarded the petition of complaint to the officer-in-Charge, Vaishali Police Station under Section 156(3) of the Cr.P.C. for investi gating into the case. The Offlcer-in-Charge, registered a case under Section 366 read with Section 120B I.P.C. and recovered respondent No. 5 from the house of respondent No. 4. She was produced before the Magistrate for passing proper order about her custody. On 15-12-1979, respondent No. 5 made a statement under Section 164 of the Code that she was aged about 22 years and she had married respondent No. 4 of her own volition. She further stated that respondent No. 4 did not entice her; she herself went along with him. Copies of the petition of complaint as well as the statement under Section 164 of the Code are annexures to the counter-affidavit filed on behalf of respondent No. 5 before this Court. Respondent No. 5 was medically examined by the Lady Doctor pursuant to an order passed by the Chief Judicial Magistrate, who was of the opinion that she was above 15 years but below 18 years. On 18-12-1979, the Chief Judicial Magistrate passed an order giving the custody of respondent No. 5 to the petitioner taking the view that as (sic) she was below 18 years of age, as such, minor and the petitioner being the father, was the natural guardian. Respondent No. 5, however, filed a revision application before the Sessions Judge, which as already stated above, was allowed and the learned Sessions Judge in view of the assertion made by respondent No. 5 that she had married respondent No. 4, passed an order that she should be set at liberty and be allowed to go with respondent No. 4 whom she claimed to have married. According to the learned Sessions Judge, as respondent No. 5 was above 15 years of age, under the Mohomedan Law she could marry without the consent of her parents. The aforesaid finding on the question of law was seriously challenged on behalf of the petitioner before this Court.

3. Learned Counsel appearing for the petitioner submitted that on the allegations made in the petition of complaint by the petitioner, respondent No. 4 will be deemed to be an accused of an offence of kidnapping as he has enticed a minor girl (under 18 years of age) out of the keeping of the lawful guardian without the consent of such guardian, as such the learned Sessions Judge should not have released respondent No. 5 saying that she was at liberty to live with respondent No. 4. In other words, according to the petitioner, respondent No. 5 being a minor within the meaning of Section 361 I.P.C. as well as under the Indian Majority Act, petitioner should have been allowed to have custody of

respondent No. 5. On the first impression, this argument is attractive, but complication has been created because of intervening factor, i.e. the alleged marriage between respondent No. 5 and respondent No. 4.
4. Whenever a minori s produced before a Court, the Court has to consider the question as to who should be the guardian of such minor during the pendency of the proceeding, keeping in view the interest of the minor. But while considering that question, the Court has also to consider as to who has the right in law to be the guardian of such a minor. Section 98 of the Code vests power in the Magistrate whenever any complaint is made to him of abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, to make an order of immediate restoration of such woman to her liberty, or of such female child to "her husband, parent, guardian or other person having the lawful charge of such child". Problem arises when there is conflict between the parent and the husband of such female who is belew 18 years. Then Court is called upon to decide the question as to who should be the guardian of such female child, the parent or the husband. Now in the instant case, admittedly when the offence of kidnapping is alleged to have been committed, respondent No. 5 was not married to respondent No. 4. According to the statement of respondent No. 5 herself, she married him on 11-12-1979. Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mahomedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection reference can be made to Artcle 251 of Mulla's Principles of Mahomedan Law which says that every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, In absence of evidence, on completion of the age of 15 years. Even in Tyabji's Muslim Law under Artcle 27 is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Artcle 268 of Mulla's Principles of Mahomedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man of the woman as his wife. Article 90 of Tyabji's Muslim Law also says that a marriage is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian.
5. So far as the factumo f marriage is concerned, I may say at the outset that in the instant case it has not been disputed at any stage. Prom the order of the learned Sessions Judge it does not appear that the petitioner disputed the factum of marriage. His only assertion sincet he very beginning was that she Is below 15 years of age, and, as such, she could not marry without the consent of her guardian. Even before this Court In the writ application there is no assertion that in fact there has been no marriage. This aspect of the matter has been considered by a Bench in the case of Mst. Bashiran v. Mohammad Hussain AIR 1941 Oudh 284 wherein it was observed:

Under the Mahomedan Law, acknowledgment of a man is valid with regard to five persons, his father, mother, child, wife and Mowla: vide Bail- he's Muhammadan Law, P. 407 and Ammer Ali's Mahomedan Law, Vol. 2, P. 230. In (1921) 60 Ind Cas 147 (Muhammad Ali Khan v. Ghzanfar Ali Khan)' it was held that though an acknowledgment may be open to the objection that it might have been made from ulterior motives, to conceal what might otherwise have been a result of shame it is sufficient in the eye of the Mahomedan Law to invest the woman with the status of a married wife and the sub-sequent born children with the status of legitimacy, unless the marriage is shown to have been legally impossible.
There is no suggestion that there was any impediment in the way of respondent No. 5 marrying respondent No. 4. In such a situation, even for the purpose of considering the question as to whether the

petitioner should be the guardian of respondent No. 5, I am left with no option but to proceed on the assumption that there has been a marriage between respondent Nos. 5 and 4. It is well settled that the Indian Maiority Act which fixes the age of 18 years, at which a minor becomes a major, exempt, marriage and divorce. The result will be that respondent No. 5 on the relevant date may be minor under the Indian Majority Act, or within the meaning of Section 361 of the Indian Penal Code, but certainly she could have married without the consent of her natural guardian. The necessary corollary to this will he that whatever may be the fate of the criminal case, which has been lodged by the petitioner for prosecuting respondent No. 4 for kidnapping, after the marriage, respondent No. 4 will be deemed to be the husband, and, as such, entitled to live with respondent No. 5. In such a situation, in my opinion, learned Sessions Judge has not committed any error in directing the release of respondent No. 5 saying that she was at liberty to live with respondent No. 4 whom she claims to have married.

6. I have not been able to appreciate under what provision of law respondent No. 5 was taken in custody because she is not alleged to have committed any offence, and, as such, her detention in custody was without any authority in law. We are informed that even today she has been kept in Bihar State (North) Care Home, Patna City-6 under some order passed either by the learned Magistrate or by the Sessions Judge sub-sequently. As she is not an accused in any case there is no justification for detaining her in any Care Home. She should be allowed to go with respondent No. 4 as directed by the learned Sessions Judge.

7. In the result, the writ application is dismissed.

Muneshwabi Sahay, J.

8. I agree.

PUNJAB AND HARYANA

62. Kaur and Anr. vs State of Punjab and Ors, Crl. Misc. No. M-3694 of 2011 (O and M), Decided on 16.03.2011, MANU/PH/1468/2011.

Ritu Bahri, J.

1. This petition under Section 482 of the Code of Criminal Procedure is for issuance of direction to the official Respondents not to harass or interfere in the peaceful married life of the Petitioners at the instance of the private Respondents.

2. Counsel for the Respondents has placed on record a short affidavit of Dr. Arvinder Singh, IAS, Secretary to Government of Punjab, Department of Home Affairs and Justice, wherein it has been stated that in cases pertaining to the protection of young couples/honour killings, certain policy/guidelines have been laid down by the Government. All Commissioners of Police and Senior Superintendents of Police in State of Punjab have been directed to display this policy to prevent honour killing in three languages i.e. English, Hindi and Punjabi and all Police Stations under their control. Protection home/Centre in each district has been identified by all the Deputy Commissioners of Punjab State. As per the instructions

issued by the Department of Home Affairs and Justice dated 10.8.2010, the following guidelines are laid down to avoid the creation of such an atmosphere:

i) To deal sternly with the parents/relatives who threaten such couples and create law and order situation.

iii) Give protection to the newly wedded couples where they feel that their life and property is in danger. Security in such cases may be provided at reasonable cost.

iii) Protection centres are provided to give facilities of boarding and lodging to secure life and liberty of these couples for a period of six weeks after their marriage.

iv) Such couples may be given protection by giving application in the court of District Registrar who may recommend adequate security to head of police force. Superintendent of Police/Senior Superintendent of Police shall be prompt in taking effective steps for providing adequate security to the parties.

v) Formation of mediation/counselling cells should be created in the offices of Commissionrates/Sr. Supdts of Police to guide parents, relatives and such couples to live in peace.

vi) Gram Panchayat in villages and Special Cells in cities be counseled to prevail upon resisting parents/relatives to reconcile to such love form couples and they be prevailed upon not to take as threat to their honour or family honour at all.

vii) To ensure that right to life and liberty of all (especially couples) is respected and not at all threatened by anyone as the same is going to create turmoil in society.

viii) False cases should not be registered at the behest of parents/relatives under Section 363/366/376 IPC against such couples who are majors. However, the Police should strictly deal with cases involving minors.

ix) The tendency to meet out threats to such couples for separation and use of violence against them is strictly curbed.

x) However, though liberty of citizens is to be respected, but at the same time virtues like morality, law, justice, and common good should not be overlooked for the orderly progress and social stability.

xi) To deal with such cases of runaway marriages at senior/personal level and issue suitable directions to the subordinate police officials and review their progress from time to time.

xii) Arrest should be normally deferred till absolutely necessary in such cases and criminal force against boy should be avoided.

3. A list of Protection Homes/Centres established in the State of Punjab has also been identified.

4. In view of the above instructions, in the State of Punjab the runaway couples can approach the authorities directly for protection and retention in the Protection Homes which have been identified in all the districts.

5. In the present case, an inquiry was got conducted through SI Bikar Singh and both the Petitioners have made their statements that they have performed their marriage with their own consent and now they are happily living as husband-wife and have no danger to the life and liberty from any body and do not require any police protection.

6. In view of the above, no further order is required to be passed.

63. Amnider Kaur and Anr. vs. State of Punjab and Ors., Decided on 27.11.2009, 2010CriLJ1154.

Rakesh Kumar Jain, J.

1. According to the averments made in the petition, petitioner No. l is a Brahmin whereas petitioner No. 2 is a Jatt Sikh. Although no documentary evidence had been placed on record to prove the date of birth, it was averred in para 5 of the petition that petitioner No. 1 was born on 20.8.1991 and petitioner No. 2 was born on 22.2.1988. It was further averred that they got married as per Sikh rites at Guru Nanak Gurudwara (registered Phase VI Mohali) as per Marriage Certificate which is attached. The petition was supported by an affidavit of petitioner No. l. Notice of motion was issued on 26.10.2009 for 30.10.2009…

2. It is averred in the reply that petitioner No. 1 was born on 20.8.1993 and Was 16 years and 2 months of age at the time of alleged marriage. A Middle standard examination certificate of Punjab School Education Board, held in February 2006 showing her date of birth was attached. It is further averred that respondent No. 4, father of petitioner No. 1 himself got married on 22.7.1992 for which a translated copy of the Marriage Invitation Card is attached. It is further averred that answering respondent No. 4 has lodged FIR dated 22.10.2009 under Sections 363/366-A IPC at Police Station Patran, District Patiala against petitioner No. 2 Gurbhag Singh, his mother Jasvir Kaur and father Lakha Singh for abducting and alluring his minor daughter for marriage. It is further alleged that petitioner No. 1 is a minor and petitioner No. 2 is uneducated and unemployed person having no means of livelihood. During the course of hearing, another CRM No. 54156 of 2009 has been filed by the petitioners in order to place on record some photographs of the marriage as Annexures P-2 and P-3 and CRM Nos.56394 and 56395 of 2009 are filed by respondent No. 4 in order to place on record Annexures R-4/3 and R-4/4. Both the applications are allowed and documents (AnnexuresR -4/3 and R -4/4) are taken on record. It is pertinent to mention here that petitioner No. 2 did not place on record any documentary evidence to rebut the documents Annexures R-4/3 and R-4/4 wherein the date of birth of petitioner No. 1 is recorded as 20.8.1993.5. Thus, from the resume of the afore-stated facts, it is apparent that petitioner No. 1 was 16 years and 2 months of age at the time of her marriage, which is alleged to have been performed on 21.10.2009 and a Criminal

case has been registered by respondent No. 4 against petitioner No. 2 and his parents vide FIR No. 235 dated 22.10.2009 under Sections 363/366-A IPC at Police Station Patran, District Patiala.

3. At this time the statement of Ram Gopal son of Roop Chand Caste Pandit resident of Farid Nagar Patiala Road P.S.Patran aged about 42 years has been brought by HC Harbans Singh 2543 sent by SI Subeg Singh, PS. Patran for the registration of the FIR. The detail of the statement is as under:

It is stated that I am resident of above mentioned address and working on the private bus i.e. Garg Bus service as Conductor. I have two children, eldest is my daughter Amininder Kaur whose date of birth 20.8.1993. Younger to her is my son Balwinder Singh. My wife Kirna Rani is working as a teacher in Happy Public School, Daftriwala. In the said school my daughter Amninder Kaur is also studying in 10+2 class. Gurbagh Singh s/o Lakha Singh, Caste Jat, resident of Mohalla Faquir Nagar, Patiala Road, Patran is residing opposite to my house along with his parents, who are settled here for the last about one year after selling their land in their village Noch District Kaithal (Haryana). During the intervening night of 20/21.10.2009, after taking dinner, the whole family went to their bedroom and slept there. At about 4 a.m. I got up and was getting ready for my duty. I found my daughter Amninder Kaur was not present in the bed. I wake my wife up and enquired from her regarding the whereabouts of my daughter. We checked our household goods and found that my daughter Amninder Kaur has taken away the gold ornaments including gold rings, gold chain, ear rings and Rs. 13,000/- cash along with her birth certificate. On inquiry, I came to know that Gurbhag Singh, Jat resident of village Faquir Nagar, Patiala Road, Patran has enticed away my daughter with the intention to marry her, in connivance with his mother Jasbir Kaur and father Lakha Singh. All the above three persons are not present in their house. When my daughter could not be found, I made inquiry and verify that my daughter Amninder Kaur has been taken by above said Gurbagh Singh in connivance with her parents with the intention to marry her. In this regard I was going to lodge the report to the police station accompanying by Suresh Kumar s/o Dalip Chand Aggarwal, the owner of the Bus that you met me in Bhagat Singh Chowk Patran, Action be taken. Statement heard which is correct. SD/- Ram Kumar attested by Suresh Kumar further attested Sd/- Subegh Singh P.S. Patran dated 22.10.2009

4. Therefore, the questions which arose for consideration of this Court were:

(i) In a case of runaway marriage where the girl is admittedly minor, who has been enticed away from the lawful keeping of a guardian by her alleged husband against whom a case under Sections 363/366-A IPC is also registered, whether such a marriage is void in terms of Section 12 of the Act?

(ii) Whether the persons who are in some way party to such child marriage, are also liable for punishment under Sections 10 and 11 of the Act?

(iii) Whether a person who has enticed/taken away minor from the keeping of lawful guardian and against whom a case under the provisions of IPC has already been registered can claim police protection in the name of his life and liberty?

5. In this case the facts are not in dispute. Petitioner No. 1 was a minor girl being 16 years and 2 months of age at the time of alleged marriage. According to Section 3 of The Majority Act, 1875 every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before. According to Section 2(f) of the Act "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. Ac cording to Section 2(a) of the Act, "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 and according to Section 2(b) of the Act, "child marriage" means a marriage to which either of the contracting parties is a child. Then according to Section 12(a), the marriage of petitioner No. 1 which falls within the definition of child and within the definition of minor being the age of 16 years and 2 months who has been enticed away out of the keeping of the lawful guardian cannot contract the marriage and her marriage shall be null and void.

6. In view of those provisions, I have no other choice but to hold that marriage of petitioners No. 1 and 2 which is alleged to have been performed on 21.10.2009 as per Marriage Certificate (Annexure P -1 undated) as void marriage and none of the judgments which have been cited by the learned Counsel for the petitioners in support of their case, is applicable to the facts and circumstances of he present case… The provisions of Section 12 of the Act would apply with full rigour in the present case and the marriage which has been solemnized by petitioner No. 2 with petitioner No. 1, who is child and a minor, is unsustainable in the eyes of law and is thus, declared as void.

7. The second question involved in this case is that whether the persons, who have performed the marriage, are also liable for punishment. In this regard Sections 10 and 11 of the Act provides for punishment for such persons and Section 15 of the Act provides that not withstanding anything contained in the Code of Criminal Procedure, 1973, an offence shall be cognizable and non-bailable. Therefore, I hold that the person who has performed or abetted the child marriage of petitioner No. 1, is also equally liable and for that purpose, I direct the State to take appropriate action by lodging the case against the persons who are responsible for the performance of the child marriage in the present case. In respect of the third question, the petitioners cannot be allowed to take the benefit of the constitutional remedy of protection of their life and liberty on the pretext of their void marriage. The life and liberty of petitioners No. 1 and 2 is only endangered and is being threatened by respondent No. 4 so long their marriage legally subsists but once their marriage is declared to be void, there is no threat left to their life and liberty. Moreover, such a case where the allegation against the husband is of enticing away minor girl from the lawful keeping of guardian/parents and a case has been registered under Sections 363/366-A IPC, no protection under Section 482 Cr.P.C. can be granted by this Court because in that eventuality police protection has to be granted to a fugitive of law.

8. In view of the above discussion, the present petition is found to be without any merit and the same is hereby dismissed.

64. Jyoti & Anr. vs State of Haryana & Ors. Decided on 23 December, 2010, Crl. Misc. No. M-38039 of 2010 (O&M).

Daya Chaudhary, J.

1. The present petition has been filed under Section 482 Cr.P.C. for issuance of directions to the official respondents to provide adequate security to protect lives and liberty of the petitioners who apprehend threats to their lives at the hands of private respondents and for further direction not to harass and interfere in their peaceful married life and not to intrude into their privacy.

2. The petitioners claim to be major on the basis of documents annexed with the petition and they got married contrary to the wishes of their parents and are apprehending threats to their lives and liberty.

3. Even though this Court is disinclined to entertain and to go into such allegations, but at the same time it cannot be oblivious to the fact that because of social friction and sectarian differences such incidents are not entirely unheard of and prima facie the case also appears to be covered by the observations of the Hon'ble Supreme Court in ***Fiaz Ahmed Ahanger and others Vs. State of J&K*** 2009 (3) R.A.J. 692, which are as under: - Crl. Misc. No. M- 38039 of 2010 (O&M) (2) "In such cases of inter-caste or inter religion marriage the Court has only to be satisfied about two things:-

> (1) That the girl is above 18 years of age, in which case, the law regards her as a major vide Section 3 of the Indian Majority Act, 1875. A major is deemed by the law to know what is in his or her welfare.
>
> (2) The wish of the girl.

In the circumstances, the Court direct that nobody will harass, threaten or commit any acts of violence or other unlawful act on the petitioner, Chanchali Devi/Mehvesh Anjum and the petitioner' family members and they shall not be arrested till further orders in connection with the case in question. If they feel insecure, they can apply to the police and, in such event, the police shall grant protection to them.

4. In view of this, the petition is disposed of with a direction to respondent No. 2 i.e. SP, Ambala to look into the allegations as contained in the petition personally and take necessary steps in accordance with law if the situation so warrants.

5. This order shall not be construed to be conferring the legitimacy or authenticity to the factum of marriage having been performed as the Court is clearly deprived of any means to determine the aforesaid facts.

65. Kammu vs. State of Haryana and others, Crl. Writ Petition No.623 of 2009 (O&M), Date of Decision: 16.02.2010[8].

Nirmaljit Kaur, J.

1. Respondent no.5 i.e. Jekam along with Sarjeena had filed Criminal Misc. No.9799 of 2009, stating that both the petitioners were major and that they have got married against the wishes of their parents. Thus, they apprehend danger to their life and liberty. It was further stated that the age of Sarjeena was 18 years. In order to support the fact that her age was above 18 years, a photocopy of the ration card was placed on record as P 1.An affidavite, in spport of her age, was also filed.

In view of the averments, a direction was issued to "Superintendent of Police, Mewat to look into the matter and provide necessary security, if need be."

Therefore, the present petition under Article 226 of the Constitution of India is filed by the uncle of Sarjeena, praying for issuance of a writ of Habeas Corpus to recover the detenue, namely, Sarjeena alleged to be minor of the age of 14 years and 5 months at the time of marriage but more than 15 years at the time of filing of writ petition, from the custody of respondent No.5-Jekam son of Md. Mummal, resident of VPO Mahun, Tehsil Ferozepur Jhirka, District Mewat, alleging himself to be the husband of Sarjeena.

The contest appears to be between her uncle and her husband. Surprisingly, the father has not filed the petition. Subsequently an application has been moved by the father to be impleaded as a party. Thus, the assumption is that the said custody case has been filed by the uncle on behalf of the father vis-a- vis the custody of the girl to the respondent No.5 who is stated by the girl to be her husband. In order to show that the Date of Birth of Sarjeena was 02.01.1995, reliance was placed on the Birth Certificate as maintained by the Child Development Project Officer, Punhana (Mewat), as well as, School Leaving Certificate.

> In view of the contradictory stand of the parties with respect to the age of Sarjeena, daughter of Mohd. Bhopat son of Roojdar, the matter was sent to the District Judge, Gurgaon to enquire into the same and submit his report with respect to her correct age. The report dated 28.07.2009 was submitted by the District and Sessions Judge, Gurgaon. On objection filed by the respondents, the said report was set aside. The District Judge, Gurgaon was directed to submit a fresh report after taking into consideration certain documents. Accordingly, the second report dated 03.11.2009 was submitted by the District Judge, Gurgaon, holding as under:-
>
> "As a result of the discussion above, it is held that the applicant Kammu has been able to produce ample evidence to show that the date of birth of Sarjina was 02.01.1995 and, thus, she was a minor aged about 15 years and five months at the time of filing of the Criminal Writ Petition under Article 226 of the Constitution of India in the Hon'ble High Court."

[8] http://lobis.nic.in/phhc/

Learned counsel for the respondent, however, disputed the same and stated that the age of Sarjeena was 15 years even on the date of issuance of Ration Card A-2 dated 16.02.2006. Reference was also brought to para 15 of the report, which is as under:-

"15. Of course in the ossification test report Ex.D1, the age of Sarjina is opined to be in between 17 to 18 but in the light of above discussed cogent and convincing documentary evidence in the shape of ration card Ex.P1, entry Ex.P2 in Admission & Withdrawal Register, School Leaving Certificate Ex.P3, Certificate Ex.P4 issued on the basis of entry Ex.P5 of Births and Deaths Register, it stands conclusively proved that Sarjina had born on 02.01.1995 and thus was a minor being aged about 15 years and 5 months on the date of the filing of the petition before the Hon'ble High Court. Moreover, it is well settled law that there has always been margin of two years on both sides of the age so opined in ossification test."

Thereby, challenging the finding with respect to the age of the girl and stressed that the girl was between 17 to 18 years at the time of her marriage. However, the fact remains that the District Judge, Gurgaon, vide his report dated 03.11.2009, after taking into record the entire evidence, finally came to the conclusion that the girl was aged about 15 years and five months at the time of filing of the Criminal Writ Petition. Moreover, reliance has been placed on the Birth Certificate of the girl and the Birth Certificate has a strong evidentiary value as the document was prepared by the public servants in discharge of their public duty. Sarjeena was slightly less than 15 years of age at the time of marriage but was more than 15 years of age at the time of filing of the Criminal Writ Petition and as on date, she is almost 16 years of age.

…In the present case, Sarjeena is admittedly more than 15 years at the time of filing of the petition and is 16 years of age as on today. The mother of the girl was allowed to meet her in the Chamber. However, the girl refused to even talk to her mother. The girl was asked whether she would like to go with her parents but she strongly projected her denial and refused to go with them. Admittedly, respondent No.5 and Sarjeena are living together after marrying each other. The said marriage is stated to have solemnized on 19.04.2009. In the objections to the report of the District Judge, it has been mentioned that she is pregnant. However, without deciding the factum whether the said averment is true or not, it is apparent that the girl is now more than 15 years of age and is capable of expressing her wish and desire. As per the Mohammedan Law, as on date, she has attained the age of puberty. Thus, as on date, she can marry without the consent of her guardian.

As per the Text Book of Mohammedan Law by Aqil Ahmad, "Puberty and majority are in the Muslim law one and the same. The presumption is that a person attains majority at the age of 15 years. It should be noted that marriage of a minor without the consent of the guardian is invalid unless it is ratified after the attainment of majority. A boy or girl who has attained puberty is at liberty to marry a ny one he or she likes and the guardian has no right to interfere if the match be equal." Thus, the girl who is now more than 15 years of age has the option under the Muslim law to ratify or enter into the contract of marriage afresh.

…The present case is a case of habeas corpus. No doubt, she was less than15 years of age at the time of marriage but today she is almost 16 years of age. As per the Muslim Law, she has attained the age of

puberty being 15 years. Thus, the uncle on behalf of the parents is seeking the custody of Sarjeena who is aged 16 years. The girl and boy are admitting their marriage. On the date of filing of the petition for protection of life and liberty, she was more than 15 years of age. Under the Mohammedan Law, a Muslim girl at the age of 15 years can marry without the consent of her natural guardian. As on date i.e. at the age of 15 years, she has expressed her desire to accompany respondent No.5 and wishes to voluntarily stay with him. Thus, it cannot be said that he is keeping her in the illegal custody. The girl does not want to go with her parents.Accordingly and in view of the above discussion; the petition is dismissed with liberty to the girl, who is today more than 15 years, to decide her own fate.

66. Dinesh Vs. State of Haryana and another, Criminal Writ Petition No.981 of 2009, Date of decision: 14.12.2009[9].

S.S. Saron, J.

This petition has been filed for issuance of a writ in the nature of habeas corpus for the release of the detenue-Neelam, daughter of respondent No.2-Rajbir Rathi. It is alleged by the petitioner that the detenue is aged 20 years and respondent No.2 wants to marry her against her wishes to some other person. The petitioner has alleged that the detenue has not agreed for the same and, therefore, her father (respondent No.2) may cause danger to her life. The petitioner being a friend of the detenue has a right to protect her by filing the present petition. Notice of motion was issued in this case on 4.9.2009. Thereafter, the case was taken up on 3.12.2009, on which date it was stated by learned counsel for the petitioner that Neelam-detenue wants to marry the petitioner against the wishes of her father (respondent No.2) but she was being illegally detained. Accordingly, Neelam was directed to be produced in Court on the adjourned date i.e. today. Neelam-detenue has been produced in Court and she is identified by the petitioner as also respondent No.2, who is present. On the asking of the Court, it is stated by Neelam that her date of birth is 6.9.1988 and she has studied up to 10+2 in the village school. It is further stated that she wants to go with the petitioner-Dinesh and she wants to solemnize her marriage with him. Besides, she does not want to stay with her father (respondent No.2). Keeping in view the aforesaid facts and circumstances, the present petition is disposed of with liberty to the detenue to go with the petitioner or wherever she likes.

67. Balwinder Singh @ Binder vs. State of Punjab and Ors., (2008)151PLR534.

Sham Sunder, J.

1. This Criminal Writ Petition under Articles 226 and 227 of the Constitution of India for issuance of a writ in the nature of habeas corpus, for the release of detenu Sarabjeet Kaur wife of Balwinder Singh, petitioner, and Akashdeep Singh, his son, from the illegal custody of respondent No. 3, has been filed by him (petitioner).

[9] http://www.indiankanoon.org/doc/654099/

2. According to the averments, contained in the petition, the petitioner and Sarabjeet Kaur went to Chhattisgarh, where they performed their marriage in Arya Samaj, Kashi Nagar. Both of them were living happily. From their wedlock, one male child was born. It was stated that thereafter the parties approached the Collector/Marriage Officer, District Korba (Chhattisgarh) for registration of their marriage. The marriage of the petitioner and the detenu was registered. Copy of the marriage certificate is Annexure P-2. It was further stated that the mother of Sarabjeet Kaur, detenu lodged FIR No. 40 dated 27.2.2006, in Police Station Valtoha, under Sections 363, 366 and376 Indian Penal Code, in which the petitioner and his family members were arrested. It was further stated that Sarabjeet Kaur was detained in Nari Niketan, Jalandhar, as she did not want to go with her mother. It was further stated that the petitioner, after his release, went to meet his wife, who told him, that she did not want to stay, in Nari Niketan and wanted to go to her matrimonial home, with him. The petitioner requested the Superintendent of Nari Niketan, Jalandhar, to release Sarabjeet Kaur, wife of the petitioner, but she refused to do so. It was further stated that detention of Sarabjeet Kaur in Nari Niketan being illegal, and even her minor child could not be kept in the said Niketan, respondent No. 3, be directed to release them from such illegal custody, immediately.

3. At the time of issuance of notice of motion to the Advocate General, Punjab on 31.3.2008, the Counsel for the petitioner, was directed to produce, on record the certified copy of the order passed by the concerned Judicial Magistrate, vide which Sarabjeet Kaur wass ent to Nari Niketan. The Counsel for the petitioner, thus, produced, on record, certified copy of the remand request dated 30.11.2007, vide which the police requested for the police remand of the accused, wherein a prayer was also made that Sarabjeet Kaur be sent to Nari Niketan. Certificate copy of the order dated 30.11.2007, passed on the said application, by the concerned Judicial Magistrate, was also placed on record. The concerned Judicial Magistrate passed an order remanding the accused to police custody, but, no specific order, was passed for sending Sarabjeet Kaur to Nari Niketan. It was, thereafter, that the District and Sessions Judge, Amritsar, was directed to send the entire record relating to FIR No. 40 dated 27.2.2006 under Sections 363, 366 and 376 read with Section 34 IPC, Police Station Valtoha, which was registered against the accused, and in which Sarabjeet Kaur, was the prosecutrix. He was also directed to send his detailed report as to whether, any specific order was passed by the concerned Committing Court or by the trial Court for sending Sarabjeet Kaur to Nari Niketan, as the Counsel for the petitioner, emphatically stated that no order was passed by any Court for sending Sarabjeet Kaur to Nari Niketan nor her statement was recorded, in that regard, and, as such, her detention in Nari Niketan was illegal, the trial Court was also directed to record the statement of the prosecutrix, as to whether, she wanted to remain in Nari Niketan or not.

4. In pursuance of such direction, the record of the trial Court, the statement of Sarabjeet Kaur dated 17.4.2008 recorded by it, and the report of the District and Sessions Judge, Amritsar were received.

5. After hearing the Counsel for the parties, and, on going through the record of the case, and the detailed report dated 23.4.2008, sent by the District and Sessions Judge, Amritsar, in my considered opinion, respondent No. 3 is required to be directed to release Sarabjeet Kaur immediately as her detention, in Nari Niketan, Jalandhar is illegal, in her statement dated 17.4.2008, recorded by the Additional Sessions Judge, in clear-cut terms, stated that she wanted to go out of Nari Niketan. She further stated that she was married to Balwinder Singh, and at that time she had completed 18 years of age. She further stated that she moved an application dated 5.12.2007, Mark 'A' and 2.1.2008 Mark 'B\ as her mother assured her that

she would be sent with Balwinder Singh, her husband. She further stated that she wanted to go with the petitioner, her husband. It is evident from the report, of the District and Sessions Judge, Amritsar, and the record that no order whatsoever, was passed by any competent Court of law, after obtaining the consent of Sarabjeet Kaur, for sending her to Nari Niketan. In these circumstances, it can be safely held that the concerned, Presiding Officer/Officers of the Court(s) was/were completely remiss in the performance of their judicial functions. It was a case, in which the life and liberty of a person, was involved. Such a person could not be sent to Nari Niketan, against his/her-wishes…

6. For the reasons recorded herein before, the instant petition is accepted. Respondent No. 3 is directed to release Sarabjeet Kaur, wife of Balwinder Singh @ Binder son of Parsan Singh, r/o Gajjal, Police Station Khem Karan, Tehsil Patti, District Amritsar, along with her minor child immediately and the compliance report is sent. The registry shall comply with the order forthwith. Copy of the order is given dasti, on payment of usual charges. The Trial Court record be sent back.

RAJASTHAN

68. Suresh Kumar vs. State and Ors., 2010(1) WLN635.

A.M. Kapadia J**.**

1. In pursuance of the order passed by this Court, the corpus Vimla D/o Rama Ram has-been produced before the Court by Dy. Superintendent of Police, Sirohi.

2. Upon enquiry from the corpus, it is stated by her that she wants to go with her parents and she has not solemnized any marriage with the petitioner. It is further stated by her that the affidavit annexed with the writ petition is also false and bogus.

3. Upon perusal of the writ petition, it is revealed that there is no marriage certificate annexed by the petitioner along with the writ petition, so also, upon query made by the Court, it is submitted by learned Counsel for the petitioner that there is no certificate of marriage.

4. We have also recorded the statement of corpus Vimla D/o Rama Ram separately which shall be treated to be the part of this order in which it is stated by her that she is desirous to go with her parents.

5. In this view of the matter, we are of the opinion that this frivolous petition has been filed by the petitioner without any evidence of marriage and right, which is abuse of process of the Court. In this view of the matter, this habeas corpus petition is dismissed with cost of Rs. 5,000/-. The cost shall be deposited in the office of Free Legal Aid Authority, Rajasthan High Court , and Jodhpur within a period of 15 days.

69. Dwarka Prasad vs. State of Rajasthan and Ors., 2002CriLJ1278.

Gyan Sudha Misra and Anoop Chand Goyal, JJ.

1. This habeas corpus petition has been filed by one Dwarka Prasad who came up with a case that her daughter Vedwati Kumari Sharma whose age is stated to be 13 years, has been missing ever since March 2001 for which an FIR No. 44/2001 was registered under Section 363 and 379 of the IPC. The accused who is alleged to have kidnapped the girl is Rajesh Sharma- respondent No. 3 herein. The police did not take any action to trace out the girl nor submitted the charge-sheet in FIR No. 22/2001. The father of the abducted girl was therefore compelled to file this habeas corpus petition for tracing out her daughter, on which a show cause notice was issued by this Court. After which the court monitored the investigation of the aforesaid FIR, the abducted girl Vedwati Kumari Sharma was produced before the Court although only three days back on 26.11.2001, the respondents were not in a position to inform the whereabouts of this girl to this Court.

2. It is unfortunate that this Division Bench of the High Court which is primarily meant to hear the appeals against convictions has to engage itself in monitoring the investigation of the cases based on first information reports lodged at the police Station which investigation should be carried out without any interference and without seeking any direction from a court of law. However, since the FIR of such nature very often does not reach to any conclusion either way in the sense that neither charge-sheets are submitted nor final reports are submitted, the hapless informants generally have to move habeas corpus petitions due to the police in action… We are thus compelled to infer that the girl could have been traced out even without the court direction but for the in action of the respondents. We deprecate this situation for time and again, the Division Bench of a High Court has to keep on chasing the police investigation directing the police Officers to conduct their job with sincerely and speed. It is expected of them to be vigilant and conduct the investigation even without any direction or interference of the Court thereby not creating a situation where a citizen is compelled to move a court of law for a relief which in act can be availed by them if only the cases are duly registered and investigations are diligently carried out. It is perhaps relevant to emphasizes that habeas corpus petitions are not meant for the High Court to monitor police investigations as that is the bounden duty of the police being the investigating agency without any interference of law courts and the High Court is certainly not meant to be treated as an executing Court for enforcing investigation of the cases which are registered by entertaining petitions of habeas corpus as habeas corpus petitions are certainly not meant to monitor police investigation…

3. After the statement of the alleged detenu Vedwati Kumari Sharma was recorded before the Deputy Registrar (Judicial) which we have perused, we are satisfied that it was not a case of illegal detention since the detenu has stated her age as 19 years who had voluntarily married Rajesh Sharma and out of the wedlock she has given birth to a child who is three moths old. Since the alleged detenu is stated to be a major, she is at liberty to go anywhere she wants including Rajesh Sharma.

4. In view of the fact that the girl has been produced, this habeas corpus petition is dismissed as infructuous.

Denial of Right to Choice to protect Family Honor

ALLAHABAD

70. Sujit Kumar and Ors. vs. State of U.P and Ors, 2002 2 AWC1758.

M. Katju and Rakesh Tiwari, JJ.

1. The barbaric practice of 'honor killings', that is. killing of young women by their relatives or caste or community members for bringing dishonor to the family or caste or community by marrying, or wanting to marry, a man of another caste or community or whom the family disapproves of is frequently reported to take place in Pakistan which is a State based on feudal and communal ideology. However, this Court has been shocked to note that in our country also, which boasts of being a secular and liberal country, 'honor killings' have been taking place from time to time, and what is deeply disturbing is that the police and other authorities do not seem to take steps to check these disgraceful and barbaric acts. In fact such, 'honour killings', far from being honorable, are nothing but pre-meditated murder and must be treated accordingly.

2. It was reported in the newspapers sometime back that in Meerut, a Jat boy and a Harijan girl, who were majors, were in love with each other and wanted to marry each other but were killed by their relatives and others because it would have been an inter-caste marriage. Many other reports are coming from Meerut, Muzaffarnagar and other districts of the State where young men and women are being killed for being in love with each other just because they were of different castes or communities. Very recently, it has been reported that there were such 'honour killings' in Industrial Nagar in Allahabad district and even of a boy in front of the High Court building because the couple who were of different castes and were in love with each other.

3. In the present case, Sujit Kumar, Petitioner No. 1 was a Jat by caste and Ms. Rashmi is a Tyagi by caste and she is a major as is evident from her High School certificate(Annexure 6) in which her date of birth was recorded as 5.10.1979 and hence she was more than 22 years of age… The petitioner No. 1 is said to be 30 years of age. The impugned F.I.R. dated 21.4.2002 has been filed by the father of Rashmi Shri Ved Prakash r/o Meerut alleging that Sujit Kumar persuaded his daughter Ms. Rashmi to go with him and they were both living in district Muzaffarnagar. She stated that her parents are planning to abduct her and kill her and make her body disappear and they are also planning to get her husband killed. She sought protection from the District Magistrate.

4. Both Sujit Kumar and Ms. Rashmi appeared before us and we are satisfied that they are majors. They state that they love each other and are married with each other and are living together of their own freewill. We are satisfied that they have given their statements of their own freewill and without any pressure.

5. It is, therefore, time that the Court declares the law on this aspect. The law is very simple under Section 3 of the Indian Majority Act. 1875, a person who is of 18 years of age, is regarded as a major and the law deems that he/she knows her/his interest and welfare. Hence he/she can go wherever they like or marry whomever they want of any caste or community. There s no prohibition of inter-caste or inter-community marriage in the law. If a person who is a major wants to get married to a person of another caste or community, the parents cannot legally stop him/her. That being so, the Administration must ensure thatn obody harasses or ill-treats or kills such people for marrying outside his or her caste, community or class.

6. Since both Sujit Kumar and Ms. Rashmi have appeared before us and have given their statements, it is not necessary to issue notice to the respondents and we are allowing this petition at this stage. The impugned F.I.R. Annexure-1 to the petition under Section 362/366, I.P.C. is hereby quashed. The police in the State are directed that they must prevent any such 'honour killings' or harassment of people who love each other and want to get married, as such practice is a blot on our society. The police must also see that the persons entering into inter-caste or inter-community marriages are not harassed by their relatives or any others and are free to live at any place and with whomever they like. The police in the State must take strong measures against those who commit such 'honour killings' and harassment and they must stop this feudal, backward and barbaric practice, if brought to their notice, otherwise the police will be taken to task by this Court.

7. India is a free, democratic and secular country. This Court will not permit practices like honour killings or harassment to such couples to prevail in our country. The police of Meerut and Muzaffarnagar are directed to see to it that the petitioner and Ms. Rashmi are not harassed in any manner by anyone.

71. Raghvendra Singh @ Babua vs. State of U.P, 2011(1) ADJ824.

S.C. Agarwal, J.

1. This revision under Section 397/401 Code of Criminal Procedure s directed against the order dated 6.9.2010 passed by Addl. Sessions Judge, Court No. 8, Bulandshahar in S.T. No. 816 of 2009, State v. Raghvendra and Ors., under Section 363, 366, 376 and 506 IPC, P.S. Dibai, District-Bulandshahar, whereby the application 102-A under Section 311 Code of Criminal Procedure filed by the revisionist Raghvendra Singh @ Babua was dismissed.

2. Revisionist is one of the accused in the aforesaid session trial. The allegations against him are kidnapping and rape of the prosecutrix (daughter of the complainant Roshan Singh). It was alleged that the revisionist took away the prosecutrix from the house of the complaint with the promise of marriage on

6.2.2009 at 6am. The prosecutrix was recovered after four days on 10.2.2009. During trial, the prosecutrix was examined as P.W. -2 on 8.12.2009 and was cross-examined by the defence. On 23.8.2010, an application was moved by the prosecutrix before learned Sessions Judge stating therein that a false report regarding her kidnapping was lodged. She was not kidnapped by any person nor raped against her own will. Her father and maternal grand-father pressurized her to give false statement under Section 164 Code of Criminal Procedure and they wanted her to marry with a boy, who was not to her liking. She is repentant and wants to correct the mistake committed by her and therefore her statement be recorded again. Affidavit of the prosecutrix was also filed in support of the said application. Again an application was moved by the prosecutrix on 26.8.2010 stating therein that she wanted to testify again, as her father and maternal grand-father are pressurizing her to recall her application dated 23.8.2010. She further stated that her father and maternal grand-father might murder her by way of honour killing and therefore she be protected and her statement be recorded that very day. This application was rejected by learned Addl. Sessions Judge vide order dated 26.8.2010 on the ground that the prosecutor was not summoned by the Court to appear as a witness and she had come to the Court along with her father…

3. An application was also moved on behalf of the revisionist for summoning the prosecutor for further cross-examination on the ground that her earlier statement was given under pressure. This application was rejected by learned Addl. Sessions Judge by impugned order dated 6.9.2010 on the ground that P.W. -2 had been thoroughly cross-examined. The statement of accused under Section 313 Code of Criminal Procedure is to be recorded and at this stage there was no sufficient ground for summoning the prosecutor for further cross-examination. Aggrieved by the said order, this revision has been filed.

4. I have gone through the statement of P.W -2 recorded earlier. There is sufficient material on the record to show that prima facie she was a consenting party. Though in her statement under Section 164 Code of Criminal Procedure, the prosecutor deposed against the revisionist, in her statement on oath recorded during trial, during examination-in-chief also she deposed against the revisionist but in cross-examination certain facts have come to light, which show that she was in love with the revisionist. She admitted that Suryakant had come to her house to call her stating that Raghvendra was calling her and she went with Suryakant but did not disclose this fact to her family members that she was going to meet Raghvendra. She roamed for 3-4 days with the revisionist but did not try to flee or to raise any alarm, though she claimed that from time to time she was made to smell some intoxicating material. She was also confronted with the love letters written by her to the revisionist and she admitted to writing such letters. On page 9 of the statement of P.W. -2, she admitted that she had written in a letter "I love you Babua" and "Babua and Anuradha". She admitted that Babua is the name of the accused Raghvendra. She also admitted that she started the letter with the words "Priya Babuaji (dear Babua) I love you". She has also written in the letter to the revisionist that when you love me, what is the hitch in marriage. She further promised in the letter that she would always be with him birth to birth. She further admitted that in her letter, she had written that her brother wanted to marry her elsewhere but she would not marry anyone else even if she had to die. She further admits that in a different letter she had written that her family members were prepared to kill her.

5. The above admissions clearly indicated about the love affair between the prosecutrix and the revisionist and these facts also indicate that she might have deposed earlier under pressure of her family members. Now the prosecutor has shown her willingness to depose true facts before the Court and there is no reason

that why her statement cannot be recorded by the Court. It is duty of the trial Court to bring true facts before the Court so that justice should not be denied on the ground of mere technicalities. In this view of the matter, the impugned order cannot be sustained and is liable to be set aside.

The revision is allowed. Impugned order dated 6.9.2010 passed by the Addl. Sessions Judge rejecting the application under Section 311 Code of Criminal Procedure is set aside. The application under Section 311 Code of Criminal Procedure filed by the revisionist is allowed. Learned trial Judge is directed to recall P.W. -2 for further cross-examination for the purposes of bringing true facts before the Court.

DELHI

72. Abdus Sadur Khan vs. Union of India, 176(2011) DLT630.

Dipak Misra, C.J. and Manmohan, J.

1. In this intra-Court appeal under Clause 10 of the Letters Patent questioning the warrant ableness of the order dated 25th November, 2010 passed by the learned Single Judge in WP(C) No. 7898/2010, though on the surface level, a question is raised as to the locus standi of the Appellant-Petitioner (hereinafter referred to as 'the Appellant') as a father to question the legal propriety of the order passed by the Ministry of Home Affairs (MHA), Foreigners Division, Government of India under Section 3A of the Foreigners Act, 1946 (for brevity 'the Act') whereby the competent authority has passed an order that the Respondent No. 10, Ms. Shazia Zareen Sathi, the daughter of the Appellant, will remain exempted from deportation proceedings, yet on a studied scrutiny and a keener scan, it would be luminescent that the father has put his obstinacy and honour in its degenerated sense at a higher pedestal in the name of parental concern totally ostracising the idea and the value that a major has the choice to get married and also a right to life and not to live in constant fear psychosis. True it is, it has been said "the family is the nucleus of civilisation", but the question that emerges for consideration is whether a daughter, after getting protection from the authority of MHA, would still remain subservient to the loud and morbid honour of her father who is embedded with his "coveted honour". Long back, Aristotle had pronounced, "Dignity doesn't consist in possessing honour, but in deserving them". As the factual matrix of the case would unfold, it would reveal that the Respondent No. 10 has the intense desire to get rid of the 'family skeleton' and the "myth of honour" and lead a life of her own choice.

2. The exposition of facts, as unfurled, are that the daughter of the Appellant, a major, came to India on her own on a Bangladeshi passport and got married to one Zubair Khan on 13th February, 2009 and thereafter submitted a representation to the Central Government on 28th May, 2010 wherein she expressed an apprehension that if she went back to Bangladesh, her life would be in danger. The learned Single Judge perused the impugned order which showed acceptance of the apprehension expressed by Ms. Shazia Zareen Sathi and the formation of an opinion that all the provisions of the Act shall not apply to her as well as to her daughter and she would remain exempted from deportation proceedings. Upon perusal of the order the learned Single Judge held that the writ petition was not filed in the best interest of the Respondent No. 10 as she has a choice to marry and the plea of the father that he is concerned with

the safety and welfare of his daughter is not convincing and, hence, the impugned order at the instance of the Appellant is not to be interfered with.

3. To appreciate the submissions raised at the bar, we called for the original file wherein the representation of the Respondent No. 10 was dealt with and the order was passed. On a perusal of the file, we find that the Respondent No. 10 is a Bangladeshi national who had arrived in India on 12th February, 2009 on 'T' visa valid for 30 days and after certain communication from the Bangladesh High Commission, a report was called from FRRO, Delhi and Intelligence Bureau which found nothing adverse against Ms. Shazia Zareen Sathi. As she was staying on an invalid passport, the Ministry of External Affairs was requested to contact the Bangladesh High Commission to determine the modalities for her deportation. Eventually, as is revealed, the Appellant had filed WP(C) No. 12325/2009 praying for deportation of his daughter to Bangladesh in accordance with law. Mr. Zubair Khan, husband of Ms. Shazia Zareen Sathi, the Respondent No. 10 herein, had filed WP(Crl.) No. 965/2009 for quashment of the FIR lodged by the cousin of the Respondent No. 10 under Sections 366 and 342 of IPC. At this juncture, a representation was received from Ms. Shazia Zareen Sathi in November, 2009 requesting for facilitating her stay in India with her husband Mr. Zubair Khan. The Joint Secretary (F) spoke to FRRO, Delhi on 2nd February, 2010 and stated the position that if Ms. Shazia Zareen Sathi is deported to Bangladesh, her parents would cause harm to the child in her womb which raises human rights issues. The Court recorded the stand of the Government that Ms. Shazia Zareen Sathi has also submitted a request to the Government of India for allowing her to stay in India for a long period and this Court left it at the discretion of the Government to consider her request. In WP(Crl.) 965/2009, this Court directed the investigating officer to visit Ms. Shazia Zareen Sathi on 4th February, 2010 and to file a status report. After the queries were made, this Court eventually directed the State Government to consider the request and take appropriate decision. Thereafter, as the notings in the file would reveal, the matter was considered at various levels and eventually, as is manifest, Ms. Shazia Zareen Sathi met the Joint Secretary (F) on 20th May, 2010 and informed that she is living happily with her husband in India and if she would go to Bangladesh, her life would be in jeopardy. Considering the representation and the statement, on 22nd September, 2010, the Respondent No. 10 has been allowed to stay in India on humanitarian basis exempting deportation/ prosecution against her and her daughter by invoking Section 3A of the Foreigners Act, 1946.

4. In this context, we may refer to Section 3A of the Foreigners Act, 1946 which reads as follows:

> 3A. Power to exempt citizens of Commonwealth countries and other persons from application of Act in certain cases. -
>
> > (1) The Central Government may, by order, declare that all or any of the provisions of this Act or of any order made thereunder shall not apply, or shall apply only in such circumstances or with such exceptions or modifications or subject to such conditions as may be specified in the order, to or in relation to -
> >
> > > (a) The citizens of any such Commonwealth country as may be so specified; or
> > >
> > > (b) Any other individual foreigner or class or description of foreigner.

(2) A copy of every order made under this section shall be placed on the table of both Houses of Parliament as soon as may be after it is made.

On a reading of the aforesaid provision, it is crystal clear that the Central Government has the power to declare all or any of the provisions of the Act or of any order made there under not applicable to a citizen of specified commonwealth country. There are certain riders apart from the stipulation that copy of every order made under the said Section is required to be placed on the table of both Houses of the Parliament. Thus, there are immense safeguards and guidelines inbuilt in the said provision. This Court in its power of judicial review is only required to see whether a decision taken by the Central Government at this stage dealt with the case appositely regard being had to the representation made by the daughter of the Appellant or passed an order in a routine or mechanical manner. The reasons indicated therein clearly show that there has been application of mind, survey of facts and analysis of the situation and consideration of the factual score from human rights perspective. Thus, it would be inapposite to accept the apprehension of the Appellant that his daughter might be involved in any kind of trafficking. The daughter, as the facts exposit, is a major. She has a choice to lead her individual life. There may be cases where a father in certain circumstances may think of filing a habeas corpus petition in case the daughter is detained in illegal custody. But when a public authority has examined her and recorded the satisfaction that she is married to Zubair Khan and has been blessed with a daughter, on the said ground also melts into insignificance. On the contrary, the apprehension expressed by the daughter before the competent authority of the department, we are disposed to think, is absolutely sanguine. She has the fear not of her life in case she is deported but also that of her daughter. When a statutory provision empowers the Central Government to take a decision and when a danger to life has been canvassed and the same has been accepted by the authority on proper scrutiny of the material, it can be stated with certitude that the decision rendered is in accord with the constitutional philosophy of India, the statutory protection and declaration of human rights. It is apt to note that a human right is a basic right, a natural right. It cannot be crucified or brought to a state of comatose because of maladroit design of a headstrong father. It can only be said that the father has exhibited obstinacy and stubbornness in a bad cause. The father may harbour a feeling that it is the defeat of his family but a defeat of this nature is not to be given any kind of acceptation.

5. *In Sangita Rani (Smt.) Alias Mehnaz Jahan v. State of Uttar Pradesh and Anr.* 1992 Supp (1) SCC 715 a three-Judge Bench of the Apex Court while dealing with a petition preferred under Article 32 of the Constitution of India had not only quashed the FIR taking note of the fact that the boy and the girl had already been married and the marriage had been registered in court but also cautioned the parents to accept the situation and create no problem for her daughter and her husband.

6. In this context, we may refer with profit to the decision in *Lata Singh v. State of U.P. and Anr* . AIR 2006 SC 2522, wherein a two-Judge Bench of the Apex Court has opined thus:

"18. We sometimes hear of 'honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out acts of barbarism."

7. The parental unwanted and unwarranted intervention in the lives of major children is sometimes writ large. In the name of honour-individual, family and community apart from torture murder also takes place. Honour killing cannot be countenanced in a civilized society and more so in a body polity governed by rule of law, for right to life is sacred and sacrosanct. One may treat that it is an affair of honour and he would go to any extent for the cause of his honour but by such an idea he cannot have the feeling of a victor and the sufferer at his hand a vanquished one. India is governed by the resplendent philosophy of the compassionate. The concept of social expulsion or suspension or even for that matter a perverse notion of self-respect cannot be countenanced. True it is, Mr. Bhushan, learned senior counsel for the Appellant urged with immense vehemence about the locus standii of the father and his concern but we are of the considered opinion in the present case that both the concepts are bound to collapse like a pack of cards as the facts are telltale to fresco the picture that the Appellant as a father has an agenda of vendetta and not of real concern.

8. Ex consequenti, we do not find any merit in this appeal and dismiss the same. Ordinarily, we would have imposed exemplary costs but we have refrained from doing so. We are disposed to think, a misguided father requires more of therapeutic treatment rather to face the burden of costs.

KOLKATA

73. Kishwar Jahan and Anr. vs. State of West Bengal and Ors., 2008(3)CHN857.

Dipankar Datta, J.

1. Rizwanur Rahman (hereafter Riz), since deceased, son and brother of the petitioners 1 and 2 respectively, was laid to rest in September 2007. The suspicious circumstances in which he died, the role of the State Police agencies in investigating the cause of his death, the conduct of certain police officers of Kolkata Police both before and after his death, alleged involvement of his father-in-law Ashok Todi (respondent No. 12) and his uncles-in-law Anil Saraogi (respondent No. 13) and Pradeep Todi (not a party to the petition) in connection with his unnatural death, investigation conducted by the Central Bureau of Investigation (hereafter the CBI) being directed by this Court - all these and much more, exercised thoughtful consideration of this Court on the face of eloquent arguments advanced by learned Senior Counsel for the petitioner, the State, the accused police officers and the respondent No. 12 and learned Counsel for the CBI and the respondent No. 13, both on factual as well as legal points, based on erudition and developed by great industry. The valuable assistance rendered to the Court needed to be appreciated at the outset.

2. It is discerned from the materials on record that Riz, a computer graphic engineer working at Arena Multi Media (a computer training centre) had a love affair with his student Priyanka Todi (hereafter

Priyanka), daughter of respondent No. 12, which matured in a marriage on 18.8.07 under the Special Marriage Act, 1954. Their marital relationship had the possibility of souring the relation between the father and the daughter and as such was not disclosed to the respondent No. 12 immediately thereafter. The couple apprehended that respondent No. 12 might interfere in their marital relationship and accordingly they had jointly addressed a letter dated 30.8.07 to the Commissioner of Police, Kolkata Police The letter reads as follows:

Sub: Registry Marriage information.

We would like to inform you that we, Rizwanur Rahaman s/o Late Rehaman Rahman, resident of 7/B, Tiljala Lane, Kolkala-19 and Priyanka Todi d/o Ashok Kr. Todi resident of CG 235, Salt Lake, Kolkata 91, got married under the presence of Marriage Officer, Sipra Ghosh, on 18st August, 2007. The copy of our Marriage Certificate is being enclosed for your kind perusal. This marriage was performed with our own wish and not under the influence of any external pressure. We are also enclosing copy of our birth certificates as proof that we are both matured.

We are presuming that our Father-in-Law/Father, Mr. Ashok Kr. Todi may threaten us with dire consequences or create pressure or can send antisocial elements or goondas to kidnap us. In view of this we hope to get protection from your end if required.

3. Letters with similar contents were also addressed to the Deputy Commissioner of Police (South Division), the Officers-in-Charge, Karaya Police Station, Entally Police Station and Bidhannagar Police Station, and others.

4. The Officer-in-Charge, Karaya Police Station upon receipt of the letter jointly written by Riz and Priyanka dated 30.8.07 had endorsed the same to S.I., Pulak Dutta on 31.8.07. An enquiry into the attached petition was made. During enquiry the S.I. had been to premises No. 7B, Tiljala Lane, Kol-19 and contacted Mr. Rizwanur Rahaman s/o It. Rezaur Rahaman of 7B, Tiljala Lane Kol-19 and Mrs. Priyanka Todi d/o Ashok Kr. Todi of CG -235, Salt Lake, Kol-91 and they stated that they are both adult and married each other with their mutual consent as per Special Marriage Act and they have no complain against each other. The S.I. also found father of Priyanka Todi, Mr. Ashok Kr. Todi with other relatives are also present inside the premises and talking with them. The uncle of Rizwanur Rahaman was also present there. Documents in support of their marriage were verified…

5. On 31.8.07 itself, Priyanka had been taken to Riz's residence at Tiljala. Respondent No. 12 was given such information whereupon he had been to the residence of Riz to persuade Priyanka to return. The effort failed. Despite respondent No. 12 being aware of the Fact that his daughter had started staying with Riz, on the following day, Pradeep Todi (brother of respondent No. 12) lodged a complaint with the Deputy Commissioner of Police (Detective Department), Kolkata Police alleging that Riz had abducted Priyanka.

6. It is further alleged in paragraph 12 of the petition that on 8.9.07, the respondent No. 9 arrived at the petitioners' residence to convey that Riz and Priyanka were required to attend Lalbazar to meet the Deputy Commissioner of Police, Detective Department and they should accompany him. Around 3.30

p.m., Riz and Priyanka met Ajoy Kumar, the respondent No. 5 at Lalbazar. The petitioner No. 2 and his uncles also accompanied them and were present to find the respondent No. 5 become furious the moment Riz and Priyanka entered his chamber. While shouting, he threatened that if Priyanka did not return to her parents' house, Riz would be arrested and she sent back home. Riz having protested, the respondent No. 5 became more furious and gave Riz two options. While one option was that Priyanka must return to her parents for seven days otherwise Riz would be arrested on charges of abduction and stealing of valuables, the other option given to Riz was to approach the Court of Law. Riz accepted the first option having become nervous being constantly pressurized by the respondent Nos. 5, 8 and 9. Riz was then directed to the Anti-Rowdy Section along with the respondent Nos. 8 and 9 and when he along with the petitioner No. 2 reached there, they found Anil Saraogi, the respondent No. 13 (uncle of Priyanka) present. The respondent No. 13 wrote on a plain white paper that Priyanka was being taken by him to her parents for seven days…

8. Priyanka did not return. Requests of Riz to let her return fell on deaf years. A dead body was found on 21.9.07 on the rail tracks between Sealdah and Bidhannagar stations, under Sealdah Division of Eastern Railway, believed to be that of Riz.

9. A written complaint dated 21.9.07 was lodged by the petitioner No. 2 before Karaya Police Station on 22.9.07 alleging that he suspected the hands of respondent No. 12 behind the death of his brother's unnatural death…

10. Riz's death hurt the sentiments of the public at large and led to disruptions in public life. This prompted the then Commissioner of Kolkata Police Prasun Mukherjee, respondent No. 3 to hold a press conference. According to the petitioners (based on newspaper reports), he declared, inter alia, that Riz had committed suicide and this was transparent, although report on post-mortem was yet to be received.

11. Enquiry into the unnatural death of Riz was initially conducted by the Dum Dum G.R.P.S. within whose jurisdiction his dead bodyw as found. Thereafter such enquiry was handed over to the Criminal Intelligence Department (hereafter the CID) by the State Government. The police officers arrayed as respondent Nos. 3, 5, 7, 8 and 9 herein, however, were transferred soon after the death of Riz.

12. It is on record (supplementary affidavit of the petitioners) that the Chief Minister had appointed a retired Judge of this Court to hold an enquiry under the Commissions of Enquiry Act, 1952.

13…hence, considering the facts and circumstances of the case, I am of the opinion, prima facie, a case has been made out for passing an interim order. Therefore, let there be an interim order directing the CBI to investigate into the cause of unnatural death of Rizwanur and the CBI shall file a report in a sealed cover before this Court within two months from the date of service of authenticated copy of this order.

14. The order was not appealed against. The CBI proceeded to register a case of murder and, thereafter, commenced investigation.

15. In the meanwhile CBI concluded its investigation. Report of investigation was filed before this Court in terms of direction passed by it earlier.

16. Concluding portion of the report was read out in open Court. It reads as under:

Conclusion

In view of the facts and circumstances narrated above, the CBI has decided to take the following action:

a) Prosecution of Ashok Todi, Pradip Todi, Anil Saraogi, S.M. Mohiuddin @ Pappu, Ajoy Kumar, the then DC/DD, Sukanti Chakraborty, the then AC/ARS and SI Krishnendu Das under Section 120B read with Section 306/506 IPC. Ashok Todi, Pradip Todi, Anil Saraogi and S.M. Mohiuddin @ Pappu are liable for further prosecution for the substantive offences under Section 306/506 IPC. Ajoy Kumar, Sukanti Chakraborty and Krishnendu Das are liable to be prosecuted for the substantive offence punishable Under Section 506 IPC.

b) RDA for Major Penalty is being recommended against Gyanwant Singh, the then DC/HQ, Ajoy Kumar, the then DC/DD, Sukanti Chakraborty, the then AC/ARS and Sis Krishnendu Das, Jayanta Mukherjee and Pulak Kumar Dutta.

c) Such action as deemed fit is being recommended against Shri Prasun Mukherjee. The then Commissioner of Police, Kolkata.

Prayer

(i) As directed, a detailed report after conclusion of the investigation is submitted for perusal by this Hon'ble Court;

(ii) The CBI may be permitted to file Police Report/Charge Sheet before the appropriate Court as per provisions of Cr. PC; and

(iii) The Hon'ble Court may pass any other appropriate order or direction as it deems fit and proper in the interest of justice.

17. Prayer was then made by the State as well as the petitioners and other respondents for furnishing them a copy of the report of the CBI to enable them file their respective counter-affidavits to the petition. Such prayer was opposed by learned Counsel for the CBI. The same was turned down by an order dated 28.2.2008. Liberty was again given to them to tile counter-affidavits. However, it was observed that the issue of furnishing copy of report would remain open and would be considered again when the writ petition is heard finally.

18. The State, and the respondent Nos. 3, 5, 7, 8, 9, 12 and 13 filed separate sets of counter-affidavits and the petition was then taken up for final consideration.

19. Whether a writ petition shall be entertained or not having regard to existence of an efficacious alternative remedy is entirely the discretion of the Court of Writ. Article 226 of the Constitution does not impose any such limitation or restraint. It is one imposed by the Court of Writ in its own wisdom and is part of its various 'self-imposed restrictions'. Requiring a party to exhaust the alternative remedy prior to

approaching the Court of Writ is not a rule of law but a rule of convenience which does not and cannot oust the jurisdiction of the Court. On a given set of facts a Court of Writ may refuse to entertain a writ petition in view of availability of an efficacious alternative remedy while exercising discretion judiciously but to hold that a writ petition owing to such fact is not maintainable in law, to the mind of this Court, is not the correct exposition of law.

20. In the present case the petitioners have claimed that investigation of cause of unnatural death of Riz be entrusted with the CBI and that actions of the respondent Nos. 4 to 9 be declared as unconstitutional.

21…It is not possible for the Court to precisely demarcate the nature of cases where the Writ Court would be justified in its interference despite availability of alternative remedy and the cases where not to interfere. Each case has to be decided on its merit. However, when an individual perceives a threat to his life and limb and seeks enforcement of his right to life, interference of the Writ Court may be more intrusive but to lay down as a matter of rule that a writ petition must be entertained whenever right guaranteed by Article 21 is sought to be enforced despite availability of an alternative remedy would itself result in impinging on exercise of judicial discretion by the Writ Court.

22. The issue is thus answered in favour of the petitioners.

23. Though while passing the interim order dated 16.10.07 the Court did not have the benefit of considering the version of the respondents on affidavits, the materials presented were duly considered and on the basis of appreciation thereof prima facie satisfaction was recorded by the Court that investigation was not proper and therefore the CBI was directed to investigate the cause of death of Riz.

24. Regard being had to the facts and circumstances which fell for consideration on 16.10.07, this Court is of the considered view that entrusting the CBI with investigation of cause of death of Riz cannot be said to be improper or unwarranted. This Court therefore holds that the Court was perfectly justified in directing CBI investigation.

25. These issues are answered accordingly.

26. Learned Counsel for the respondents except the CBI have contended that the CBI acted ultra vires in registering an FIR for alleged offence of murder and, therefore, all steps taken on the basis thereof are null and void and hence inoperative.

27. To decide this issue it would be worthwhile to take a further look to the direction of the Court dated 16.10.07 which reads as follows;

Therefore, let there be an interim order directing the CBI to investigate into the cause of unnatural death of Rizwanur and the CBI shall file a report in a sealed cover.

28. In the present case it is an admitted position on facts that when the order dated 16.10.07 was passed by the Court, there was no FIR disclosing commission of cognizable offence. On 22.9.07, the petitioner No. 2 had by his complaint informed Karaya Police Station about the unnatural death of Rizwanur and that he suspected the hands of respondent No. 12 behind his death. Immediately thereafter, the CID had

taken over investigation and had conducted investigation which ultimately was declared to be 'not in accordance with law'. The Court directed CBI to investigate the cause of unnatural death of Riz on 16.10.07 on this petition in which the CBI was a respondent. In the petition it had been alleged that Riz had been killed/ murdered. As has been held in H.N. Rishbud (supra) and Bhagwant Kishore Joshi (supra), the CBI was empowered to conduct investigation on the basis of information received otherwise than information recorded under Section 154 of the Code.

29. Having regard to the facts and circumstances which were on record, accidental death of Riz was ruled out. Therefore, in order to find out whether the death was suicidal or homicidal, the CBI being empowered to exercise powers conferred on the police to investigate under Chapter XII of the Code could have done so only on recording an FIR. Action taken by the CBI in this behalf does not appear to this Court to be offending either the power conferred on it by the Code or the order dated 16.10.07. It has been contended on behalf of the respondents that the CBI has interpreted the order dated J6.10.07 by reading words therein, otherwise absent, without seeking any clarification. If the CBI had proceeded on the basis of its own interpretation of the order which does not appear to be absurd or unreasonable, the Court Would not invalidate the impugned action on the ground that the CBI ought to have approached the Court for further clarification instead of taking recourse to a particular action. It would have been a discreet action on the part .of the CBI but mere indiscretion, without anything more, cannot be equated with mala fides.

30. This Court thus holds that in registering an FIR and in conducting investigation on the basis thereof, the CBI did not act ultra vires.

31. This issue is answered in favour of the CBI.

32. Having regard to the facts that the report was one to assist the Court to record a satisfaction that the cause of death of Riz has been ascertained with additional information relating to complicity of persons in connection therewith and that chargesheet under Section 173 of the Code of Criminal Procedure has not been filed, it was beyond the jurisdiction of the CBI to include in its report filed before this Court the recommendation for initiation of major penalty proceedings against some of the police officers. As Clause 204 provides, request for initiation of disciplinary proceeding should be sent to the competent disciplinary authority simultaneously with filing of chargesheet under Section 173 of the Code. The stage therefore has not yet arrived and at this stage it was inappropriate for the CBI to state in unequivocal terms that grounds for initiating departmental action against the erring police officers did exist and that action should be taken in that direction.

33. Additionally, the CBI ought to have appreciated that the petitioners had prayed for a declaration from this Court that the actions of the police officers (respondent Nos. 5, 7, 8 and 9) are ultra vires. The issue being sub judice, it was absolutely inappropriate for the CBI to make a recommendation in this direction without obtaining leave from Court.

34. This issue is accordingly answered in favour of the respondent Nos. 5, 7, 8 and 9.

35. Having regard to the aforesaid discussion, this Court grants liberty to the CBI to proceed in accordance with law tor filing chargesheet before the Competent Court under Section 173(2) of the Code, There shall, however, be no direction for further investigation as prayed for by Mr. Bandopadhyay regarding discrepancy in age of the deceased as recorded in the official records but absolute liberty is reserved to the CBI to conduct further investigation before it actually files the charge sheet on any point it may consider necessary in the interest of justice. However, it shall not act upon the proposal to recommend to the State initiation of disciplinary proceedings for major penalty against respondent Nos. 5, 7, 8 and 9 or any other police officer.

36. Since this Court has returned a finding that the city police officers (respondent Nos. 5, 7, 8 and 9) invaded Riz's right to life without authority of law while discharging duty as public servants, it is declared that they have acted ultra vires and their acts impugned herein are unconstitutional.

37. However, on the question as to what is the effective relief that ought to be granted on facts and in the circumstances of the case vis-a-vis the prayers made has presented its own difficulties. In view of the law laid down in Rani Laxmibai, an allegation of fact has to be pleaded in the petition for enabling the adversary to meet it based on the principle that a party should not be caught unawares at the hearing. But, rules regarding pleadings at least in respect of writ petitions have been diluted to good extent by subsequent decisions. One may profitably refer to the decision in ***State Bank of India v. S.N. Goyal***, AIR 2008 SCW 4355 wherein it has been held that in writ proceedings, the High Court can call for the record of the case, examine the same and pass appropriate orders after giving an opportunity to the State/ the statutory authority to explain any particular act or omission, and that it is quite different from a civil suit where the parties are governed by rules of pleadings and there can be no adjudication of an issue in the absence of necessary pleadings. In the present case, the factual foundation for seeking effective relief has been laid though a prayer in that behalf is absent. Parties have been heard at length on the claim of Mr. Bandopadhyay that the State should be directed to initiate disciplinary proceedings against the erring police officers. The decision in Rani Laxmibai would, therefore, have no application on facts.

38. Though the petitioners have not claimed any relief against the respondent No. 3 as also against respondent Nos. 5, 7, 8 and 9 consequent to declaration that was sought and has been granted, in the considered view of this Court interest of justice would be best served if liberty is reserved unto the State to proceed in accordance with law. Accordingly, it is observed that the State may initiate such action as it deems fit and proper against any of or all of the respondent Nos. 3, 5, 7, 8, 9, 12 and 13 in accordance with law.

39. Observations made and/or findings recorded in this order are wholly for the purpose of a decision on this writ petition and the same shall not influence or prejudice the adjudicator of future criminal proceedings, if initiated according to law.

40. The writ petition stands allowed, while the applications stand dismissed. However, parties shall bear their own costs.

41. Report of the CBI together with the compact disc placed on record by Kolkata TV shall be re-sealed by the Assistant Court Officer and retained with the records of the case.

42. Urgent photostat certified copy of this judgment, if applied for, be furnished to the applicant within 4 days from date of putting in requisites therefore.

GUJARAT

74. Diwan Nurmahammadsha Mahemadsha vs. State of Gujarat and Ors., Decided On: 28 April, 2011[10].

M D Shah J.

Learned advocate for the petitioners submitted that the petitioners are from different communities and they got married with each other and as soon after the marriage, there are threats administered to them by family of petitioner no.2-wife, this application is filed to provide necessary police protection to them. It is an admitted fact that both the petitioners were major when they got married and they got married as per their own desire. It is held by the Hon'ble Supreme Court in ***Lata Singh V/s State of U.P. & Anr.*** reported in AIR 2006 SC 2522, more particularly, in paragraphs 18 and 19 as under:

"18. We sometimes hear of 'honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.

19. Inthe circumstances, the writ petition is allowed. The proceedings in Sessions Trial No.1201/2001 titled State of U.P. v. Sangita Gupta & Ors. arising out of FIR No.336/2000 registered at Police Station Sarojini Nagar, Lucknow and pending in the Fast Track Court V. Lucknow are quashed. The warrants against the accused are also quashed. The police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioner's husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law, by the authorities concerned."

Thefacts of this case are identical to the facts of the case before the Honourable Supreme Court. Therefore, the respondent nos.2 to 4 are directed to ensure that neither the petitioner no.2 nor her husband nor any relatives of the petitioner no.2's husband are harassed or threatened nor any acts of violence are committed against them

[10] http://www.indiankanoon.org/doc/1190179/

75. Asari Manishaben Jivabhaiv s. State of Gujarat and O rs., Special Criminal Application No. 585 of 2011, Decided On: 15 March, 2011[11].

M D Shah J.

1. This petition is filed by the petitioner for providing necessary protection to the petitioner as well as her in-laws as the present petitioner has married with Jivabhai Kaljibhai Asari against the will of her parents. The marriage certificate is also placed on record. When marriage took place, the present petitioner was major. School Leaving Certificate is also produced on record.

2. It is an admitted fact that the petitioner and her husband were major when they got married and they got married as per their own desire. It is held by the Hon'ble Supreme Court in the case of *Lata Singh vs. State of U.P. & An*r ., reported in AIR 2006 SC 2522, more particularly, in paragraphs 18 and 19 as under:

> "18. We sometimes hear of 'honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.
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> 19. In the circumstances, the writ petition is allowed. The proceedings in Sessions Trial No.1201/2001 titled State of U.P. v. Sangita Gupta & oths arising out of FIR No.336/2000 registered at Police Station Sarojini Nagar, Lucknow and pending in the Fast Track Court V. Lucknow are quashed. The warrants against the accused are also quashed. The police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioner's husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law, by the authorities concerned."

3. The facts of this case are identical to the facts of the case before the Honourable Supreme Court. Therefore, the respondents No.2 and 3 are directed to take appropriate steps in the matter for giving protection to the petitioner as well as her in-laws.

4. With the above direction, this petition is disposed of.

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http://gujarathc-casestatus.nic.in/gujarathc/validPageChk.jsp

PUNJAB AND HARYANA

76. Gurdev Singh vs. State of Haryana, 2011(2) RCR (Criminal) 950.

M. Jeyapaul, J.

1. The first accused Mandeep in Sessions case No. 29/09 on the file of Additional Sessions Judge, Karnal was convicted for the offence under Section 364 of the Indian Penal Code and was sentenced to undergo seven years rigorous imprisonment and also to pay a fine of Rs. 5000/-; in default to undergo a further period of one year rigorous imprisonment. He was also convicted for the offence under Section 120-B of the Indian -Penal Code and was sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs. 1000/-; in default to undergo a further period of six months rigorous imprisonment. Second accused Gurdev Singh, third accused Suresh Kumar and fourth accused Rajinder Singh, fifth accused Satish Kumar and sixth accused Baru Ram in the same Sessions case were convicted under Section 302 of the Indian Penal Code and were awarded death sentence each. They were also convicted for the offence under Section 364 Indian Penal Code and were sentenced to undergo seven years rigorous imprisonment each and to pay a fine of Rs. 5000/- each and in default to undergo a further period of one year rigorous imprisonment each. They were also convicted for the offence under Section 120-B of the Indian Penal Code and were sentenced to undergo three years rigorous imprisonment each and to pay a fine of Rs. 5000/- each and in default to undergo a further period of six months rigorous imprisonment each. Accused Ganga Raj in Sessions Case No. 27 of 2009 originated from the very same FIR but based on the supplementary charge sheet filed in that case was convicted for the offence under Section 302 Indian Penal Code and was sentenced to undergo life imprisonment and to pay a fine of Rs. 10,000/-, in default to undergo a further period of two years rigorous imprisonment. He was also directed to compensate mother of the deceased Manoj by name Chanderpati to the tune of Rs. 1,00,000/- under Section 357 of the Code of Criminal Procedure. He was convicted for the offence under Section 364 of the Indian Penal Code and was sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs. 5000/- and in default of payment of fine to further undergo one year rigorous imprisonment. He was also convicted for the offence under Section 120-B of the Indian Penal Code and was sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo six months rigorous imprisonment.

Prosecution version

5. (a) PW 25 Chander Pati was the mother. PW 26 Seema was the sister and PW 2 Narender Singh was the cousin brother of the deceased Manoj Manoj and Babli left the village on 6.4.2007 and got married on 7.4.2007. Om Pati the mother of Babli enraged by the act of Manoj lodged a complaint against him and his family members with Rajound Police Station. PW 24 SI Jagbir Singh on the basis of the complaint lodged by Om Pati registered FIR No. 24 on 26.4.2007 as against Manoj and his family members.

(b). Babli was produced before the Court of the Addl. Chief Judicial Magistrate and her statement under Section 164 Code of Criminal Procedure was recorded by PW 37 Mr. V.P. Sirohi, Addl. Chief Judicial Magistrate.

(c) In the said statement recorded under Section 164 Code of Criminal Procedure Babli has stated that she having married Manoj started living with him at Chandigarh on her own volition. No body had exerted pressure on her. The family members of Manoj were not involved in her affairs…

Murder reference

2. Even in the 21st century such a shamful act of hollow honour killing is perpetrated in our society. We feel that it is really a slur on the fine fabric of the Indian society. Abduction is really cruel and that too murder of the abductees is barbaric. But unfortunately in this case there is no eye witness to the occurrence. The entire case of the prosecution depends on the circumstantial evidence. The court was left with the option of inferring certain facts from the circumstances projected by the prosecution. As we have rendered the verdict based on the circumstantial evidence, our conscious does not permit us to confirm the death sentence awarded to the accused A-2 Gurdev Singh, A-3 Suresh Kumar, A-4 Rajinder Singh and A-6 Baru Ram. It is not out of place to mention here that we have already held that no offence was made out as against A-5 Satish Kumar.

2. It is beneficial to refer to the recent decision of the Supreme Court in Dalip Prentnarayan Tiwari and Anr. Vs. State of Maharashtra,MANU/SC/1884/2009 : 2410 (1) R.C.R.(Criminal) 230: 2009 (6) R.AJ. 628: (2010) 1 SCC 775. That was a similar case where four murders of family members of young girl who got married another community boy had been committed. In fact death sentence was imposed on the accused by the trial court and the same was confirmed by the High Court. But the Hon'ble Supreme Court took a different view inspite of the fact that it was a hollow honour killing of four persons and awarded 25 years of actual imprisonment to three accused and 20 years of actual imprisonment to one of the accused, converting the death sentence given by the Sessions Court and confirmed by the High Court. It is very much relevant to refer to some of the observations made in paras 60, 66 and 67 of the aforesaid judgment:

60. All murders are foul, however, the degree of brutality, depravity and diabolic nature differ in each case. It has been held in the earlier decision of this Court which we may not repeat that the circumstances, under which the murders took place, differ from case to case and there cannot be a strait jacket formula for deciding upon the circumstances under which the death penalty is a must.

66. The disturbed mental feeling or the constant feeling of injustice has been considered by the Court as mitigating circumstances in Om Prasksh v. State of Haryana where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed not by itself a circumstance justifying the death sentence.

67. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology; his social conditions and his mindset for committing the offence are also relevant.

Before parting with the case:

3.1. We find that the Investigating agency in such a sensational case has bungled at each and every stage. Firstly PW 24 SI Jagbir Singh who in fact perceived a threat for the life of Manoj and Babli should not have withdrawn security in the guise of a written statement given by them to withdraw the same. Till their

departure at Pipli, there had been a real threat to their life from the family members of Babli. Very strangely PW 24 obtained some statements of Manoj and Babli and virtually landed them in a death trap.

3.2. VT Message was received at Butana Police Station by PW12 HC Ramesh Chand as regards the abduction of Manoj and Babli on 15.6.2007 itself but the entire police force attached to Bhutana Police Station was in deep slumber up to 2o.6.2007 when PW 26 lodged a complaint alleging abduction of her son. Had the SHO Bhutana Police Station woken up on receipt of such VT message, he would have saved the precious life of innocent young couple.

3.3. Neither PW 31 ASI Dharampal attached to Bhutana Police Station nor PW 33 Inspector Subhash who recorded the statement of about five other persons who were present at toll plaza Ajheri could not deduct the bus from where Manoj and Babli were brought down from the bus and abducted Neither the driver nor the conductor of the vehicle could be traced by PW 33, or any other police officials who took up the case for further investigation. We are constrained to infer that in fact the police official had been hand in, glove with the accused party and provided loop hole at each and every stage of investigation. None of the mobile phones was seized by the investigating agency. One Vijay, the proprietor of a booth from where Manoj lastly made a call to his mother, was not cited as a witness as his statement under Section 161 Code of Criminal Procedure was not recorded. The passengers in the bus who witnessed the horrific occurrence of abduction could have been easily zeroed in on, if efficient investigation had been done in time. On a careful perusal of the entire process of investigation embarked upon by the investigating officials, we find that they had just investigated the matter for the purpose of giving disposal to the investigation. They have not evinced any interest as warranted in this case, to collect telling materials as against the accused in a crime which has virtually thrown a challenge to the society itself. A team of the Police officials should have been employed considering the gravity of the offence to collect fool-proof evidence but quite unfortunately novices in the investigation field have been employed to detect the shocking crime for the reasons best known.

3.4. Keeping the above facts in view, the Director General of Police Haryana is directed to initiate disciplinary proceedings against PW 24 Jagbir Singh the then Sub Inspector of Rajound Police Station, PW 31 Dharampal and PW 33 Inspector Subhash who investigated this case in a very casual fashion. The action taken report be sent to this Court within three months form the date of receipt of a copy of this judgment.

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http://lobis.nic.in/phhc/

77. Geeta Sabharwal & another Vs Stateof Haryana & Others, Criminal Miscellaneous No. M-27548 of 2008, Decided on 22 October 2008.[12]

Ajai Lamba J.

It has been pleaded that the petitioners being of legally marriageable age, got married as per their wishes. The marriage, however, was solemnized against the desires of respondent Nos.4 and 5. The petitioners are now being threatened by the said respondents.

The Hon'ble Supreme Court of India taking serious note of such instances in *Lata Singh Versus State of U.P. & Another*, JT 2006(6) SC 173 has observed in the following terms:-

> "7. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation united. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news is coming from several parts of the country that young men and women, who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste o r inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.
>
> 8. We sometimes hear of `honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."

In view of the law laid down by the Hon'ble Supreme Court of India and keeping in view the facts and circumstances of the case, it is directed that this petition be treated as a representation/ complaint. Respondent No.3, Station House Officer, Police Station, City, Shahabad, Distri ct Kurukshetra, is directed to have an enquiry conducted into the facts given out in the petition. The enquiry be conducted within 15 days of receipt of a copy of this order. In case the perception of threat of the petitioners is found reasonable, appropriate steps would be taken to ensure protection of their life and liberty.

It was further directed that in case any complaint or FIR has been lodged in regard to the issues pleaded or raised in this petition, first an enquiry be conducted so as to verify the allegations made in the petition and only thereafter proceed with the enquiry or investigation of the case.

Disposed of with the above directions.

Decriminalising Same Sex Relationships

DELHI

78. Naz Foundation vs. Government of NCT of Delhi, 2010 CrLJ 94

A.P Shah, C.J, S.Muralidhar J.

A P Shah C.J.

1. The writ petition has been preferred by Naz Foundation, a Non-Governmental Organisation (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as "unnatural offences", to the extent the said provision criminalises consensual sexual acts between adults in private. The challenge was founded on the plea that Section 377 IPC, on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 & 21 of the Constitution of India. Limiting their plea, the petitioners submit that Section 377 IPC should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The Union of India is impleaded as respondent No.5 through Ministry of Home Affairs and Ministry of Health & Family Welfare. Respondent No.4 is the National Aids Control Organisation (hereinafter referred to as "NACO") a body formed under the aegis of Ministry of Health & Family Welfare, Government of India. NACO is charged with formulating and implementing policies for the prevention of HIV/AIDS in India. Respondent No.3 is the Delhi State Aids Control Society. Respondent No.2 is the Commissioner of Police, Delhi. Respondents No.6 to 8 is individuals and NGOs, who were permitted to intervene on their request. The writ petition was dismissed by this Court in 2004 on the ground that there is no cause of action in favour of the petitioner and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation. The Supreme Court vide order dated 03.02.2006 in Civil Appeal No.952/2006 set aside the said order of this Court observing that the matter does require consideration and is not of a nature which could have been dismissed on the aforesaid ground. The matter was remitted to this Court for fresh decision.

2. At the core of the controversy involved here is the penal provision Section 377 of the Indian Penal Code which criminalizes sex other than heterosexual penile-vaginal.

3. Indian Penal Code was drafted by Lord Macaulay and introduced in 1861 in British India. Section 377 IPC is contained in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body". Within this

Chapter Section 377 IPC is categorised under the sub-chapter titled "Of Unnatural Offences" and reads as follows:

377. Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

DIGNITY

4. Dignity as observed by L'Heureux-Dube, J is a difficult concept to capture in precise terms [Egan v. Canada (1995) 29 CRR 79 at 106]. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India. V.R. Krishna Iyer, J. observed that the guarantee of human dignity forms part of our constitutional culture [Prem Shankar Shukla v. Delhi Admn. (supra), page 529 of SCC].

SECTION 377 IPC AS AN INFRINGEMENT OF THE RIGHTS TO DIGNITY AND PRIVACY

5. The privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy…

6. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves. [Sachs, J., The National Coalition for Gay and Lesbian Equality v. The Minister of Justice [413 US 49 (1973)].

7. The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

SECTION 377 IPC AS AN IMPEDIMENT TO PUBLIC HEALTH

8. Article 12 of the International Covenant on Economic, Social and Cultural Rights makes it obligatory on the "State to fulfill everyone's right to the highest attainable standard of health." The Supreme Court of India interpreting Article 21 of the Indian Constitution in the light of Article 12 of the Covenant held that the right to health inhered in the fundamental right to life under Article 21. [Paschim Banga Khet Mazdoor Samity v. State of W.B. MANU/SC/0611/1996 : AIR1996SC2426].

9. The "Delhi Declaration of Collaboration, 2006" issued pursuant to International Consultation on Male Sexual Health and HIV, co-hosted by the Government of India, UNAIDS and Civil Society Organisations, recognised that: "...the stigma, discrimination and criminalisation faced by men who have sex with men, gay men and transgender people are major barriers to universal access to HIV prevention and treatment" [Delhi Declaration of Collaboration : 26th September, 2006]. On June 30, 2008, the Prime Minister Mr. Manmohan Singh in a speech delivered at the release of the Report of the Commission on AIDS in Asia stated "the fact that many of the vulnerable social groups, be they sex workers or homosexuals or drug users, face great social prejudice has made the task of identifying AIDS victims and treating them very difficult" [Prime Minister's address on the release of the Report of the Commission on AIDS in Asia: June 30, 2006]. On August 08, 2008, the Union Minister of Health and Family Welfare, Dr. Ambumani Ramadoss speaking at the 17th International Conference on Aids in Mexico City is reported to have stated "...structural discrimination against those who are vulnerable to HIV such as sex workers and MSM must be removed if our prevention, care and treatment programmes are to succeed". He said, "Section 377 of the Indian Penal Code, which criminalises men who have sex with men, must go" [Reported in Indian Express: August 9,2006 http://www.indianexpress.com/story/ 346649.html]. Union Minister of Health is also reported to have stated at the International HIV/AIDS Conference in Toronto, 2006 that Section 377 IPC was to be amended as part of the government's measures to prevent HIV/AIDS.[The Hindu: August 16,2006]

MORALITY AS A GROUND OF A RESTRICTION TO FUNDAMENTAL RIGHTS

10. While it could be "a compelling state interest" to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest" to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others. In Lawrence v. Texas (supra), the Court held that moral disapproval is not by itself a legitimate state interest to justify a statute that bans homosexual sodomy. Justice Kennedy observed:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a

promise of the Constitution that there is a realm of personal liberty which the government may not enter." ...The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[page 578]

11. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly [Constitutional Assembly Debates: Official Reports Vol.VII: November 4, 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.

After quoting Grote, Dr. Ambedkar added:

While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution. The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.

12. Granville Austin in his treatise "The Indian Constitution - Cornerstone of A Nation" had said that the Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. The core of the commitments to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution. The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

13. The scope, content and meaning of Article 14 of the Constitution has been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though

Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e., causal connection between the basis of classification and object of the statute under consideration. [Budhan Choudhry v. State of Bihar MANU/SC/0047/1954 : 1955CriLJ374]. In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust,n ecessarily the classification will have to be held as unreasonable. [Deepak Sibal v. Punjab University MANU/SC/0157/1989 : [1989]1SCR689]

14. …it is not within the constitutional competence of the State to invade the privacy of citizen's lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The states interest "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.
SECTION 377 IPC TARGETS HOMOSEXUALS AS A CLASS

15. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself…

16. The inevitable conclusion is that the discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.

17. The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalisation concerning "normal" or "natural" gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalisation about the conduct of either sex…

18. We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15."STRICT

SCRUTINY" AND "PROPORTIONALITY REVIEW" - ANALYSIS OF ANUJ GARG v. HOTEL ASSOCIATION OF INDIA MANU/SC/8173/2007 : AIR2008SC663

CONCLUSION

1. The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion…….. (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.' [Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pages 57-65].

2. If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.

3. We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

The Special Marriage Act, 1954

DELHI

79. Pranav Kuma Mishra and Anr. vs. Govt of NCT of Delhi & Anr., WP(C) No.748/2009, Decided on 08.04.2009.

Hon'ble Mr. Justice S. Ravindra Bhatt

1. The petitioners, by way of this writ petition, challenged the alleged practice of posting the notice of intended marriage under the Special Marriages Act, 1954 (hereafter the Act) at the residential addresses of both parties to the marriage as also through the Station House officer (S.H.O.) of the police station of concerned jurisdiction for the purpose of verification of address.

2. As per the petitiont he first and the second petitioner are citizens of India and permanent residents of Delhi both being of marriageable age as required under the provisions of the Act. They intend to be married under the provisions of the said Act. For this purpose they approached office of the Registrar of Marriages at Deputy Commissioner North, 5 Shamnath Marg; Delhi and obtained the necessary forms. They stated that on further inquiry they were informed of the procedure whereby a copy of the "Notice of Intended Marriage" (as required under section 5 of the Act) would be displayed on the Notice Board of the Registrar's office for information to the public at large and for inviting objections. They were also told that another copy of the "Notice of Intended Marriage" would be sent at the respective addresses of the parties and a notice may also be sent through the S.H.O. of the police station of the concerned jurisdiction for the purpose of verification of the residential address.

3. It is further stated that for the purpose of confirming the above stated procedure the petitioners made an application under the Right to Information Act but they did not receive a satisfactory response. The petitioners challenged the procedure adopted as being arbitrary and illegal and the same is not line with the provisions of the Special Marriage Act, 1954 to the extent it provides for posting of the notice at the addresses of the parties and verification of the address by the S.H.O. They do not wish the said notice to be sent to their residences. 4.The petitioners contend that the authorities are following the criterion prescribed for t he purpose of 'registration of marriages which have already been solemnized' rather than the one enacted for 'solemnization of marriage under Special Marriage Act', which clearly does not provide for sending notices to the respective residential addresses of the parties to the intended marriage. It merely requires pasting of the notice at the office notice board by the S.D.M.

4. It becomes clear on a textual reading of the relevant provisions of the Act and the information procured from the website of the Govt. of Delhi that no requirement of posting of notice to applicant's addresses or service through the SHO, or visit by him is prescribed in either the Act or the website. The Petitioner's concerns and apprehensions are justified. Absent any legal compulsion – as is the position –for sending notices to residential addresses in case of solemnization of the marriage, in terms of Sections 4 and 5, their dispatch can well amount to breach of the right to privacy, which every individual is entitled to Ref Govind v. State of MP MANU/SC/0119/1975 : (1975) 2 SCC 148, R. Rajgopal v. State of T.N. MANU/SC/0056/1995 : (1994) 6 SCC 632, District Registrar and Collector v. Canara Bank MANU/SC/0935/2004 : (2005) 1 SCC 496.

5. It is to be kept in mind the that the Special Marriage Act was enacted to enable a special form of marriage for any Indian national, professing different faiths, or desiring a civil form of marriage. The unwarranted disclosure of matrimonial plans by two adults entitled to solemnize it may, in certain situations, jeopardize the marriage itself. In certain instances, it may even endanger the life or limb of one at the other party due to parental interference.

6. In such circumstances if such a procedure is being adopted by the authorities, it is completely whimsical and without authority of law. The Writ Petition, therefore, deserves to succeed; the respondents were hereby directed to consider and process the petitioners? request for solemnization of marriage under the Special Marriage Act, 1954, without sending any notices to their residences. It is; however, open to the concerned Marriage Officer to display the notice on the office notice board in accordance with law. All Marriage Officers are hereby directed to follow the above procedures and not dispatch notices to the residence of the applicants, who seeks solemnization of their marriage under Chapter II of the Act.

The writ Petition is allowed in the above terms.