THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 11.08.2010

+ **WP (CRL) 1003/2010**

SH. JITENDER KUMAR SHARMA … Petitioner

versus

STATE & ANOTHER … Respondents

Advocates who appeared in this case:-
For the Petitioner : Mr Manoj Kumar
For the Respondent/State : Mr Akshay Bipin
For the Complainant : Mr Devi Sahai

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MS JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. Jitender Kumar Sharma and Poonam Sharma fell in love, eloped together and got married. The problem is that they are both minors: Jitender is just under 18 years of age and Poonam is 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, 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, 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 is 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 u/s 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 u/s 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 alongwith 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?

Validity of the marriage

8. It was argued on behalf of Poonam's father that the marriage between Jitender and Poonam, who are hindus, is invalid because it is in violation of section 5(iii) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HMA"), inasmuch as Poonam is below 18 years of age and Jitender is below the age of 21 years. Section 5 sets out the conditions for a hindu marriage, one of them [clause (iii)] being the stipulation as to ages of the bridegroom and bride. It reads as under:-

> "**5. Conditions for a Hindu marriage.—*A marriage may solemnized between any two Hindus, if the following conditions are fulfilled, namely*** :—
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> (*i*) neither party has a spouse living at the time of the marriage;
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> (*ii*) at the time of the marriage, neither party—
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> (*a*) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
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> (*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 twenty-one years and the bride the age of eighteen years at the time of the marriage;***
>
> (*iv*) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
>
> (*v*) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

It is true that one of the conditions of a hindu marriage is that the bride should have completed 18 years age and the bridegroom, 21 years. But, does this mean that a marriage where this twin condition as to ages is not

satisfied is, *ipso facto,* invalid or void? An examination of section 11 of the HMA would seem to suggest otherwise. The said provision is as under:-

> **"11. 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."

Though five conditions have been stipulated in section 5, only the contravention of three of them, namely, clauses (i), (iv) and (v) would render the marriage to be null and void. Clause (iii) of section 5, which is the condition with regard to the minimum ages of the bride and bridegroom, is conspicuous by its absence. As a result, a hindu marriage solemnized in contravention of clause (iii) of section 5 of the HMA cannot be regarded as a void or invalid marriage. We are not oblivious of section 18 of the HMA which prescribes punishment for contravention of certain conditions for a hindu marriage. It reads as under:-

> **"18. Punishment for contravention of certain other conditions for a Hindu marriage.—**Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*) and (*v*) of Section 5 shall be punishable—
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> ***(a) in the case of contravention of the condition specified in clause (iii) of Section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both***;
>
> (*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (*v*) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both
>
> (*c*) [***]"

But, the fact that punishment has been provided for contravention of the condition specified in section 5(iii) of the HMA does not mean that the

marriage itself is void or invalid. If the legislature had intended that such a marriage would be void or invalid, it could have easily included clause (iii) of section 5 in Section 11 itself. Only clauses (i), (iv) and (v) of section 5 are specifically mentioned in section 11. The only conclusion is that the legislature consciously left out marriages in contravention of the age stipulation in clause (iii) of section 5 from the category of void or invalid marriages.

9. This view is well supported by several division bench decisions of this court. In ***Neetu Singh v. State:*** ***77 (1999) DLT 601 (DB)***, after considering two decisions, one of the Allahabad High Court [***Mrs Kalyani Chaudhary v. The State of U.P.:*** ***1978 CrLJ 1003***]and the other of the Himachal Pradesh High Court [***Seema Devi alias Simaran Kaur v. State of H.P.:*** ***1998 (2) Crime 168***], it was held that a marriage in contravention of clause (iii) of section 5 of the HMA is "neither void nor voidable" although it may be punishable under section 18 of the HMA. This view has been reinforced in ***Ravi Kumar v. The State:*** ***124 (2005) DLT 1 (DB)*** and ***Manish Singh v. State Govt of NCT:*** ***AIR 2006 Del 37= 126 DLT 28 (DB)***. While the decisions in ***Neetu Singh*** *(supra)* and ***Ravi Kumar*** *(supra)* did not refer to the provisions of the Child Marriage Restraint Act, 1929, the said provisions were specifically noticed in ***Manish Singh*** *(supra).* In that case the division bench held that the "*Act aims to restrain performances of child marriages*" but the "*Act does not affect the validity of a marriage, even though it may be in contravention of the age prescribed under the Act*". After referring to the

penal provisions in the HMA and the Child Marriage Restraint Act, 1929, the division bench observed marriages solemnized in contravention of the age prescription in section 5(iii) of the HMA were neither void nor voidable but were "*..only punishable under section 18 of the Hindu marriage Act with imprisonment of 15 days and a fine of Rs 1000/- as also under the provisions of Child marriage Restraint Act.*"

10. Before we proceed further, under Hindu law there are essentially two kinds of marriages – void marriages or valid marriages. The latter category has a sub-category of voidable marriages. A marriage in contravention of clause (iii) of section 5, as we have seen above, does not fall in the category of void marriages specified in section 11 of the HMA nor does it fall in the category of voidable marriages specified in section12. Consequently, by the process of elimination, it would be a valid marriage. Of course, the marriage may be dissolved through a decree of divorce, but, that would have to be on the grounds specified in section 13 of the HMA. Interestingly, section 13(2)(iv) enables a 'wife' to petition for dissolution of her marriage on the ground:-

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

What does this show? It shows that even a marriage of a minor girl below the age of fifteen is regarded as valid and can only be dissolved on her

petition, provided she repudiates the marriage between the time she is 15 years old and 18 years old.

11. Coming back to the division bench decisions mentioned above, it is pertinent to note that they were rendered prior to the enactment and enforcement of The Prohibition of Child Marriage Act, 2006 which replaced the Child Marriage Restraint Act, 1929. The latter act did not contain any provisions impinging upon the validity of a marriage. However, the Prohibition of Child Marriage Act, 2006 contains specific provisions which deal with void and voidable marriages. Let us, first of all, consider the issue of void marriages. Section 12 details the circumstances under which the marriage of a "minor child" would be void. It reads as under:-

> **"12. Marriage of a minor child to be void in certain circumstances**.—Where a child, being a minor—
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> (*a*) is taken or enticed out of the keeping of the lawful guardian; or
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> (*b*) by force compelled, or by any deceitful means induced to go from any place; or
>
> (*c*) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,
>
> such marriage shall be null and void."

Before we proceed further the expression "a child, being a minor" or, in short, "minor child" needs to be explained. Clauses (a) and (f) of section 2 define "child" and "minor" respectively. "Child" means a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age. "Minor" means a person who, under the provisions of the Majority Act, 1875 is to be deemed not to have attained his majority. Now,

as per section 3(1) of the Majority Act, 1875 it is stipulated that every person domiciled in India shall attain the age of majority on his completing the age of 18 years and not before. Thus, "minor child", in the context of section 12 of the Prohibition of Child marriage Act, 2006, would have reference to a person (male or female) under 18 years of age.

12. The 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.

13. We shall now consider the issue of voidable marriages. We have seen that the division bench decisions of this court referred to above, consistently held that a marriage in contravention of clause (iii) of section 5 of the HMA was "neither void nor voidable". We have discussed the aspect of void marriages and found that a marriage which is not void under the HMA may yet be void in any one or more of the circumstances specified in section 12 of the Prohibition of Child marriage Act, 2006. The latter act has, unlike its precursor – the Child Marriage Restraint Act, 1929, also introduced the concept of a voidable marriage. Section 3 of the Prohibition of Child marriage Act, 2006 reads as under:-

> "**3. Child marriages to be voidable at the option of contracting party being a child**.—(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:
>
> Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.
>
> (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.
>
> (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.
>
> (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side,

> or an amount equal to the value of such valuables, ornaments, other gifts and money:
>
> Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed."

This provision, irrespective of whether a child marriage is or is not voidable under personal law, makes every child marriage voidable at the option of a party to the marriage, who was a child at the time of marriage. Another important aspect of this provision is that a petition for annulling a child marriage by a decree of nullity can be filed only by a party to the marriage, who was a child at the time of marriage. It is therefore clear that where, earlier, a child marriage may not have been voidable under personal law, as in the case of the HMA, by virtue of the 'secular' provisions of section 3 of the Prohibition of Child marriage Act, 2006 it has explicitly been made voidable at the option of the 'child' spouse. But, nobody other than a party to the marriage can petition for annulment of the marriage.

14. It is clear that because of the change in law brought about by the enactment of the Prohibition of Child marriage Act, 2006 and repeal of the Child Marriage Restraint Act, 1929, the statement of law with regard to the validity of a child marriage has to be modified. The legal principle that a marriage in contravention of clause (iii) of section 5 of the HMA was "neither void nor voidable", was established prior to the enactment and enforcement of the Prohibition of Child marriage Act, 2006. The principle

which is now applicable is that a marriage in contravention of clause (iii) of section 5 of the HMA is not ipso facto void but could be void if any of the circumstances enumerated in section 12 of the Prohibition of Child marriage Act, 2006 is triggered and that, in any event, all such marriages would be voidable at the option of the 'child' spouse in terms of section 3 of the Prohibition of Child marriage Act, 2006.

15. 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. For, one cannot make something voidable which is already void or invalid.

The issue of custody

16. This takes us 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. As held in ***Neetu Singh*** *(supra)* she cannot be kept there against her wishes. She has refused to live with her parents for fear of her life. In fact, her only desire and wish is that she live with her husband – Jitender. The counsel for the petitioner argued that Poonam should be permitted to reside with the petitioner as they were married. He submitted that it was also in her best interest that she live with the petitioner and not with her parents as she would be looked after with love and attention, whereas there was fear to her life if she were to be sent to her parents' home. The learned counsel representing Poonam's father, on the contrary, argued that Poonam's father was her natural guardian and that she should be in his custody.

17. Let us first examine the Guardians and Wards Act, 1890. Section 4 (1) defines a "minor" to mean a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority. As we have indicated earlier in this judgment, a person under 18 years of age is

a person who has not attained his majority. Section 4(2) defines "guardian" to mean a person having care of the person of a minor or his property, or of both his person and property. Section 4(3) defines "ward" to mean a minor for whose person or property, or both, there is a guardian. The points to note are that the minor is a person under 18 years of age and that a guardian can be of the person or property of the minor or of both the person and property of the minor.

18. Under Section 7 of the Guardians and Wards Act, 1890, the court has power to make an order as to guardianship. The said provision reads as under:-

> **"7. Power of the Court to make order as to guardianship**.—(1) Where the Court is satisfied that is for the welfare of a minor that an order should be made—
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> (*a*) appointing a guardian of his person or property, or both, or
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> (*b*) declaring a person to be such a guardian,
>
> the court may make an order accordingly.
>
> (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.
>
> (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

It is clear that a guardian is appointed where it is for the welfare of a minor.

19. Section 17 of the Guardians and Wards Act, 1890 specifies the matters which need to be considered in appointing a guardian. It reads as under:-

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

Here again, there is stress on the welfare of the minor "*consistently with the law to which the minor is subject*", which is the Hindu Minority and Guardianship Act,1956. What is of significance is the provision that if the minor is old enough to form an intelligent preference, the court could consider that preference. This clearly indicates that the wishes of a minor need to be seriously considered by the court where the minor is old enough.

20. Sections 19 and 21 of the Guardians and Wards Act, 1890 are also instructive. They are as follows:-

> **"19. Guardian not to be appointed by the Court in certain cases.—**Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—
>
> (*a*) of a minor who is a married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or
>
> (*b*) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(*c*) of a minor whose property is under superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

"21. Capacity of minors to act as guardians.—A minor is incompetent to act as guardian of any minor except his own wife or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family."

Two things are apparent. First, a guardian is not to be appointed or declared of the person of a minor married female whose husband is not, in the opinion of the court, unfit to be guardian of her person. Second, a minor is incompetent to act as a guardian of any minor except his own wife. Put differently, a minor husband is not incompetent, in law, to act as guardian of his minor wife.

21. Now, let us have a look at the relevant provisions of the Hindu Minority and Guardianship Act,1956. Section 2 sets the tone by stating that "*[t]he provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890*". Thus, the provisions of Hindu Minority and Guardianship Act,1956 are supplemental to Guardians and Wards Act, 1890. The definition of "minor" under this act is of the same effect as that under the 1890 Act. The word "guardian" has also been similarly defined in section 4(b) with the addition of an inclusive portion. The inclusive portion, inter alia, refers to a "natural guardian". The natural guardians of a hindu minor are set out in section 6 of the 1956 Act as follows:-

> **"6. Natural guardians of a Hindu minor**.—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
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> *(a)* in the case of a boy or an unmarried girl—the father, and after him, the mother : Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
>
> *(b)* in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father ;
>
> (*c*) in the case of a married girl—the husband :
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—
>
> *(a)* if he has ceased to be a Hindu, or
>
> *(b)* if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*).
>
> *Explanation.*—In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother."

As per this provision, the natural guardian of a minor hindu girl, who is married, is the girl's husband. Section 10 of the Hindu Minority and Guardianship Act,1956 stipulates that a minor shall be incompetent to act as guardian of the property of any minor. But, because of section 2 of this act, this provision is to be read in conjunction with sections 19 and 21 of the 1890 Act. Finally, we come to the most important provision for our purposes and that is section 13 of the 1956 Act which declares unequivocally that the welfare of the minor shall be the paramount consideration in the appointment or declaration of any person as guardian of a hindu minor. The provision reads as under:-

> **"13. Welfare of minor to be paramount consideration**.—(1) In the appointment or declaration of any person as

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

22. A reading of the 1890 Act and the 1956 Act, together, reveals the guiding principles which ought to be kept in mind when considering the question of custody of a minor hindu. We have seen that the natural guardian of a minor hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor [See: ***Anjali Kapoor v. Rajiv Baijal:*** ***(2009) 7 SCC 322 at 326***].

23. 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.

24. As regards the two FIRs which have been registered are concerned, we are of the view that continuing proceedings pursuant to them would be an exercise in futility and would not be in the interest of justice. Poonam has clearly stated that she left her home on her own and of her own free will. This cuts through the case of kidnapping and insofar as the offence punishable under section 376 IPC is concerned, the present case falls under the exception to section 375 inasmuch as Poonam is Jitender's wife and she is above 15 years of age. The allegation of criminal intimidation is also not sustainable at the outset. Hence, FIR no. 110/2010 u/s 363/376 IPC and FIR no. 177/2010 u/s 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and

all proceedings pursuant thereto are liable to be quashed. Since Jitender is less than 18 years of age, even the offence under Section 9 of the Prohibition of Child Marriage Act, which provides for the punishment of a male adult above 18 years of age, is not made out.

25. 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. As per the 205th Report of the Law Commission of India, February 2008, child marriages continue to be a fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union. In 2000 the UN Population Division recorded that 9.5% of boys and 35.7 % of girls aged between 15-19 were married [at p.15 of the Report]. Such practices must be rooted out from our social fabric. In the law commission reports on the subject as well as in the statements of

objects and reasons behind the Child Marriage Restraint Act, 1929 and now the Prohibition of Child Marriage Act, 2006, the apparent target seems to be these unhealthy practices. However, we have, in our experience in the present bench, noticed a burgeoning of cases of missing daughters and married daughters detained by their parents. It is a serious societal problem having civil and criminal consequences. In countries like USA and Canada also there is the problem of teenage marriages. There many states have recognized teenage marriages provided the boy and girl are both above 16 years of age and the minor has his or her parents' consent. In some cases, consent and approval of the court is also required with or without the consent of the parents. Where the minor girl is pregnant, the marriage is usually permitted. 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 subsists alongwith 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 be 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 to occur, they may require a different treatment.

26. 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.

Conclusion

27. 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 u/s 363/376 IPC and FIR no. 177/2010 u/s 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and all proceedings pursuant thereto are quashed.

The writ petition stands disposed of.

BADAR DURREZ AHMED, J

V.K. JAIN, J

AUGUST 11, 2010
HJ