* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+W.P. (Crl.) No.338/2008, Crl.M.C. No.1001/2011 & Crl.M.A. No.3737/2011, W.P. (Crl.) No.821/2008 and Crl.M.A. No.8765/2008, WP (Crl.) No.566/2010

Reserved on: 18.05.2012
% Pronounced on: 27.07.2012

1) W.P. (Crl.) No.338/2008

COURT ON ITS OWN MOTION (LAJJA DEVI) …..Petitioner

through: NEMO

VERSUS

STATE …..Respondent

through:Mr.A.S. Chandhiok, ASG with
Mr.Baldev Malik for the UOI
Mr. Pawan Sharma, Standing
Counsel (Crl.) with Mr.Harsh
Prabhakar and Mr.Sahil Mongia
for the State
Ms. Aparna Bhat for the
National Commission for Women

2) Crl.M.C. No.1001/2011 & Crl.M.A. No.3737/2011

SMT. LAXMI DEVI AND ANOTHER …..Petitioner

through:Mr.Javed Ahmed

VERSUS

STATE (GNCT OF DELHI) & ORS. …..Respondent

through: Mr. Pawan Sharma, Standing
Counsel (Crl.) with Mr.Harsh

3) **W.P. (Crl.) No.821/2008 and Crl.M.A. No.8765/2008**

MAHA DEV **…..Petitioner**

through:Mr. Arvind Jain with
Mr.T.S. Chaudhary and
Mr. Kuldeep Singh

VERSUS

STATE (GNCT OF DELHI) & ANR. **…..Respondent**

through: Mr. Pawan Sharma, Standing
Counsel (Crl.) with Mr.Harsh

AND

4) **W.P. (Crl.) No.566/2010**

DEVENDER @ BABLI **…..Petitioner**

through:Mr. M. Hussain

VERSUS

STATE (GNCT OF DELHI) & ANR. **…..Respondent**

through: Mr. Pawan Sharma, Standing
Counsel (Crl.) with Mr.Harsh

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V.K. SHALI

A.K. SIKRI (Acting Chief Justice)

1. Five questions are formulated by the Division Bench in its order dated 31.7.2008 passed in WP(Crl.) No.338/2008 for reference to the larger Bench. Though we shall take note of these questions at a later and more

appropriate stage, we would like to point out at the outset that the issues raised can be put in two compartments, viz., (i) what is the status of marriage under Hindu Law when one of the parties to the marriage is below the age of 18 years prescribed under Section 5(iii) of the Hindu Marriage Act, 1955 and Section 2 (a) of Prohibition of Child Marriage Act, 2006 (hereinafter referred as the 'PCM Act') and (ii) when the girl is minor (but the boy has attained the age of marriage as prescribed) whether the husband he can be regarded as the lawful guardian of the minor wife and claim her custody in spite of contest and claim by the parents of the girl. What is the effect of the Prohibition of Child Marriage Act, 2006?

2. After the aforesaid reference was made, as some other petitions involving same questions came up for adjudication, they were also directed to be listed along with Writ Petition (Crl.) No.338/2008. That is the raison d'etre that all these petitions were heard together. We would be in a better position to appreciate the issues involved if facts in each of these cases are taken note of in the first instance.

Writ Petition (Crl.) No.338/2008

3. A letter was addressed by Smt. Lajja Devi wife of Sh.Het Ram, R/o Village Mohra, P.L. Jagat, P.S. Musa Jhag, District Badayun, Uttar Pradesh to the Hon'ble the Chief Justice of this Court. In the letter, it was alleged by

Smt. Lajja Devi that her daughter named Ms.Meera, who was around 14 years of age (date of birth being 6.7.1995) was kidnapped by Promod, Vinod, Satish, Manoj S/o Shri Raj Mal. This kidnapping is purported to have taken place when Ms. Meera had visited Delhi to meet the brother-in-law of the Complainant at A- 113, Rajiv Nagar Extension, Near Village Begumpur, Delhi-110086. On the basis of the said information, an FIR bearing No.113/2008 under Section 363 IPC had been registered at P.S. Sultanpuri on 21st February, 2008 against the aforesaid accused persons.

4. This letter was treated as a Writ Petition and was placed before the appropriate Bench on 14th March, 2008 whereupon notice was issued to the State directing it to file the Status Report. Four Status Reports have been filed by the Police from time to time. These Reports are dated 02.4.2008, 12.5.2008, 11.5.2008 and 11.7.2008. The local Police, as a consequence of registration of this FIR, had arrested Shri Charan Singh from Village Sakatpur District Badayun, U.P. wherefrom the minor girl Ms.Meera was also recovered, as both of them were living together. The girl had made a statement under Section 164 of Cr.P.C. before the learned Metropolitan Magistrate, Rohini Courts Delhi that she had gone along with the accused Charan Singh of her own free will as her Uncle and Aunt were marrying her against her wishes. Charan Singh was taken in Judicial Custody on

8.6. 2008. Admittedly, Ms. Meera was a minor, and in all probabilities is aged around 13 years and a month as on that date.

5. Initially, Ms. Meera refused to go along with her parents, her natural guardians, on the ground that they intended were intending to marry her off with some other person. She was, thus, sent to Nirmal Chhaya in judicial custody. However, when the matter came up for hearing on 31.7.2008, she desired to reside with her parents on the assurance given by the parents that they would not marry her to someone else.

6. When the matter was taken up for arguments on 31.7.2008, the aforesaid facts were taken note of which points out that Ms. Meera was not abducted by Shri Charan Singh. On the contrary, she went with him on her own accord and they got married. However, she was not only minor but even less than 15 years of age. She had initially expressed her apprehension in joining her parental home. On the other hand, her husband's family wanted to have the custody of Ms. Meera as her husband was in judicial custody. In this backdrop, the question arose as to what would be the status of such a marriage. Can it be treated as a valid marriage? Or was it the voidable by law? Or it was simply an illegal marriage not recognized. The question of entitlement of husband to have the custody of a minor person with whom he married could depend upon the answer to the aforesaid question.

Crl.M.C. No.1001/2011

7. This petition is filed under Section 482 of the Code of Criminal Procedure seeking quashing of FIR registered against the petitioner No.2 under Sections 363/366/376/465/467/494/497/120B and 506 of the Indian Penal Code. It is stated that the petitioner No.1 had of her own will joined the company of the petitioner No.2 and got married with him according to Hindu rites and ceremonies on 4.3.2010. However, the respondent No.2, father of the petitioner No.1, lodged a missing report on 5.3.2010 in the Police Station. It is alleged that in the said missing report he had stated that the petitioner No.1 aged 20 years was missing. Thereafter, in April, 2010 he filed *habeas corpus* petition taking the stand that the petitioner No.1 was minor and she had been married by the respondent no.2 to someone else at Rajasthan when she returned from her in laws from Rajasthan to Delhi. She was enticed away by the petitioner No.2. The notice was issued in the said writ petition and production of the petitioner No.1 was ordered. The Police recovered her and produced before the Court on 19.4.2010. She stated that she had married the petitioner No.2 on her own accord and without any pressure and wanted to live with the petitioner No.2, who was her husband. In view of the conflicting claims about her age, direction was given to the I.O. to verify her age. The Court sent the petitioner No.1 to Nirmal Chhaya

Nari Niketan for protective custody. Ossification test was conducted and the age of the petitioner No.1 was found between 17-19 years. The respondent No.2, father of the petitioner No.1, had produced the school leaving certificate which showed her date of birth as 3.3.1993 and on this basis, she was 17 years of age on the date when the parties allegedly solemnised marriage.

The father of the petitioner No.1 wanted her custody. However, she gave the statement that she would like to stay at Nari Niketan rather than joining her parents. In view of this statement, the Court sent the petitioner No.1 to Nari Niketan till the time she attained the age of majority vide orders dated 31.5.2010. However, at the same time the petitioner No.2 was allowed to meet her twice a week at least for two hours on each occasion vide orders dated 29.10.2011. As per the school leaving certificate she completed the age of 18 years on 3.3.2011. She was, thus, released from Nari Niketan and she decided to join the company of the petitioner No.2 and has been living with him. However, on 25.2.2011 the petitioner No.2 was arrested in the FIR No.31/2011, PS Dabri under Sections 363/366/376/465/467/494/ 497/120-B/506 IPC. This FIR was registered on the basis of the directions given by the learned MM upon the complaint filed by the respondent No.2

on 3.4.2010. It is, in these circumstances, both the petitioners filed the aforesaid petition seeking quashing of the FIR.

WP (Crl.) No.821/2008

8. The petitioner in this case is the father of a minor girl Kiran Devi, who according to him was 15 years of age at that time. As per the averments made in the writ petition, Kiran Devi was found missing from her house on 27.10.2006 on which date a boy named Jagat Pal was also found missing with his parents who were residing in the neighbourhood of the petitioner. The petitioner lodged missing report with Police Station Samaypur Badli (now new Police Station Swaroop Nagar) on 30.10.2006. Thereafter, FIR No.968/2006 was lodged at that Police Station on 12.11.2006. Pursuant to this FIR the police became active and after search nabbed the boy Jagat Pal and also took Kiran Devi into custody on 5.12.2006. According to the petitioner, though he made various complaints to the police and even filed complaint under Section 200 Cr.P.C. seeking direction to register the case and also passed orders of arrest of the accused persons. As nothing happened, he filed the instant petition for taking action against the person involved in the forcible custody of his minor daughter with the direction to produce the girl before the Court.

9. After recovery Kiran Devi had been sent to Nirmal Chhaya on 5.9.2008 and she made a statement that she wanted to continue to reside at Nirmal Chhaya as her parents were not accepting her marriage. Earlier she had made the statement that she had gone with Jagat Pal of her own accord and willingly married him without any pressure or coercion. It is, in these circumstances, question of validity of marriage and guardianship has arisen for consideration in this case.

Crl.M. No.566/2010

10. This petition is filed by one sh. Devender Kumar who states that he married Shivani @ Deepika according to Hindu rites and ceremonies in a temple at Delhi on 7.8.2009. According to him, Shivani was a major at that time. However, at the instance of father of Shivani, FIR No.97/2009 at Police Station Lahori Gate, Delhi was registered under Section 363 IPC on 10.8.2009 to which later on Section 366 and 376 were added. The petitioner stated in the petition that when he learnt about registration of that FIR he and Shivani appeared before the learned MM where Shivani gave her statement under Section 164 of the Cr.P.C. that she had married the petitioner of her own accord. After recording her statement and after her medical examination, since she was *prima facie* found to be minor, Shivani was sent to Nirmal Chhaya till 5.4.2010 when the aforesaid petition was filed by the

petitioner for issuance of writ of *habeas corpus* and giving him the custody of Shivani. The events, which took place in the meantime that after the arrest of the petitioner in the aforesaid FIR, he was released on bail on 26.10.2009. He moved application for custody of Shivani with the learned MM, which was dismissed on 11.11.2009 and the matter of her release was referred to the Child Welfare Committee (CWC). However, the CWC was not passing the order because of which the petitioner filed the petition for *habeas corpus*.

11. It would be clear from the facts of all the aforesaid cases that in all these cases the girls have given the statement that they were not kidnapped but eloped with the respective persons of their own and got married with them. All the four girls maintained that the marriage was solemnized with their free consent. However, all the four girls were below 18 years when they got married, whereas there is no dispute about the ages of the boys with whom they got married as they were above 21 years of age at the time of marriage.

12. In some cases, the girls were even less than 15 years. It is under these circumstances questions that have arisen in all these cases are common. Now, we proceed to reproduce the questions formulated by the Division Bench in its order dated 31.7.2008 in W.P. (Crl.) No.338/2008, which are as follows:

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

2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

3) If yes, can she be kept in the protective custody of the State?

4) Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?

5) Whether there may be other presumptions also which may arise?"

13. We would like to mention here that the reason for referring the aforesaid questions for consideration by Larger Bench arose on account of three Division Bench judgments of this Court wherein view was taken that marriage of a minor girl would neither be void nor voidable under the Hindu Marriage Act, 1955 (hereinafter referred to as the HM Act).

14. The Division Bench, however, was not willing to accept the decision of the aforesaid three judgments as, according to it, in these cases there was no consideration of all extent statutes.

15. The three judgments of the Division Bench, on the one hand and the views expressed by the Division Bench in its orders dated 31.7.2008 reflect the conflicting views on the issues involved. However, much detailed

submissions were made before us at the time of arguments and we would point out these submissions while giving our opinion on the questions referred. The Division bench made it clear in para 9 that the position regarding Muslim Law was different as the said law recognizes marriage of minor, who has attained puberty as valid and therefore, the status of marriage under Muslim Law is specifically excluded from reference.

Question 1:

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

Statutory provisions of various enactments which have bearing on this issue may be taken note of in the first instance.

Prohibition of Child Marriage Act 2006

"**Section 2 - Definition**

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

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

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

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(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed ot to have attained his majority.

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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.

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

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"**12. Marriage of a minor child to be void in certain circumstances.-**Where a child, being a minor--

(a) is taken or enticed out of the keeping of the lawful guardian; or"

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

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

such marriage shall be null and void.

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"**15. Offences to be cognizable and non- bailable–** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 od 1974), an offence punishable under this Act shall be cognizable and non-bailable."

<u>Hindu Marriage Act</u>

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

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(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;"

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"11. Void marriages. – Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto[1][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."

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12. Voidable marriages.–(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

[1][(a) that the marriage has not been consummated owing to the impotence of the respondent; or]

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [2][was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, the 1978 (2 of 1978)], the consent of such guardian was obtained by force[3][or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of[4][the said ground]."

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13. Divorce. -

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

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(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.
Explanation. – This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

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"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),[1] [and (v)] of section 5 shall be punishable-

[(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;"

Special Marriage Act

"**4. Conditions relating to solemnization of special marriages. –** Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two

persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:--

(a) neither party has a spouse living;

[(b) neither party--

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

(ii) 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

(iii) has been subject to recurrent attacks of insanity;]

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

[(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and]

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends].

[Explanation.--In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule

which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied--

(i) that such rule has been continuously and uniformly observed for a long time among those members;

(ii) that such rule is certain and not unreasonable or opposed to public policy; and

(iii) that such rule, if applicable only to a family, has not been discontinued by the family.]"

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24. Void marriages.–(1) Any marriage solemnized under this Act shall be null and void[1][and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if--

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III

> may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15:
>
> Provided that no such declaration shall be made in any case where an appeal -has been preferred under section 17 and the decision of the district court has become final.

16. Interpreting the provisions of HM Act, the three Division Benches of this Court, as pointed out earlier, held the view that the marriage of a minor under the HM Act was valid. The genesis of arriving at such a conclusion is discussed in brief by the Division Bench in its order dated 31.7.2008 in paras 4 to 8, which are as under:-

> "4. It may be pertinent here to mention that there are three judgments of the Division Bench of this Court which are having bearing so far as the questions arising in the instant case are concerned. In the first case titled as ***Neetu Singh vs. State and Ors.*** 1999 (1) JCC (Delhi) 170, the Division Bench was called upon to test the validity of an order passed by the Additional Metropolitan Magistrate remanding the minor to Nari Niketan for the purpose of custody, against her own wishes. The Division Bench of the High Court quashed the order of remanding the minor girl to Nari Niketan by observing that a marriage of a minor girl in contravention of Section 5(iii) of the Hindu Marriage Act is neither void nor voidable and the only sanction which is provided under Section 18 of the Act is a sentence of 15 days and a fine of Rs.1,000/-. The girl was released to the husband. Reference was made to the judgments of other High Courts namely Mrs. Kalyani Chaudhary vs. The State of U.P. and Ors. 1978 Cr.L.J. 1003 and Seema Devi

alias Simaran Kaur vs. State of H.P. 1998 (2) Crime 168, which however did not consider the Child Marriage Restraint Act, 1929 which now stands repealed by Prohibition of Child Marriage Act, 2006.

5. In the recent years, there have been two judgments of a Division Bench both headed by Hon'ble Mr. Justice Manmohan Sarin. In the first judgment titled as ***Manish Singh Vs. State Govt. of NCT and Ors.*** reported in 2006 (1) CCC (HC) 208 and ***Sunil Kumar Vs. State NCT of Delhi and Anr.*** 2007 (2) LRC 56 (Del) (DB), wherein the Division Bench has affirmed its earlier view approving Neetu Singh's case.

6. The Division Bench also referred to its own judgments in ***Ravi Kumar Vs. The State and Anr.*** 2005 (124) DLT and ***Phoola Devi vs. The State and Ors.*** 2005 VIII AD Delhi 256. **The sum and substance of these authorities is that marriage solemnized in contravention of the age prescribed under Section 5(iii) of the Hindu Marriage Act i.e. 21 years for male and 18 years for female are neither void nor voidable under Sections 11 and 12 of the Hindu Marriage Act. The only sanction prescribed against such marriages was noticed to be a punishment prescribed under Section 18 of the said Act which was to the extent of 15 days and a fine of Rs.1,000/-.**

7. The Hon'ble Division Bench was at pains to explain that by making such pronouncement, the Court was only interpreting the provisions of law and it could not have been perceived as reducing the age of marriage, reducing the age of consent or declining to nullify marriages of minors. It was observed that this was neither the intent of the Court nor was any such prayer made in these petitions and it was primarily for the legislature to consider as to whether the present provisions under the Hindu Marriage Act and the Child Marriage Restraint Act are insufficient or being failed to discourage child

> marriages and take such remedial actions as may deemed appropriate in their wisdom.
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> 8. In Manish Singh's and Ram Ladle Chaturvedi's case, the Division Bench directed quashing of FIR under Section 363 against Ram Ladle Chaturvedi while as in Sunil Kumar's case the Division Bench permitted the girl who was aged 16 years to reside with her husband-the alleged kidnapper on the ground that the girl had come of age of discretion. We are of the opinion of these judgments have not taken into consideration of the prohibition of Child Marriage Act, 2006 which makes the contracting of a marriage by a boy above the age of 18 with a girl who is less than 18 as a cognizable and non-bailable offence."

17. However, in the reference order the Division Bench has recorded a discordant note and the reason given in the reference order is that the provisions of the PCM Act were not taken into consideration, which would materially change the legal position. Discussion in this behalf is contained in para-10, which is as under:-

> "10. The easiest course for us would have been to follow the Division Bench judgments of our own High Court on this question with regard to legality of marriage as well as custody of the minor spouse. However, we are of the view that a question of public importance is involved in the matter which needs consideration by a Full Bench on account of the absence of consideration of all extant statutes:-
>
> (a) The first reason why prima facie, we hesitate to agree with the observations passed by the Division Bench of this Court is on account of the fact that although there may be different definitions of the word

'child' with regard to the age of the minor girl given in different enactments but the purpose of each enactment is to be seen. The enactment which is of utmost importance with regard to the child marriage or for that matter the marriage with a minor girl would be the Prohibition of Child Marriage Act, 2006.

(b) According to Section 2 (a) of the Prohibition of Child Marriage Act, 2006, a 'child' means a person who, if a male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age.

(c) Section 12(a) of the said Act makes the marriage of a minor girl who has been taken or enticed out of the keeping of the lawful guardian shall be null and void. The language of Section 12(a) of the said Act is mandatory in nature and does not admit of any reservation. Further it makes the marriage of a child, or a minor girl as null and void. That means the marriage itself is non-existent and the law does not recognize the same. Section 9 of the said Act provides for punishment for a male adult above 18 years of age contracting a child marriage punishable with rigorous imprisonment which may extend to two years or with fine which may extend to Rs. 1 lac or with both.

(d) The offence carries a punishment which may extend up to 2 years and, therefore, clearly the offence would be bailable and non-cognizable. Despite this, by virtue of the non-obstante clause of the Section 15 of the Act, such offence is a cognizable and non-bailable offence under Cr.P.C. This aspect of the matter has not been previously considered by the Court and accordingly quashing of FIR under Section 363 or in the instant case under Section 363 and 376 would not only be in contravention of law but also against the letter and spirit of the Act by observing that the girl has attained the

> age of discretion with the reference to Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act."

18. We would also like to point out in the interregnum, this very issue is discussed by other Courts as well and the judgments to that effect were placed before us by the learned counsel for the parties. In ***Amnider Kaur and Anr.*** **v.** ***State of Punjab and Ors.,*** 2010 Crl.L.J. 1154 decided by Punjab and Haryana High Court, the Single Judge of the said Court has taken a view that having regard to the provisions of Section 12 of the PCM Act, marriage with a minor girl would be void. A perusal of this judgment would show that the learned Judge has proceeded almost on same lines as taken by the Division Bench in the present reference order, which is clear from the following passages of this judgment:-

> "14. 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. According 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.

15. 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 the present case because in the case of Ravi Kumar (supra), the Division Bench had considered only the provisions of Sections 5 and 18 of the Act of 1955 to observe that in case of violation of Section 5(iii) of the Act of 1955, the punishment is only 15 days simple imprisonment with fine of Rs. 1000/- or both but the marriage is not illegal or void. However, much water has flown thereafter and now for the contravention of Section 5(iii) of the Act of 1955, the punishment under Section 18 (a) has been enhanced to 2 years, rigorous imprisonment and/or with fine up to of lac or with both. Moreover, the case of Ravi Kumar (supra) was decided on 5.10.2005. At that time, the Act was not in force as it did not receive the assent of President of India and has been notified w.e.f 1.11.2007. Therefore, the learned Counsel for the petitioners cannot take the advantage of the observations made in the case of Ravi Kumar (supra). Insofar as the case of Ridhwana and another (supra) is concerned, in that case also this Court had prima-facie found that there is evidence collected by the police that girl was more than 18 years of age but still while parting with the judgment for the sake of argument, it was decided that even if girl is 16 years and 2 months age and has married with her own sweet will, no offence is said to have been committed. This Court had no occasion to refer to the provisions of Section 12 of the Act. Therefore, the ratio laid down in these cases is not

applicable. The case of Lata Singh (2006 Crl.LJ 3309) (supra) itself talks about the persons who were major at that time when they got married and on that premise, it was held that if the persons are major and have got married on their own, their life and liberty should not be threatened by the persons who are against their marriage. Hence, the said judgment is also of no help to the present petitioners. In the case of Pardeep Kumar Singh (supra) this Court had laid down as many as nine directions but in none of the directions it has been provided that if the girl is minor and has been enticed away for the purpose of marriage by alleged husband, the said marriage is valid. Hence, I have found that provisions of Section 12 of the Act would apply with full rigour in the present case and the marriage which has been solemnised by petitioner No. 2 with petitioner No. l, who is child and a minor, is unsustainable in the eyes of law and is thus, declared as void.

16. 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 notwithstanding 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."

19. Then, we have ***T. Sivakumar v. The Inspector of Police,*** (HCP No.907/11 decided on 3.10.2011), which is a judgment by the Full Bench of the Madras High Court. In that case also five questions were referred for answer by the Division Bench as under:-

> "(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?
>
> (2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?
>
> (3) If yes, can she be kept in the protective custody of the State?
>
> (4) Whether in view of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law and whether in violation of the procedure mandated by the Juvenile Justice (Care and Protection of Children) Act, 2000, the Court dealing with a Writ of Habeas Corpus, has the power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the Hindu Marriage Act

and Section 9 of the Prohibition of Child Marriage Act, 2006? And

(5) Whether the principles of Section 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act?"

20. The Full Bench of the Madras High Court referred to the provisions of HM Act as well as PCM Act. It observed that the position, which was under the HM Act as well as Child Marriage Restraint Act (hereinafter referred to as the 'CMRA'), was that these Acts do not declare marriage of a minor either as void or voidable and such marriage of a child was treated all along as valid. There were number of judicial pronouncements to this effect. In this legal scenario, Hindu Minority and Guardianship Act also provided that the husband of a wife is her natural guardian. After taking note of this position, which prevailed on the reading of HM Act and CMRA the Court discussed the reason for enacting the PCM Act, namely, which replaced the CMRA and it has been pointed out that "it is manifestly clear that this Act is secular in nature which has crossed all barriers of personal laws." Thus, irrespective of personal laws, under this Act child marriages are prohibited. Section 3 of this Act makes the child marriage to be voidable at the option of contracting party being a child. The Full Bench noted that this is a great departure from the position in HM Act. When the PCM Act, 2006 was enacted, the

Parliament was aware of the provisions of Sections 5, 11, 12 and 18 of the HM Act. By declaring that the PCM Act shall apply to all citizens, the Parliament has intended to allow the PCM Act to override the provisions of HM Act to the extent of inconsistencies between these two enactments. Similarly, PCM Act will override the personal law. This is manifest from the statement of Objects and Reasons of the PCM Act, 2006, which reads as follows:-

> "1) The Child Marriage Restraint Act, 1929 was enacted with a view to restraining solemnisation of child marriages. The Act was subsequently amended in 1949 and 1978 in order, inter alia, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnisation of child marriages yet it does not declare them to be void or invalid. The solemnisation of child marriage is punishable under the Act.
>
> 2) There has been a growing demand for making the provisions of the Act more effective and the punishment thereunder more stringent so as to eradicate or effectively prevent the evil practice of solemnisation of child marriages in the country. This will enhance the health of children and the status of women. The National Commission for women in its Annual Report for the year 1995-96 recommended that the Government should appoint Child Marriage Prevention Officers immediately. It further recommended that – (i) the punishment provided under the Act should be made more stringent; (ii) marriages performed in contravention of the Act should be made void; and (iii) the offences under the Act should be made cognizable.

> 3) The National Human Rights Commission undertook a comprehensive review of the existing Act and made recommendations for comprehensive amendments therein vide its Annual Report 2001-2002. The Central Government, after consulting the State Governments and Union Territory Administrations on the recommendations of the National Commission for Women and the National Human Rights Commission, had decided to accept almost all the recommendations and give effect to them by repealing and re-enacting the Child Marriage Restraint Act, 1929."

21. On that basis, view of the Full Bench of Madras High Court was that the law was enacted for the purpose of effectually preventing evil practice of solemnisation of child marriages and also to enhance the health of the children and the status of the marriage and therefore, it was a special enactment in contrast with the HM Act, which is a general law regulating Hindu marriages. Thus, the PCM Act, being a special law, will have overriding effect over the HM Act to the extent of any inconsistency between the two enactments. For this reason, the Court took the view that Section 3 of this Act would have overriding effect over the HM Act and the marriage with a minor child would not be valid but voidable and would become valid if within two years from the date of attaining 18 years in the case of female and 21 years in the case of male, a petition is not filed before the District Court under Section 3(1) of the PCM Act for annulling the marriage. Similarly, after attaining eighteen years of age in the case of female, or

twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period, the marriage shall continue to remain as a voidable marriage.

22. The circumstances under which this voidable marriage will become valid or would be treated as annulled as per Section 3 of the Act, is stated by the Full Bench in para 21 of the said judgment in the following manner:

> "21. …..In our considered opinion, the marriage shall remain voidable (vide Section 3) and the said marriage shall be subsisting until it is avoided by filing a petition for a decree of nullity by the child within the time prescribed in Section 3(3) of the Prohibition of Child Marriage Act. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a petition is not filed before the District Court under Section 3(1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period as provided in Section 12(3) occurs, the marriage shall continue to remain as a voidable marriage. If the marriage is annulled as per Section 3(1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time.

xxxxx xxxxx xxxxx

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

23. We would be failing in our duty if we do not refer to another Division Bench judgment of this Court delivered on 11.08.2010 in W.P. (Crl.) No.1003/2010 in the case entitled ***Sh. Jitender Kumar Sharma* v. *State and Another***. That was a case where both the boy and the girl were minors, who had fallen in love; eloped together and got married as per the Hindu rites and ceremonies. The Division Bench specifically considered the issue of validity of marriage. The Court took note of the earlier Division Bench judgments as well as the provisions of PCM Act, 2006. The Division Bench was, however, of the view that the validity of marriage is primarily to be judged from the

standpoint of personal law applicable to the parties to the marriage. The Court was of the opinion that a Hindu marriage, which is not a void marriage under the HM Act, would continue to be such provided the provisions of Section 12 of the PCM Act, 2006 are not attracted. A marriage in contravention of Clause (3) of Section 5 of the HM Act was neither void nor voidable. However, Section 3 of the PCM Act had introduced the concept of a voidable marriage. This was a secular law. In view of Section 3 thereof, which made child marriages to be voidable at the option of the contracting party being a child, the Division Bench observed that the position contained in Clause (3) of Section 5 of the HM Act holding that such a marriage was neither void nor voidable was the legal position prior to the enactment and enforcement of PCM Act, 2006 and after this enactment the marriage in contravention of Clause (3) of Section 5 of the HM Act would not be *ipso facto* void but could be void if any of the circumstances enumerated in Section 12 of the PCM Act, 2006 is triggered and the effect of Section 3 of PCM Act and the interplay of Section 3 of the PCM Act and Clause (3) of Section 5 of the HM Act is summarised in the following manner:-

> "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 marriage 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."

24. Detailed submissions were made before us in the light of the provisions of various enactments and the views expressed by the Court in various judgments taken note of above. Instead of reproducing arguments in detail, it would be suffice to point out that whereas Mr. Arvind Jain primarily argued on the lines of the Full Bench judgment rendered by Madras High Court in ***T. Sivakumar* v. *The Inspector of Police*** (supra), Mr. Chandhiok, learned ASG, argued that view taken by the Division Bench of this Court in ***Sh. Jitender Kumar Sharma* v. *State and Another*** (supra) was in tune with law. Since we have already given the gist of these two judgments and what

they decide, to avoid duplicity we are not reproducing in detail, arguments of the learned counsel for the parties on this aspect.

25. At the outset we would like to point out that the object behind enacting PCM Act was to curb the menace of child marriages, which is still prevalent in this country and is most common in rural areas. The Full Bench of Madras High Court has undertaken indepth discussion of this evil of child marriage in India. A Division Bench of this Court in ***Association for Social Justice & Research*** **v.*Union of India & others***, [W.P. (Crl.) No.535/2010] decided on 13.5.2010 also took note of this menace, *inter alia*, pointing out as under:-

> "6. Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay, it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute these phenomenon of child marriage to a variety of reasons. The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent.

7. The present case is a telling example, which proves the sociologists correct.

8. It cannot be disputed that the aforesaid marriage is in violation of provisions of the Prohibition of Child Marriage Act, 2006 inasmuch as Chandni is minor and in below the age of 18 years. At the same time, marriage is not void under civil law. The circumstances under which Chandni is married to Yashpal are narrated above and presumably under these forced circumstances, economic or otherwise, Vijay Pal decided to marry Chandni to Yashpal even when she was less than 18 years. Be as it may, since Vijay Pal and Yashpal are already arrested and FIR is also registered against them, insofar as that aspect is concerned, law will take its own course.

9. The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under:

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child bridges, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that 'where these elements are linked with gender inequities and biases for the majority of young girls… their socialization which grooms them to be mothers and submissive wives, limits their development

> to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore more likely to experience domestic violence themselves. Violent behaviour can take the form of physical harm, physical harm, psychological attacks, threatening behaviour and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband's family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights.
>
> 10. The Prohibition of Child Marriage Act has been enacted keeping in view the aforesaid considerations in mind."

26. Thus, child marriage is such a social evil which has the potentialities of dangers to the life and health of a female child and plays havoc in their lives, who cannot withstand the stress and strains of married life and it leads to

early deaths of such minor mothers. It also reflects the chauvinistic attribute of the Indian society. This menace is depicted in the following lines from a song sung during marriages in Rajasthan:-

> *"Choti si umariya main parnanaya o babosa, kain main tharoo kario kusoor"*
>
> "Oh father why had you given me off in the marriage at such a tender age, for what sin did I commit."

27. These lines itself symbolize the mixed pain of leaving the father's house and at the same time the anguish as to why was she being married off at such a tender age. Such situation is unprecedented and the inner pain unimaginable. The word 'Child Marriage' is itself contradictory in itself as one would wonder how marriage and child could go together.

28. When we look into the matter, keeping in view the aforesaid disastrous consequences of the child marriage, which is even treated as violation of human rights, including right to lead a life of freedom and dignity, the very first thing which comes in mind is that the menace of child marriage needs to be curbed. Even the legislative thinking is in the same direction. However, as would be seen hereafter, the legislature has still not made adequate and effective provisions in the laws to make such a marriage as void.

29. We would like to mention that child marriage existed historically in India and over a period of time it was perceived to be a wrongful practice. The legislature stepped in more than 80 years ago when the CMRA (popularly known as the Sarda Act) was enacted with the objective of eliminating the practice of child marriage. It forbade the marriage of a male with less than 21 years and female with less than 18 years of age. However, the penal provisions of the Sarda Act did not invalidate the effect of marriage. It laid down punishment for male adult below twenty one years of age and for male adult above twenty one years of age who contracted a child marriage and also for the person, who performed, conducted or directed a child marriage. Some amendments were carried out in this Act but it was felt that it was not serving any purpose. It is for this reason that in 2006, the Prohibition of Child Marriage Act was passed by the Parliament which is before us in the present form. The Statement of Objects and Reasons of the PCM Act, 2006 have been quoted above. The salient features of the Bill, which culminated in the enactment of the PCM Act, 2006 are as follows:-

> "(i) To make a provision to declare child marriage as voidable at the option of the contracting party to the marriage, who was a child.
>
> (ii) To provide a provision requiring the husband or, if he is a minor at the material time, his guardian to pay maintenance to the minor girl until her remarriage.

(iii) To make a provision for the custody and maintenance of children born of child marriages.

(iv) To provide that notwithstanding a child marriage has been annulled by a decree of nullity under the proposed section 3, every child born of such marriage, whether before or after the commencement of the proposed legislation, shall be legitimate for all purposes.

(v) To empower the district Court to add to, modify or revoke any order relating to maintenance of the female petitioner and her residence and custody or maintenance of children, etc.

(vi) To make a provision for declaring the child marriage as void in certain circumstances.

(vii) To empower the Courts to issue injunction prohibiting solemnsation of marriages in contravention of the provisions of the proposed legislation.

(viii)To make the offences under the proposed legislation to be cognizable for the purposes of investigation and for other purposes.

(ix) To provide for appointment of Child Marriage Prevention Officers by the State Governments.

(x) To empower the State Governments to make rules for effective administration of the legislation."

30. A glance through the main provisions of the PCM Act, 2006 brings out the following scheme of the Act:-

Section 2 (a) of PCM Act defines "child" and Section 2 (b) defines "child marriage". The legislature has, however, taken care to define "minor"

separately in Section 2(f), as a person who under the provisions of the Majority Act, 1875 is deemed to have not attained the age of majority.

Section 3 of the PCM Act relates to child marriages. It specifically states that a child marriage shall be voidable at the option of the contracting party to the marriage, who was a child at the time of marriage. The term "child" in Section 2(a) 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. A voidable marriage does not become void on its own or immediately when the option is exercised. It requires a decree on adjudication issued by the district court. The said decree can be only passed on a petition by a contracting party to the marriage who was a child at the time of the marriage. The petition has to be filed before or within two years of attaining "majority" (i.e. majority as defined in the Majority Act, 1875). Sub-section (2) to Section 3 states that the petition can be moved through a guardian or next friend along with the Child Marriage Prohibition Officer. The use of the term "guardian" in Section 3 (2) does cause confusion and is ambiguous. A husband under the Hindu Minority and Guardianship Act, 1956 is the guardian of the minor wife (see Section 6(c)). Obviously, the husband, in such a situation, will not and cannot act as a guardian and move a petition on behalf of his minor wife. "Guardian" in this case will mean the

natural father or the mother of the girl. Fortunately, the legislature has permitted the next friend to also move an application for annulment of marriage. Sub-section (4) to Section 3 of the PCM Act states that before passing such an order notices are required to be issued by the District Judge to the parties concerned. Sub-section (4) protects a female child, who was married, and stipulates that the district court can pass an interim or final order directing payment of maintenance to her. In case the male contracting party is a minor, his parent or guardian is liable to pay maintenance.

Section 3 of the PCM Act has to contrasted with "void" marriages mentioned in Section 12 of the same Act. Void marriages are null and void ab initio and accordingly are treated as different and not similar to voidable child marriages. As per Section 12, in three circumstances, a marriage of a minor child is to be treated as void. We record that sub-section 2 to Section 3 will not apply in case of a "child" after he has attained majority, for he or she thereafter do not have any lawful guardian.

Section 13 (2) (iv) of HMA gives the right to a wife to file a petition for dissolution of her marriage by a decree of divorce under the said Act. The said provision was introduced with effect from 27th May, 1976. It stipulates that a Hindu wife can file a petition for divorce if the marriage is solemnized before she had attained the age of 15 years and she repudiates

the marriage before she attains the age of 18 years. The said right of the Hindu females to ask for divorce, does not mean that a petition before the district court cannot be filed under Section 3 of the PCM Act. PCM Act as noticed above is a secular law and is a latter enactment, which specifically deals with the problem of child marriages. Religion of the contracting party does not matter. PCM Act being a "special Act" and being a subsequent legislation, to this extent and in case there is any conflict, will override the provisions of HMA Act or for that matter any personal law. However, this should not be interpreted that we have held that a petition for dissolution of marriage under Section 13(2)(iv) is not maintainable. Both provisions i.e. Section 13(2)(iv) and Section 3 operate, apply and have their own consequences. These are two concurrent provisions, which can be invoked by the "parties" satisfying the conditions stipulated in the two sections.

As noticed below, a Division Bench of this Court in W.P.(Crl.) 1003/2010 decided on 11.08.2010 ***Jitender Kumar Sharma Vs. State and Another***, has been held that PCM Act is a secular law. On this aspect we respectfully agree with the view that PCM Act is a secular law. Decision of the Full Bench of Madras High Court in ***T. Sivakumar Vs. The Inspector of Police*** (supra) also accepts the said position.

31. We have already reproduced Sections 2(a), 9, 12 and 15 of this Act. It is clear therefrom that marriage of a minor child is treated as void only under the circumstances mentioned in Section 12. Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons. At the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as voidable. The interplay of this Act with other enactments compounds this anomaly and comments on such anomalies are stated in detail at the appropriate stage. At present we confine ourselves to the issue at hand as the status of the child marriage needs to be determined on the basis of statutory provisions, which exists as of now. As pointed out above, under the Hindu Marriage Act, child marriage is still treated as valid and not a void marriage. It is personal law, in codified form, governing Hindus. On the other hand, PCM Act, which is a secular law, treats this marriage as voidable except those events which are covered by Section 12 of the PCM Act. In neither of the aforesaid statutes

the child marriage is treated as *void ab initio* or nullity. Therefore, we cannot hold child marriage as a nullity or void. The next question that follows is as to whether the provisions of personal law, i.e., Hindu Marriage Act should be applied to declare such a marriage as valid or the provisions of PCM Act would prevail over the HM Act.

32. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages. Thus by keeping a lower age of consent for marital intercourse, it seems that the legislature has legitimized the concept of child marriage. The Indian Majority Act, 1875 lays down eighteen years as the age of majority but the *non obstante* clause (*notwithstanding anything contrary*) excludes marriage, divorce, dower and adoption from the operation of the Act with

the result that the age of majority of an individual in these matters is governed by the personal law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the personal law and customs of the religion. It is to be specifically noted that the other legislations like the Indian Penal Code and Indian Majority Act are pre independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post independent era. Another post independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages. The words 'when the woman was minor' used in section 6(1)(c) reflects the implied legislative acceptance of the child marriage. Criminal Procedure Code, 1973 also contains a provision which incorporates the legislative endorsement of Child Marriage. The Code makes it obligatory for the father of the minor married female child to provide maintenance to her in case her husband lacks sufficient means to maintain her.

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

attaining fifteen years of age and who repudiates the marriage between 15-18 years.

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

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

36. Mr. Deep Ray of NALSAR University of Law, Hyderabad has pointed out the following three loopholes in his article "Child Marriage and the Law". Firstly, Child Marriages are made voidable at the option at the parties but not completely void. That means Child Marriages are still lawful. Making such marriages voidable doesn't really help matter in most cases as girls on

attaining majority don't have the agency or adequate support from their families to approach the court and go for annulment of the marriage. The reason behind not making such marriages void probably is that child marriages, once solemnized and consummated makes it very difficult, if not impossible for girls to deny and step out of those marriages. Therefore, it is in keeping with the social reality that such marriages are not declared void. If the social reality largely remains the same, the likelihood that young girls will now choose to nullify their marriages, which would probably be consummated by the time she attains maturity and decides to approach the courts, seems very unlikely.

37. Secondly, the applicability of Prohibition of Child Marriage Act, on various marriages of different communities and religion is unclear. Social customs and personal laws of different religious groups in India allows marriage of minor girls and the Prohibition Child Marriage Act,2006 does not mention whether it prohibit all the underage marriages that are sanctioned by religious laws.

38. Thirdly, registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of

their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.

39. As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.

40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No.1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than

21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void.

41. With this we come to the second part of the question relating to custody of the female of less than 18 years to the husband. This would be taken up along with Question Nos.2 and 3 hereinbelow.

Question No.2 and 3

Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?

If yes, can she be kept in the protective custody of the State?

42. We are of the opinion that simply because the marriage is not void, it should automatically follow that the husband is entitled to the custody of the minor girl. We have already noted in detail the serious repercussions of child marriage. Some of the ill effects of the child marriage were taken note of in the case of ***Association for Social Justice & Research* v.*Union of India & others*** (supra), some of which are reproduced again:-

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early

sexual initiation and childbearing, including HIV and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even

before menarche. Child marriage also has considerable implications for the social development of child bridges, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that 'where these elements are linked with gender inequities and biases for the majority of young girls… their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control.

43. Section 6 of the Hindu Minority and Guardianship Act, 1956, reads:-

> *"6. Natural guardians of a Hindu minor.- The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-*
>
> *(a) In the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;*

(b) In 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 expression "father" and "mother" do not include a step-father and a step-mother."

44. It was stated that in the case of a minor married girl, the husband is the guardian and in case of an unmarried minor girl father or the mother, is her guardian. It was accordingly submitted that the husband, even if a minor, would be the guardian of his wife. Fortunately, this argument has to be rejected. The overriding and compelling consideration governing custody of guardianship of the child is the child's welfare and claim to the status as a guardian under the said section is not a right. This was declared long back in 1973 in ***Rosy Jacob Vs. Jacob Chakramakkal***, AIR 1973 SC 2090.

45. We may also refer Section 13 of the Minority and Guardianship Act, 1956, which reads:-

> *"13 . Welfare of minor to be paramount consideration.- (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*
>
> *(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."*

The said section has been interpreted and it has been repeatedly held that while deciding the question of custody of a minor child, it is the interest of the child, which is paramount and important. (See ***Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha*** *AIR 2001 SC 2179 and AIR 2004 SC 1525*).

46. In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the PCM Act, 2006 is that there should be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. There is another important aspect which is to be borne in mind. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking to exercise her option to get the marriage declared as void till she attains the age of 20 years. How she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Such marriages, if they are made legally enforceable will have

deleterious effect and shall not prevent anyone from entering into such marriages. Consent of a girl or boy below the age of 16 years in most cases a figment of imagination is an anomaly and a mirage and, and will act as a cover up by those who are economically and/or socially powerful to pulverize the muted meek into submission. These are the considerations which are to be kept in mind while deciding as to whether custody is to be given to the husband or not. There would be many other factors which the Court will have to keep in mind, particularly in those cases where the girl, though minor, eloped with the boy (whether below or above 21 years of age) and she does not want to go back to her parents. Question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband would not be allowed to consummate the marriage. Thus, we are of the opinion that there cannot be a straight forward answer to the second part of this question and depending upon the circumstances the Court will have to decide in an appropriate manner as to whom the custody of the said girl child is to be given.

Question No.4

Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?

47. This brings us to the anomaly with and in the Indian Penal Code. Consent below the age of 16 years is immaterial, except when the rape is committed by a male who is married to the girl. Section 376 IPC does not treat the rape committed by a husband on his wife above the age of 15 years as an offence. This certainly requires a relook. This provision is not in consonance with the PCM Act. Section 376 IPC is required to be rationalized and amended in consonance with the PCM Act, and it may be difficult to implement and effectively enforce the PCM Act otherwise. The question of age of consent for the purpose of Indian Penal Code is a larger issue, and not being a subject matter of the reference, has not been examined by us.

48. We often come across cases where girl and boy elope and get married in spite of the opposition from the family or parents. Very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep- seated social and cultural prejudices. However, both the boy and girl are in love and defy the society and their parents. In such cases, the courts face a dilemma and a predicament as to what to do. This question is not easy to answer. We feel that no straight jacket formula or answer can be given. It depends upon the facts and circumstances of each case. The decision will largely depend upon the

interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Section 3 of the PCM Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.

49. In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Section 376 IPC is made out. The chargesheet cannot be quashed on the ground that she was a consenting

party. However, there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.

50. Consummation, with the wife below the age of 15 years, is an offence under Section 375. No exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not. Personal law applicable to the parties is also immaterial.

51. If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.

Question No.5
Whether there may be other presumptions also which may arise?

52. In view of our discussion on questions No.1 to 4, no further observations need to be made in so far as this question is concerned.

53. Having answered the aforesaid questions we now take up each case as was agreed by the counsel for the parties and it is not necessary to refer the case to the Division Bench.

WP (Crl.) No.388/2008

54. As per the facts noted in paras 3-6 above, Ms.Meera is the girl in question whose date of birth is 6.7.1995. When she married Charan Singh she was 13 years of age. She had made a statement under Section 164 of the Cr.P.C. before the learned MM, Rohini that she had gone with Charan Singh of her own free will. This petition was registered on the basis of letter written by her mother Smt. Lajja Devi. During the pendency of this petition, order dated 31.7.2008 was passed permitting her to go with her parents as she desired to live with them on assurance given by her parents that they would not marry her to anyone else. She is still 17 years of age. This marriage, as per our discussion above, is voidable. Since she has not attained majority and is residing with her parents, this arrangement would continue. When she becomes major it would be for her to exercise her right under the PCM Act if she so desires and future course of action would depend threon.

With these directions, the petition is disposed of.

Crl.M.C. No.1001/2011 & Crl.M.A. No.3737/201

55. Facts of this case have already been noted above. As per the ossification test, the girl/petitioner No.1 was found between 17-19 years of age. As per the school leaving certificate, she was 17 years of age on the date when the parties solemnised marriage. Since she has given the statement that she married of her own accord to the petitioner No.2 and was more than 16 years of age, FIR No.31 of 2011, P.S. Dabri under Sections 363/366/376/465/467/494/497/120-B/506 IPC registered against the petitioner No.2 is hereby quashed.

W.P. (Crl.) No.821/2008 and Crl.M.A. No.8765/2008

56. In this Writ Petition, the question is only of validity of marriage and guardianship. Even if the age of the girl is taken as 15 years at the time of incident, i.e., 27.10.2006, she would be 21 years of age as of now. She has not filed any proceedings for declaring the marriage as void. Therefore, the marriage becomes valid now. The question of guardianship does not arise at this stage as she is major and during the period she was minor she resided at Nirmal Chhaya. Thus, the Writ Petition is disposed of in the aforesaid terms.

WP (Crl.) No.566/2010

57. As per the facts noted in para 10 above, Shivani @ Deepika at the time of her marriage was less than 16 years of age, her date of birth being 3.6.1994. It was directed that she would remain at Nirmal Chhaya. However, as per the aforesaid date of birth, i.e., 3.6.1994 she has attained majority on 3.6.20012. The petition was filed by Sh. Devender Kumar who married her *habeas corpus* and was claiming her custody. She has attained majority, she is free to go anywhere.

58. With these directions, this petition stands disposed of.

ACTING CHIEF JUSTICE

(SANJIV KHANNA)
JUDGE

(V.K. SHALI)
JUDGE

July 27, 2012
HP.