Court No. - 74 **A.F.R.**

Case:- MATTERS UNDER ARTICLE 227 No. - 4804 of 2020

Petitioner:- Pradeep Tomar And Another
Respondent:- State of U.P. and Another
Counsel for Petitioner:- Dhirendra Kumar Agrahari,Sudhir Mehrotra
Counsel for Respondent:- G.A.,Rama Shankar Mishra

Hon'ble J.J. Munir,J.

1. This petition under Article 227 of the Constitution has been filed seeking to set aside an order of the learned Judicial Magistrate-I, Hapur, dated 24.11.2020, passed in Case Crime No. 516 of 2020, under Section 363 IPC, P.S. Pilakhuwa, District Hapur, directing that the prosecutrix Km. Shivani be permitted to go along with her husband, the accused Pintoo son of Omvir.

2. A counter affidavit has been filed on behalf of the second opposite party by Mr. Rama Shankar Mishra, Advocate, which is taken on record. The petitioner has filed a rejoinder.

3. Admit.

4. Heard forthwith.

5. Heard Mr. Sudhir Mehrotra, learned counsel for the petitioners, Mr. Rama Shankar Mishra, learned counsel for opposite party no.2 and Mr. S.S. Tiwari, learned AGA appearing on behalf of the State.

6. The submission of Mr. Sudhir Mehrotra, learned counsel for the petitioners, briefly said, is to the effect that the date of birth of the prosecutrix, according to her High School Examination Certificate issued by the U.P. Board of High School and Intermediate Education, is 04.11.2004. She is, thus, a minor, aged 16 years and 2 months approximately. She would attain majority on 05.11.2022. Mr. Mehrotra submits that the Magistrate has erred in permitting the prosecutrix to accompany her husband, an accused in the crime, going by the marriage acknowledged by the parties to be solemnized on 21.09.2020 at the *Pandav Kalin Neeli Chhatri Mandir*

Sanatan Dharam Vivah Padti Trust, Yamuna Bazar, Delhi. Mr. Mehrotra submits that the prosecutrix, being a minor, cannot be permitted to stay in a matrimonial relationship, where the marriage would be void under Section 12 of the Prohibition of Child Marriage Act, 2006 (for short, 'the Act of 2006'). He submits that in any case the prosecutrix, who is not a major, cannot be permitted to stay with her husband and ought not to be allowed to accompany him. Doing so, would be permitting statutory rape and also an offence under Section 5/6 of the Protection of Children from Sexual Offences Act, 2012.

7. Mr. Rama Shankar Mishra, on the other hand, submits that the prosecutrix in her stand before the Magistrate has made it clear that she has married the accused Pintoo of her free will and wishes to stay with him. He emphasizes that the parties' marriage has been registered under the U.P. Marriage Registration Rules, 2017 by the Marriage Registration Officer, Ghaziabad on 21.09.2020. He has drawn the attention of this Court towards a certificate of the registration of marriage, dated 21.09.2020.

8. This Court has perused the impugned order and considered the entire facts and circumstances. The prosecutrix is a little over 16 years of age. The Magistrate has been swayed to permit the prosecutrix to go along with the accused, her husband on ground that the father of the prosecutrix made an application that he would not take her back home and that he had lodged an FIR, out of social embarrassment. The Magistrate has relied upon the decisions of this Court in **Smt. Rajkumari vs. Superintendent, Nari Niketan, 1998 Cr.L.J 654 (All)** and **Smt. Ramsati @ Syamsati vs. State of U.P., Habeas Corpus Writ Petition No. 245 of 2015, decided on 07.09.2005** to hold that upon marriage of a minor according to her wishes, she could be left free to live her life.

9. The law has changed much course since the decisions above referred were rendered. In **Independent Thought vs. Union of India and another, (2017) 10 SCC 800,** it has been held:

"**Rape or penetrative sexual assault**

67. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 IPC) or aggravated penetrative sexual assault [an offence under Section 5(*n*) of thePocso Act and punishable under Section 6 of the Pocso Act] the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognise it as rape for the purposes of IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

72. If such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child—and yet it is not a criminal offence in the terms of Exception 2 to Section 375 IPC but is an offence under the PocsoAct only. An anomalous state of affairs exists on a combined reading of IPC and the Pocso Act. An unmarried girl below 18 years of age could be a victim of rape under IPC and a victim of penetrative sexual assault under the Pocso Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the Pocso Act, but she cannot be a victim of rape under IPC if the rapist is her husband since IPC does not recognise such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the Pocso Act. We see no rationale for such an artificial distinction.

73. While we are not concerned with the general question of marital rape of an adult woman but only with marital rape of a girl child between 15 and 18 years of age in the context of Exception 2 to Section 375 IPC, it is worth noting the view expressed by the*Committee on Amendments to Criminal Law* chaired by Justice J.S. Verma (Retired). In Paras 72, 73 and 74 of the Report it was stated that the outdated notion that a wife is no more than a subservient chattel of her husband has since been given up in the United Kingdom. Reference was also made to a decision [*C.R.* v. *United Kingdom*, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] of the European Commission of Human Rights which endorsed the conclusion that "a rapist remains a rapist regardless of his relationship with the victim". The relevant paragraphs of the Report read as follows:

> "72. The exemption for marital rape stems from a long outdated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far

> back as 1736, Sir Matthew Hale declared: '*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract*.' [Sir Matthew Hale — *History of the Pleas of the Crown*, 1 Hale PC (1736) 629. See further S. Fredman, *Women and the Law* (OUP, 1997) pp. 55-57.]
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> 73. This immunity has now been withdrawn in most major jurisdictions. In England and Wales, the House of Lords held in 1991 that the status of married women had changed beyond all recognition since Hale set out his proposition. Most importantly, Lord Keith, speaking for the Court, declared, '*marriage is in modern times regarded as a partnership of equals*, and no longer one in which the wife must be the subservient chattel of the husband'. [*R.* v. *R.*, (1992) 1 AC 599, p. 616: (1991) 3 WLR 767: (1991) 4 All ER 481 at p. 484 (HL)]
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> 74. Our view is supported by the judgment of the European Commission of Human Rights in *C.R.* v. *United Kingdom* [*C.R.*v. *United Kingdom*, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] which endorsed the conclusion that [**Ed.**: Emphasis has been supplied to the matter between two asterisks.] *a rapist remains a rapist regardless of his relationship with the victim* [**Ed.**: Emphasis has been supplied to the matter between two asterisks.]. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom. This was given statutory recognition in the Criminal Justice and Public Order Act, 1994."
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> (emphasis in original)

74. In *Eisenstadt* v. *Baird* [*Eisenstadt* v. *Baird*, 1972 SCC OnLine US SC 62: 31 L Ed 2d 349: 92 S Ct 1029: 405 US 438 (1972)] the US Supreme Court observed that a

> "marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup". (SCC OnLine US SC para 21)

75. On a combined reading of *C.R.* v. *United Kingdom* [*C.R.* v.*United Kingdom*, ECHR, Ser. A. No. 335-C (1995): (1995) 21 EHRR 363] and *Eisenstadt* v. *Baird* [*Eisenstadt* v. *Baird*, 1972 SCC OnLine US SC 62: 31 L Ed 2d 349: 92 S Ct 1029: 405 US 438 (1972)] it is quite clear that a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Similarly, a rape is a rape whether it is described as such or is described as penetrative sexual assault or aggravated penetrative sexual assault. A rape that actually occurs cannot legislatively be simply wished away or legislatively denied as non-existent.

76. There is an apparent conflict or incongruity between the provisions of IPC and the Pocso Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under IPC and therefore not an

offence in view of Exception 2 to Section 375 IPC thereof but it is an offence of aggravated penetrative sexual assault under Section 5(*n*) of the Pocso Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonised and read purposively to present an articulate whole.

79. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted:

79.1.*Firstly*, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet—so also with the status of a child, despite any prefix.

79.2.*Secondly*, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.

79.3.*Thirdly*, Exception 2 to Section 375 IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

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

basic question remains—what exactly is the artificial distinction intended to achieve?

Justification given by the Union of India

81. The only justification for this artificial distinction has been culled out by the learned counsel for the petitioner from the counter-affidavit filed by the Union of India. This is given in the written submissions filed by the learned counsel for the petitioner and the justification (not verbatim) reads as follows:

> (*i*) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 IPC so as to give protection to husband and wife against criminalising the sexual activity between them.
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> (*ii*) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalising the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.
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> (*iii*) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 IPC has been retained considering the basic facts of the still evolving social norms and issues.
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> (*iv*) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.
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> (*v*) Exception 2 of Section 375 IPC envisages that if the marriage is solemnised at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under IPC.
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> (*vi*) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 IPC has been provided considering the social realities of the nation.

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

and makes Exception 2 to Section 375 IPC all the more arbitrary and discriminatory.

83. During the course of oral submissions, three further but more substantive justifications were given by the learned counsel for the Union of India for making this distinction. The *first*justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The *second* justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The *third* justification is that Para 5.9.1 of the 167th Report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

84. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

85. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable a few decades ago may not necessarily be acceptable today. This was noted by a Constitution Bench of this Court (though in a different context) in *State of M.P.* v. *Bhopal Sugar Industries Ltd.* [*State of M.P.* v. *Bhopal Sugar Industries Ltd.*, (1964) 6 SCR 846: AIR 1964 SC 1179] that: (AIR p. 1182, para 6)

> "*6.* … But, by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid."

90. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental

right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self-esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by IPC. Her husband, for the purposes of Section 375 IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of IPC. This was recognised by LCI in its 172nd Report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonise the provisions of various statutes and also harmonise different provisions of IPC inter se.

91. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.

Harmonious and purposive interpretation

101. The entire issue of the interpretation of the JJ Act, the Pocso Act, the PCMA and Exception 2 to Section 375 IPC can be looked at from yet another perspective, the perspective of purposive and harmonious construction of statutes relating to the same subject-matter. Long ago, it was said by Lord Denning that when a defect appears, a Judge cannot fold his hands and blame the draftsman but must also consider the social conditions and give force and life to the intention of the legislature. It was said in *Seaford Court Estates Ltd.* v. *Asher* [*Seaford Court Estates Ltd.* v. *Asher*, (1949) 2 KB 481 (CA) affirmed in *Asher* v. *Seaford Court Estates Ltd.*, 1950 AC 508 (HL)] that: (KB p. 499)

> "… A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of

> some or other ambiguity. It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

105. Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child.

Implementation of laws

106. The Preamble to our Constitution brings out our commitment to social justice, but unfortunately, this petition clearly brings out that social justice laws are not implemented in the spirit in which they are enacted by Parliament. Young girls are married in thousands in the country, and as Section 13 of the PCMA indicates, there is an auspicious day — *Akshaya Trutiya* — when mass child marriages are performed. Such young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences. Civil society can do just so much for preventing such child marriages but eventually it is for the Government of India and the State Governments to take proactive steps to prevent child marriages so that young girls in our country can aspire to a better and healthier life. We hope the State realises and appreciates this.

Conclusion

107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (*i*) To let the incongruity remain as it is — this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (*ii*) To strike down as unconstitutional Exception 2 to Section 375 IPC — in the present case this is also not a viable option since this relief was given up and no such issue was raised; (*iii*) To reduce the age of consent from 18 years to 15 years — this too is not a viable option and would ultimately be for Parliament to decide; (*iv*) To bring the Pocso Act in consonance with Exception 2 to Section 375 IPC — this is also not a viable option since it would require not only a retrograde amendment to the Pocso Act but also to several other pro-child statutes; (*v*) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the Pocso Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the

> only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

10. So far as the age of the prosecutrix is concerned, in the face of the High School Certificate, there is no cavil that evidence about her being a major, which is her stand, cannot be accepted. She cannot be referred to medical examination for determination of her age, so long as her date of birth founded on her High School Certificate, is available. This certificate clearly indicates that she is a minor. There, her date of birth is 04.11.2004. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 makes the following provision regarding presumption and determination of age:

> "**94. Presumption and determination of age.–** (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
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> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –
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> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
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> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
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> (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:
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> Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

11. The provisions of Section 94 (2) of the Act, which are designed to determine the age of a juvenile, have been extended to the victim in **Jarnail Singh v. State of Haryana; (2013) 7 SCC 263** and by a Division Bench decision of this Court in **Smt. Priyanka Devi through her husband vs. State of U.P. and others 2018 (1) ACR 1061,** to which I was a party. It has been held in **Smt. Priyanka Devi** thus:

> "**13.** Learned counsel for the petitioner lastly urged that provisions of Section 94 of the Juvenile Justice Act, 2015 do not apply to the case in hand as the same are available for the purposes of determination of age for a juvenile or a child in conflict with the law but would not apply to the determination of age in the case of a victim.
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> **14.** We are afraid that the aforesaid submission is not correct. The issue was examined by the Supreme Court in the case of Mahadeo S/o Kerba Maske v. State of Maharashtra and Another; (2013) 14 SCC 637 where in paragraph no. 12 of the report it was held as under:
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> > "Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."
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> > (Emphasis supplied)
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> **15.** This issue has also been considered in an earlier judgment of the Supreme Court in Jarnail Singh v. State of Haryana; 2013 (7) SCC 263, where too it has been held that rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 must apply both to a child in conflict with law as well as to a victim of a crime. Paragraph 23 of the said report reads thus:
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> > "Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has

been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

16. Thus, principles applicable to the determination of age in the case of a juvenile would in terms apply to cases of determination of the age of a victim as well. It may be pointed out that at the point of time when Mahadeo (supra) was decided by their lordships of the Supreme Court, the Juvenile Justice Act, 2000 was in force and their lordships were interpreting the provision of Rule 12(3) of the Juvenile Justice (Care and Protection of Child) Rules, 2007. The said Act of 2000 has since been repealed and has been replaced by the Juvenile Justice Act, 2015. The rules framed under the Act of 2000 are thus no longer on the statute book. However, the provisions that found place in Rule 12(3) of the Juvenile Justice (Care and Protection of Child) Rules, 2007 framed under the Juvenile Justice Act, 2000 are now, with certain modifications engrafted into the the Principal Act vide section 94 of the Juvenile Justice Act, 2015. The inter se priority of criteria to determine age under Rule 12(3) of the Rules, 2007 (supra) and section 94 of the Act, 2015 remains the same albeit with certain modifications which are of no consequences to the facts in hand. In short, provisions of Rule 12(3) of the Rules, 2007 framed under the Juvenile Justice Act, 2000 are para meteria to the provision of Section 94 of the Juvenile Justice Act, 2015. This being the comparative position, the principles of law laid down by their lordships in the case of Mahadeo (supra) would apply with equal force to the provisions of section 94(2) of the Juvenile Justice Act, 2015 while determining the age of a victim of an offence under Sections 363 and 366 IPC. Thus, the submission of the learned counsel for the petitioners,

on this score, is not tenable."

12. The provisions of Section 94(2) makes it vivid that in the face of a date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, the other evidence about the age of a victim cannot be looked into. If the date of birth certificate as envisaged in clause (i) of sub-Section (2) of Section 94 of the Act is not available, the birth certificate given by a corporation or a municipal authority or a *panchayat* is the next evidence to be considered in the rung. It is only when the evidence about age envisaged under clauses (i) and (ii) of Sub-Section (2) of Section 94 of the Act is not available, that a victim can be referred to a medico-legal examination for the determination of her age. Therefore, even if it is the prosecutrix's stand, which this Court assumes to be so that she is 18 years old, and has married Pintoo of her free will, she cannot be regarded as a major or permitted to prove herself a major, by asking herself to be referred to medical examination by a Board of Doctors, so long as her High School Certificate is clear on the point. After the decision of their Lordships of the Supreme Court in **Suhani vs. State of U.P., 2018 SCC Online SC 781**, there was some confusion whether a victim could be referred to the medical examination of a Board of Doctors for determination of her age, in the face of a recorded date of birth in the High School certificate. But, after the decision of a Division Bench of this Court in **Smt. Nisha Naaz *alias* Anuradha and another vs. State of U.P. and others 2019 (2) ACR 2075** holding that the decision in **Suhani** does not lay down any law but is a decision on facts, the principles in **Smt. Priyanka Devi**, following the decision in **Jarnail Singh**, is law that would govern the fate of this case. In **Smt. Nisha Naaz *alias* Anuradha**, it was held:

> "**14.** A plain reading of Section 94 of the 2015, Act would reveal that only in absence of: (a) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board; and (b) the birth certificate given by a corporation or a municipal authority or a panchayat, age is to be determined by an ossification test or any other latest medical age determination test conducted on the

> orders of the Committee or the Board. A Division Bench of this court in the case of Smt. Priyanka Devi Vs. State of U.P. and others in Habeas Corpus Petition No.55317 of 2017, decided on 21st November, 2017, after noticing the provisions of the 2015, Act and the earlier 2000, Act and the rules framed thereunder, came to the conclusion that as there is no significant change brought about in the 2015, Act in the principles governing determination of age of a juvenile in conflict with law, in so far as weightage to medico legal evidence is concerned, the law laid down in respect of applicability of those provisions for determination of a child victim would continue to apply notwithstanding the new enactment. The Division Bench in Priyanka Devi's case (supra) specifically held that as there is on record the High School Certificate, the medico legal evidence cannot be looked into as the statute does not permit.
>
> **15.** The judgment of the apex court in Suhani's case (supra) does not lay down law or guidelines to be used for determination of the age of child victim. Further, it neither overrules nor considers its earlier decisions which mandated that the age of child victim is to be determined by the same principles as are applicable for determination of the age of juvenile in conflict with law. From the judgment of the apex court in Suhani's case (supra), it appears that the concerned victim (petitioner no.1 of that case) was produced before the court and the court considered it apposite that she should be medically examined by the concerned department of All India Institute of Medical Sciences (for short AIIMS). Upon which, AIIMS, by taking radiological tests, submitted report giving both lower as well as higher estimates of age. On the lower side the age was estimated as 19 years and on the higher side it was 24 years. Therefore, even if the margin of error was of 5 years, the victim was an adult. Hence, on the facts of that case, in Suhani's case, the first information report was quashed by the Apex Court. The decision of the Apex Court was therefore in exercise of its power conferred upon it by Article 142 of the Constitution of India which enables it to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. The said decision cannot be taken as a decision that overrules the earlier binding precedents which lay down the manner in which the age of a child victim is to be determined."

13. So long as the prosecutrix is a minor, she cannot be permitted to accompany the accused Pintoo, whom she claims to have married. In order to determine whether the prosecutrix was enticed away from her guardian's lawful custody, or she went away of her own, this Court ascertained the prosecutrix's stand, who is present in Court. Her stand is recorded *verbatim*:

Q. Aapka Naam?

Ans. Shivani

Q. Aapki Aayu Kya Hai?

Ans. 04.01.2002 (18 years)

Q. Aap Pintoo Ko Janti Hain?

Ans. Haan.

Q. Pintoo Kaun Hain?

Ans. Mere Pati.

Q. Pintoo Aapko Bahla Fusla Kar Le Gaya Tha?

Ans. Nahi, Mai Apni Marzi se Uske Saath Gayi Thi.

Q. Aap Apne Mata-Pita Ke Pass Jaana Chahti Hain?

Ans. Nahi. Main Apne Pati Ke Pass Jana Chahti Hun.

14. Looking to Shivani's stand, it is evident that she has not been enticed away by Pintoo. Rather, she has left her home of her own accord and married him. In this view of the matter, the marriage would not be void under Section 12 of the Act of 2006, but would be voidable under Section 3 of the said Act.

15. The conclusion is evident from the provisions of Sections 3 and 12 of the Act of 2006 which read 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.
>
> **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."

16. It would, therefore, be open to the prosecutrix to acknowledge the marriage or claim it to be void, once she attains the age of majority. It would also be open to her, once she attains the age of majority, to go wherever she likes and stay with whomsoever she wants.

17. Since, she is not inclined to go back to her parents, for the present, this Court is left with no alternative but to direct the State to place her in a suitable State facility other than a *Nari Niketan*, may be a Safe Home/Shelter Home.

18. The District Magistrate, Hapur and the Superintendent of Police, Hapur are ordered to ensure that the prosecutrix is immediately housed in a suitable Safe Home/Shelter Home, or other State facility where she would be safe and taken care of.

19. The learned District Judge, Hapur is also directed to ensure that a Lady Judicial Officer, posted in his Judgeship, will visit the

prosecutrix once a month and inquire about her welfare. In case there is anything objectionable, she will immediately report the matter to the District Judge, who will take appropriate steps to ensure the prosecutrix's welfare during her stay in the State facility/Safe Home/ Shelter Home, wherever she is housed.

20. Shivani would be permitted to live in State facility/Safe Home/ Shelter Home till 04.11.2022, and thereafter, she may go wherever she wants and stay with whomsoever she likes, including Pintoo, whom she claims to be her husband.

21. In the result, this petition **succeeds** and is **allowed.** The impugned order dated 24.11.2020, passed by the learned Judicial Magistrate-I, Hapur in Case Crime No. 516 of 2020 under Section 363 IPC, P.S. Pilakhuwa, District Hapur is hereby **set aside**. The prosecutrix shall be dealt with in accordance with the directions made *hereinabove*.

22. Let Shivani, who is present in person, be forthwith taken into the care of the Court Officer and conveyed through the Registrar General to the Senior Superintendent of Police, Prayagraj. The Senior Superintendent of Police, Prayagraj shall cause the prosecutrix to be conveyed in safety to the Superintendent of Police, Hapur, who, along with the District Magistrate, Hapur will carry out the directions carried in this order forthwith.

23. The Court Officer shall convey Shivani to the Registrar General, who shall make immediate arrangement to take her into his immediate care and ensure compliance of this order.

24. Let this order be communicated to the learned District Judge, Hapur, the District Magistrate, Hapur, the Senior Superintendent of Police, Prayagraj and the Superintendent of Police, Hapur by the Joint Registrar (Compliance) **within 24 hours**.

Order Date:- 27.1.2021
Deepak