

**A.F.R.**

**Court No. - 31**

**Case :-** HABEAS CORPUS No. - 23362 of 2020

**Petitioner :-** Km. Hashmi Thru. Her Father Natural Guardian Usman

**Respondent :-** State Of U.P. & Ors.

**Counsel for Petitioner :-** Girish Kumar Pande, Prashant Pandey

**Counsel for Respondent :-** G.A.

**Hon'ble Vikas Kunvar Srivastav, J.**

1. The present writ petition of Habeas Corpus is moved by the petitioner-Usman, father of the alleged detenu, "Kumari Hashmi" aged about 16 years, r/o Village Sarawan, P.S. Itaunja, District-Lucknow. In addition, State of U.P. and Station Officer, Police Station-Itaunja, District-Lucknow, the private Opposite Party-Vineet Kumar S/o Sukhdev R/o Village Sarawan, Police Station-Itaunja, District-Lucknow is also made opposite party.

2. In brief, the facts emerging from the pleadings of the writ petition reveals that the daughter of the next friend, 'Usman' lodged an F.I.R. in local Police Station Itaunja, District-Lucknow on 13.11.2020 at 7:19 p.m. stating therein, his 16 years' old daughter left the home at about 4:00 p.m. on 12.11.2020 for going to her maternal uncle's home at Village Darauna, P.S.- Itaunja, Lucknow but she did not reach there and he came to know from the whispers amongst native villagers that one Vineet Kumar, opposite party no.3, resident of the same village enticed and taken away his minor daughter and kept detained her in some lonely place, which is not known to the petitioner and his family members. The complainant/petitioner has further stated in the said F.I.R. that opposite party no.3, Vineet Kumar and his family members are not permitted him to meet the alleged detenu.

3. To set up the minority of his daughter, the petitioner-Usman has taken reliance on Aadhar Card wherein, date of birth is mentioned as 12.05.2004, which is made Annexure-2 to the petition. Being helpless to see or meet his daughter, the alleged detenu, opted to file the instant petition in hand. The entire petition is directed against the opposite party no.3 for the violation of fundamental right of petitioner and that of the alleged detenu. On the basis of facts stated in the petition, following reliefs are sought:-

*“(i) Issue a writ, order or direction in the nature of Habeas Corpus directing opposite party no.3 to produce the detenu before this Hon'ble Court and set her free from his illegal detention forthwith.*

*(ii) Issue a writ, order or direction in the nature of mandamus directing the the opposite party no.3 to set free the detenue from his illegal detention frothwith.*

*(iii) Issue any other order or direction which this Hon'ble Court may deem just and proper in the circumstances of the case in favour of the petitioner.*

*(iv) Allow writ petition with cost in favour of the petitioners against opposite parties.”*

4. Counter affidavit on behalf of the State is filed on 14.12.2020/17.12.2020. In para-3 of the counter affidavit, it is stated that the petitioner 'Usman' filed an FIR on 13.11.2020 in Police Station Itaunja, District Lucknow against the opposite party no.3, 'Vineet Kumar' whereupon Case Crime No.317 of 2020 under Sections 363 and 366 of Indian Penal Code was registered. The informant-complainant in the said FIR stated that opposite party no.3 has enticed his minor daughter and taken her away with him. The victim girl was recovered on 17.11.2020, the informant of the case, the next friend-Usman was called on and his daughter, the alleged detenue, Km. Hashmi was sent for medical examination, where she refused to undergo the medical examination. On the basis of educational certificate from the school first attended by her, the date of birth was found recorded 5.4.2001, according to which, the age of the victim on the date of incident was 19 years 7 months. Further, the statements of the victim under Sections 161 and 164 of the Cr.P.C. were recorded, that she left the home on her own. The Magistrate finding her an adult person set her free to go wherever she wants, she opted to go with the family members of the opposite party no.3, Vineet Kumar. She being an adult desired not to go with her parents. In support of the facts alleged in para-3 of the counter affidavit, learned A.G.A. placed the case diary before the court for perusal and also made relevant extracts from case diary Annexures to the counter affidavit. The counter affidavit is duly sworn on by Sub Inspector, Ameer Bahadur Singh, Police Station- Itaunja, District-Lucknow, the Investigating Officer of the case.

5. To controvert the facts arisen from the para-3 of the counter affidavit of the state, a rejoinder affidavit by the petitioner is also filed, sworn on by the petitioner's (next friend- 'Usman'). Para-4 of the rejoinder affidavit is relevant here, which runs as under:-

*“4. That in reply to the contents of para 3 of the counter affidavit only this much is admitted that petitioner lodged the report on 13-11-2020 at Police*

*Station Itaunja Distt. Lucknow for enticing away his daughter/detenu Km. Hashmi by Vineet Kumar s/o Sukhdev R/O Vill Sarawan, Police Station Itaunja District Lucknow which was registered at Case Crime No.317/2020 U/Ss 363/366 I.P.C. and rest of the contents are denied. In fact petitioner was not called by the police nor he went there neither met to the Detenu. It is also submitted that any documentary evidence regarding age of the detenu has not been filed with the Counter Affidavit and detenu is minor. For ascertaining the age of the detenu her medical examination is necessary.”*

6. Countering the para-9 of the counter affidavit filed on behalf of the State, stating that the alleged detenu being major as her age assessed on the basis of date of birth entered in her school record first attended being 5.4.2001, para-10 of the rejoinder affidavit is relevant to be quoted hereunder:-

*“10. That contents of para 9 of Counter Affidavit are wrong hence denied and contents of para 6 of our writ petition are reiterated. It is also submitted that any school certificate regarding date of birth of the detenu has not been filed with the Counter Affidavit.”*

7. Heard learned counsel for the petitioner, Shri Girish Kumar Pandey, Advocate and Learned Additional Government Advocate for the State, Sri Balkeshwar Srivastava, Advocate.

**The girl (alleged detenu) is an adult, the law relating the manner of assessing the age in given facts.**

8. Learned counsel for the petitioner insisted on the basis of Aadhar Card made Annexure-2 to the petition issued in favour of the alleged detenu that she is minor in age as date of birth mentioned therein 12.5.2004. Whereas, learned A.G.A. on behalf of the State argued that learned counsel for the petitioner has suppressed the fact with regard to the date of birth recorded in the records of the school first attended by the alleged detenu i.e., 5.4.2001, as such, on the date of alleged incident she was major. The writ petition is liable to be dismissed, for the reason of suppression of fact and fraud committed upon court by concealment of necessary facts. It is further argued that learned counsel for the petitioner has not denied anywhere in the petition that his daughter, the alleged detenu has not attended any school and she is uneducated. He further submitted that Aadhar card is not a recognized document under law, so as to accept as proof of age.

9. Learned A.G.A. further objected the maintainability of the writ petition on the ground that the entire petition is oriented against the private opposite party-Vineet Kumar. A writ in the nature of mandamus on the ground of the opposite party no.3, violating the fundamental right of the alleged detenu and her family members including the petitioner under Article 21 of the Constitution of India. This is established principle of law that a mandamus cannot be issued against a private individual, petition is not directed for any action of violation of fundamental right by the State opposite parties, namely opposite party no.1 and 2, therefore, petition under Article 226 of the Constitution of India is not maintainable and deserves to be dismissed.

10. Learned A.G.A. further submitted that the Investigating Officer of the Case Crime No.317 of 2020 instituted on the F.I.R. dated 13.11.2020 lodged by the detenu's father 'Usman', has sworn the rejoinder affidavit and denied even the recovery of the alleged detenu on 17.11.2020 and proceedings thereafter. In every proceeding the petitioner, Usman, his wife both were present and in their knowledge the statement under Section 164 Cr.P.C. before the Magistrate was recorded, wherein she stated her desire not to go with her family members and desired to marry Vineet Kumar, opposite party no.3. The Magistrate set her free at liberty to go wherever, she wants and thus a final report was submitted by the police in the case with closure. However, learned counsel for the petitioner denies as to the information of recovery of the girl as well as the further proceeding before the Magistrate and setting the alleged detenu free at liberty to go anywhere, she wants.

11. Learned A.G.A. submitted that petition is also not maintainable as the alleged detenu living with opposite party no.3, 'Vineet Kumar' in pursuant to her setting free by the Magistrate finding her adult in age and she on her own opted to choose Vineet Kumar.

12. In the light of arguments over the facts coming out from the pleadings on record reveals that when the petition of Habeas Corpus is presented as fresh before the Court on 1.12.2020, the learned A.G.A. on behalf of the State informed the court about recording of statement of victim under Section 164 Cr.P.C. before the Magistrate in the court. Order dated 1.12.2020 is quoted hereunder:

*“Learned counsel for the applicant and learned AGA are present.*

*Learned AGA states that the alleged detenu has been recovered and she has given her statement under Section 164 Cr.P.C. before the Magistrate also.*

Learned counsel for the applicant states that he has no information about the said fact, he wants time to confirm.

*Learned AGA is directed to submit his instructions/counter affidavit within three weeks.*

*List this case after three weeks.”*

**13.** The petitioner pursuant to order neither on 1.12.2020, despite he was informed by the learned A.G.A. as to the latest update in the case lodged by him under Sections 363, 366 I.P.C. did not move any amendment application to meet out the said information nor proceeded to the court of Magistrate. The detailed fact in further update of the proceeding, is submission of final report of closure though revealed in the counter affidavit. The petitioner again denies to be in knowledge of the said fact in the rejoinder affidavit and did not bring on record any protest petition against the said final report lodged in the concerned court by him. The inaction on the part of the petitioner, thus implies the information was well within his knowledge since before the date of filing the petition and he is willingly and knowingly suppressed the fact for coming before the court, so as to relief of Habeas Corpus. He seems to have approached the court seeking relief based on equity not with clean hands.

**14.** The relevant extracts from the case diary showing the proceeding after the institution of Case Crime No.317 of 2020 based on F.I.R. lodged on 13.11.2020 reveal, pursuant to the recovery of the girl on 17.11.2020, recording of statement by the Investigating Officer under Section 161 Cr.P.C. and sending the alleged detinue for medical examination is done in the presence of her parents. Her denial to undergo the medical examination, the production of the detinue before the court of Magistrate for getting recorded her statement under Section 164 Cr.P.C., the assessment of age by the Magistrate on the basis of date of birth entered in school record, the order of the Magistrate setting free the alleged detinue at liberty to go wherever she wants, all are made annexures to the counter affidavit. Further, the case diary is placed before the court for perusal of the said facts and proceeding referred in annexures. It is absolutely clear that alleged detinue stated before the court of Magistrate in her statement under Section 164 Cr.P.C. that she has studied only upto Class-I in Prathamik Vidyalaya, Sarawan, where her date of birth is entered as 5.4.2001. The case diary being a document required under law to be prepared by the police officer while investigating a case is a document prepared in its routine course of business by the police official who is

a public officer. The acts and proceeding entered by such officer is case diary unless contrary is proved, shall be presumed to be correct.

15. From Section 114 of the Indian Evidence Act, 1872- “Provisions for presumption of the court with regard to the existence of the certain facts.”, the relevant portion with illustration is reproduced hereunder:-

*“114. Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

**Illustrations**

*The Court may presume—*

*(a) .....*

*(b) .....*

*(c).....*

*(d).....*

*(e) That judicial and official acts have been regularly performed;*

*(f) That the common course of business has been followed in particular cases.”*

16. Thus, there is a strong presumption of correctness of the document bearing the entry of the date of birth of the alleged detainee, issued by school first attended namely “Primary School Sarawan” having been prepared in common course of business to be followed by a school. Since the said entry is not rebutted by the petitioner by alleging contrary to this even in his rejoinder affidavit, shall be presumed correct. Likewise, the case diary which is prepared by a police officer (a public officer) in common course of business shall be presumed that proper procedure have been followed and judicial order passed by the Magistrate for release of the detainee setting her free to go anywhere, she wants, all are genuinely and correctly performed in the presence and notice of the complainant of the case on whose instance the proceeding is launched.

17. For assessing the age of the victim of an alleged offence or of any person alleged to be a ‘victim’ of the offence or under unlawful detention as complained in the writ of habeas Corpus is necessary to be stated with proof of age as recognized under the provisions of law. In case of obscurity as to the age the same requires to be ascertained

in accordance with the procedure established under law or on the basis of document legally certifying the age or date of birth. If a person is claiming another to be a minor, he has burden to establish the age of that another, for the purpose of seeking relief based on age. The age of the victim of an offence or age of offender, if they are alleged to be a minor shall be ascertained on the basis of procedure envisaged under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 read with the Rule 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (as amended by the Amendment Act 33 of 2006), which runs as under:-

***“12. Procedure to be followed in determination of Age.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.***

***(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.***

***(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –***

***(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;***

***(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;***

***(iii) the birth certificate given by a corporation or a municipal authority or a panchayat.***

***(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the***

*Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.*

*and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.*

*(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.*

*(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.*

*(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”*

**18.** As such, the certificate of date of birth as recorded in the school first attended, the Primary School, Sarawan is a document recognized by law for determination of age of the alleged detainee. In the aforesaid rules of Juvenile Justice Act, 2015, Aadhar Card is not enumerated as a document recognized for the determination of age. Even Aadhar Card is not notified by any official gazette to be a document recognized for determination of age, as such, the Aadhar Card to setup the age of minority on the basis of date of birth entered



therein, is of no weight. Moreover, in the presence of a recognized documents the certificate issued from the school first attended having date of birth 5.4.2001, the Adhar Card is of no evidentiary value to prima facie establish the age of the alleged detainee.

**The right of a major girl**

19. The Court of Magistrate before whom the alleged detainee was produced for recording statement under Section 164 Cr.P.C. has also relied on the school certificate having date of birth as 5.4.2001 of the alleged detainee and treated her a major girl. Accordingly, the court set her at liberty to go wherever she wants. Consequent upon the said order, the Investigating Officer let the alleged detainee to go with whom she wanted to go. This order was not challenged anywhere, despite in the knowledge of the petitioner's, (next friend). This inaction to challenge the proceeding implies strongly that the writ petition is moved with suppression of facts and concealment of essential information, do not deserve to be entertained as petition did not come with clean hands.

**Suppression of facts by the petitioner.**

*“.....even a tiny bit of deceit is dishonorable when it's used for selfish or cowardly reasons.”*

*- Jeanne Birdsall (An American writer, author of the book- The Penderwicks)*

20. The petitioner next friend, father of the alleged detainee knowing very well that her daughter being major, an adult who went with the opposite party No.3 on her own as they wanted to marry each other. Knowingly, concealed the material facts of the proceeding as disclosed on the very first date the case was taken as fresh and thereafter in the counter affidavit filed by the State opposite parties. The willful concealment of the facts of which the petitioner had knowledge since before filing of the petition seeking relief of Habeas Corpus is malafide. As such, a fraud is committed upon the court for the purpose of seeking advantage by the petitioner, (next friend). He did not come before the court with clean hands.

21. In a case of *Dr. Vijay Kumar Kathuria Vs. State of Haryana & Ors.*<sup>1</sup>, it is held that false representation and reckless allegation made before the Court by the petitioner, such conduct, disentitled to getting any relief from the court comes within the term 'Fraud' upon the court.

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<sup>1</sup> (1983) 3 SCC 333

22. In *S.P. Chengalvaraya Naidu (dead) by Lrs. Vs. Jagannath (dead) by Lrs. & Ors.*<sup>2</sup>, Hon'ble Supreme Court held as under:

*“A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds vital document in order to gain advantage on other side then he would be of playing fraud on the court as well as on the opposite party.”*

23. Hon'ble Apex Court in the another case of *Union of India & Ors. Vs. Muneesh Suneja*<sup>3</sup> has held that “non disclosure of material fact is fatal to the petition”.

24. In view of the above case laws, the petition moved by the petitioner's next friend the father of the alleged detenu, ‘Usman’ suffers from willful suppression of material fact and misrepresentation for getting undue advantage to get the issuance of the writ in the nature of habeas corpus seeking production of alleged detenu who by virtue of a judicial order was set free to go wherever she wants and opted to go with opposite party no.3, Vineet Kumar with whom she wanted to marry. The petition deserves to be dismissed on this count alone.

**Apprehension of the petitioner as to communal tension in the garb of a threat, if the alleged detenu is not handed over to him.**

25. Para 11 of the petition runs as under:-

*“11. That Detenu belongs to **Muslim** community and O.P. No. 3 belongs to **Hindu** community and there is every possibility for communal tension is prevailing in the village”*

26. Thrust of issuing a writ of habeas corpus is also upon an unfounded apprehension in the garb of an implied threat of communal tension in the village as the alleged detenu and opposite party no.3 belong to different religions namely Muslim and Hindu respectively. The alleged detenu being an adult herself desired to go with the Opposite party no.3-Vineet Kumar to whom she wanted to marry and therefore, it would be relevant to cite here the judgment of Hon'ble

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<sup>2</sup> (1994) 1 SCC 1

<sup>3</sup> (2001) 3 SCC 92

Supreme Court in the case of *Lata Singh Vs. State of U.P. & Others*<sup>4</sup> has held as under:

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

27. In the circumstances of the case merely on the apprehension in the garb of an implied threat of communal tension in the village for the reason of different religions of the couples, no writ of habeas corpus can be issued in favour of the petitioner next friend, 'Usman', father of the alleged detenu. The local police need to be directed to ensure peace and tranquility in the locality and to maintain the law and order.

**Writ of mandamus against a private individual.**

28. Moreover, the petition not having been directed against the state and/or the public officer of the State though they are arrayed opposite party no.1 and 2 and only directed against a private individual for the relief of mandamus seeking release of alleged detenu, who is a major girl and willingly reside with opposite party no.3 may not be issued, for the reason writ of mandamus cannot be issued directing against the private individuals in a writ of Habeas Corpus moved under Article 226 of the constitution of India. It has assumed the shape of litigation between two private individuals for the breach of fundamental rights.

29. A writ cannot lie against the private person, where he violates fundamental rights that are enshrined under Article 17, 23 and 29 of

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4 (AIR 2006 SC 2522)

the Constitution of India. However, writ may be issued against the private person, if it is found that the act of the person is in collusion with a public authority, reliance placed on the judgment of Hon'ble Apex Court in the case of *Sohan Lal Vs. Union of India*<sup>5</sup> in which it is held “*There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England Vol. 11, Lord Simonds Edn. p. 84). If it had been proved that the Union of India and the appellant had colluded, and the transaction between them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ to or make an order in the nature of mandamus against the appellant might be said to exist in a Court.*”

**30.** In view of the above facts, where the pleadings made in the writ petition nowhere state about the private opposite party no.3 being in collusion with the police authorities or any public officer with regard to any act or omission, therefore, opposite party no.3 being a private individual does not fall within the ambit of word "STATE". The writ of mandamus in all the circumstances cannot be issued against the opposite party no.2 for the release of alleged detainee. The petition suffers from the concealment of material facts like the date of birth of the alleged detainee entered into her school records which she attended first, the recovery of girl by the police and proceedings adopted thereafter, recording her statement under Section 161 Cr.P.C. by the Investigating Officer and recorded under Section 164 Cr.P.C. before the Magistrate, when she was produced before him.

**31.** With these observations, the writ petition is **dismissed**.

**32.** The Director General of Police, U.P. is required to direct the Opposite party no.2 to keep vigil over the society in the locality and to ensure that the couple are not harassed by anyone, nor subjected to threats or acts of violence and anyone who gives threats or harasses or commits act of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action taken against such persons as provided in the law, in compliance of the direction of Hon'ble Apex Court given in the case of *Lata Singh (Supra)*.

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<sup>5</sup> (AIR 1957 SC 529)

**33.** Further, the Director General of Police and the local police officers shall also ensure the law and order as well peace and tranquility in the locality, so as to eradicate apprehension if any as raised by the petitioner.

**34.** The Deputy Registrar (Criminal) to communicate the order of the Court promptly to the Director General of Police, Uttar Pradesh.

**Order Date :-** 9.11.2021

Gaurav/-