

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.880 of 2023

Arising Out of PS. Case No.-7 Year-2022 Thana- SALIMPUR District- Patna

NITISH KUMAR @ NITISH RAM @ NITISH KUMAR RAM, aged about 23 years, Male, Son of Late Ram Pravesh Ram, Resident of Village - Rupas Mahaji, Police Station - Salimpur, District - Patna.

... ... Petitioner/s

Versus

1. The State of Bihar through its Additional Chief Secretary, Home Department, Government of Bihar, Patna, Bihar.
2. The Director General of Police, Bihar, Patna, Bihar
3. The Inspector General of Police, Patna.
4. The Senior Superintendent of Police, Patna.
5. The District Magistrate, Patna.
6. The Deputy Superintendent of Police, Patna.
7. The Station House Officer (S.H.O.) Police Station - Salimpur, District - Patna.
8. The Director - Incharge the State Girls Care Home, Gaighat, Patna.
9. The Child Welfare Committee through Director/ Chairman, District - Patna, Bihar.
10. [REDACTED]
11. [REDACTED]

... ... Respondent/s

Appearance :

For the Petitioner/s : Mr. Lakshmindra Kumar Yadav, Advocate
For the Respondent/s : Mr. P.K. Shahi, AG
: Mr. Prabhu Narayan Sharma, AC to AG

**CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

**CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)**

Date : 16-01-2024

Heard learned counsel for the



petitioner and learned counsel for the State.

2. The present criminal writ application has been filed on behalf of the petitioner by way of Habeas Corpus seeking a direction from the respondents for release of the respondent no. 11 namely, [REDACTED] from the respondent no. 8, namely The State Girls Care Home, Gaighat, Patna, on the ground that the respondent no. 11 was examined by the doctor and her age was assessed to be under 18 years. Her statement under Section 164 Cr.P.C. was also recorded where she has admitted that she moved out of her own will to the petitioner and in course of time, she has given birth to a child out of the relationship. Respondent No. 11 has also stated that she is major and the marriage is out of will. Hence, the present Habeas Corpus application has been preferred for her release in favour of the petitioner. There is a criminal case also instituted by the father of the respondent no. 11 against the petitioner i.e., Salimpur P.S Case No. 07 of 2022, wherein the petitioner has been granted bail.



3. Learned counsel for the petitioner has submitted that it was a case of love marriage between Nitish Kumar and [REDACTED] and they had married voluntarily and without any force or coercion. He submitted that notwithstanding that girl was minor, she still had a legal right to live with her husband and therefore, she cannot be compelled to stay at State Girls Care Home, Gaighat, Patna. The learned counsel further submitted that the present petition has been filed by Nitish Kumar. He further submitted that since the present petition is filed seeking a writ in the nature of Habeas Corpus and the same would be maintainable in law. He has further submitted that there is no bar for releasing [REDACTED] from State Girls Care Home, Gaighat, Patna, in view of the stand taken by [REDACTED] herself that she had voluntarily married Nitish Kumar and she wanted to stay with him and not with her parents and therefore, no useful purpose would be served in case [REDACTED] continues to remain in State Girls Care Home, till the age of majority.



4. Per contra, Learned counsel for the respondent nos. 5 & 9, while referring to the reply by way of affidavit filed by the District Magistrate, Patna, has submitted that as per the application of father of [REDACTED] (respondent no. 11), the age of the child is 14 years. The letter no 412 dated 26.07.2023, issued by the Chairman, Child Welfare Committee, Patna stated that [REDACTED] is a minor. The learned State counsel has further submitted that since girl is even less than 17 years of age, it was a case of child marriage and prohibited under law and therefore, even if she has consented to marriage, the same would not be of any significance as child marriage is prohibited under the law and therefore, it will be in the interest of [REDACTED] and her child continues to remain in the State Girls Care Home, Gaighat, Patna, till she attains the age of majority.

5. On 12.12.2023, when the matter was heard, the aforesaid girl [REDACTED] (respondent no. 11) who is residing at [REDACTED] Gaighat, Patna, was produced and this Court had the



occasion to interact with her. She apprised the Court that she is duly married with Nitish Kumar (petitioner) and her age is about 18-19 years and she is a major. On being pointedly asked as to where she wants to reside, she stated that she wishes to go with her husband. When she was asked as to whether she was ready and willing to go with her father or not, she flatly refused to go along with her father.

6. This Court, vide order dated 12.12.2023 also directed the Registry to issue notice to In-Charge Principal, Primary School, [REDACTED] [REDACTED] Patna to furnish the admission register wherein the details of [REDACTED] has been written. The admission register mentions that her date of birth is of 17.03.2008, also the birth certificate of respondent no. 11 produced by the father is 17.03.2008, and the date of registration of said birth certificate which is same as date of birth of respondent no. 11.

7. We have heard the learned counsel for the parties at length.



8. The question which is to be considered in the present petition is as to whether a girl who is less than 18 years of age gets married to a boy with her consent can be compelled to stay at State Girls Care Home, Gaighat, Patna while she refuses to accompany her parents or not?

9. In a Full Bench judgment passed by the **Hon'ble Delhi High Court** i.e. Court on its own motion **Lajja Devi v. State, 2012 SCC OnLine Del 3937**, two issues were considered. Firstly, what is the status of marriage under Hindu Marriage Act when one of the parties to the marriage is below the age of 18 years in contravention to Section 5 (iii) of the Hindu Marriage Act 1955 and Section 2 (a) of the Prohibition of Child Marriage Act, 2006 and Secondly, when the girl is minor but the boy has attained the age of marriage as prescribed, whether the husband can be regarded as lawful guardian of the minor wife and claim her custody in-spite of differences by the parents of the girl and what is the effect of the Prohibition of Child



Marriage Act, 2006. It was held that so far as first issue is concerned, a marriage contracted with a female of less than 18 years of age or a male of less than 21 years of age would not be a void marriage but voidable one which could become valid if no steps are taken by such "child" within the meaning of Section 2 (a) of the Prohibition of Child Marriage Act, not be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get married. Such marriage 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 and 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 and no final answer to the second issue can be made and it will depend upon the circumstances which the Court will have to decide in an appropriate manner. The relevant portion of the aforesaid judgment reads as under:-



2006 under Section 3 of the Act, seeking declaration of the marriage as void. So far as second issue is concerned, it was held that allowing the husband to consummate marriage may not be appropriate more so when 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 or she is not psychologically or medically fit to get married. Such marriage 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 and 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 and no final answer to the second issue can be made and it will depend upon the circumstances which the Court will have to decide in an appropriate manner. The relevant portion of the aforesaid judgment reads as under:-



"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.

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 e 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."

10. Dealing with the issue in hand of exception 2 to Section 375 IPC, Exception (2) to Section 375 of the IPC reads as follows:-

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

11. While elaborately discussing the 'best interests' of a girl child and impact of an early marriage in her mental, physical and psychological health, the Supreme Court in **Independent Thought Vs. Union of India, 2017 (10) SCC 800** dealt with the child marriage and also referred to the Full Bench judgments of the Hon'ble Delhi and Madras High Courts. It was observed that a girl child below 18 years of age and who is sought to be married is a child in need of care and protection and therefore, she is required to be produced before the Child Welfare Committee constituted



under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, so that she should be cared for, protected and appropriately rehabilitated or restored to society. A child remains a child whether she is intercourse is definitively 18 years and there is no dispute about this and therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. It was further observed that the age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, it must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Furthermore, such child marriages certainly cannot be in the best interest of the girl child and the solemnization of a child marriage violates the provisions of the Prohibition of Child Marriage Act, 2006. The relevant portions of the judgment are reproduced as under:-a married child or an unmarried child or a divorced child or a separated child or a widowed child. The age of consent for



sexual intercourse is definitively 18 years and there is no dispute about this and therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. It was further observed that the age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, it must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age. Furthermore, Such child marriages certainly cannot be in the best interest of the girl child and the solemnization of a child marriage violates the provisions of the Prohibition of Child Marriage Act, 2006. The relevant portions of the judgment are reproduced as under:-

"51. The Juvenile Justice (Care and Protection of Children) Act, 2015 (the JJ Act) is also relatable to Article 15 (3) of the Constitution. Section 2(12) of the JJ Act defines a child as a person who has not completed 18 years of age. A child in need of care and protection is defined in Section 2(14) of the JJ Act, inter alia, as a child "who is at imminent risk of marriage



before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnization of such marriage". Clearly a girl child below 18 years of age and who is sought to be married is a child in need of care and protection. She is therefore, required to be produced before a Child Welfare Committee constituted under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

77. *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. 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. 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. Thirdly, Exception 2 to Section 375 of the 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.

78. 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 solemnization 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 of the 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 (the IPC) condones an offence under another statute (the PCMA).

80. Besides, The Union of India completely side track 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 of the IPC all the more arbitrary and discriminatory



87. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an inter-generational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

88. 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 the IPC. Her husband, for the purposes of Section 375 of the 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 the IPC. This was recognized by the 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 harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

95. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a



child in need of care and protection (Section 2 (14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready.

The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15 (3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

105. 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 Exception 2 to Section 375 of the 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 of the 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 of the 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 harmonize the system of laws relating to children and require Exception 2 to



Section 375 of the 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." thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 of the 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 of the 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 of the 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 harmonize the system of laws relating to children and require Exception 2 to Section 375 of the 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."

12. The exercise of *parens patriae*

jurisdiction while considering the issue involved in the present case. This doctrine of *parens patriae* originated in the 13th Century. It implies that the King is the guardian of the nation and was under a duty to look after the interests of its subjects who



are in fact not able to look after themselves. This doctrine was discussed in detail by the **Hon'ble Apex Court** in **Charan Lal Sahu Vs. Union of India (1990) 1 SCC 613**. Thereafter, lately the Hon'ble Supreme Court in **Shafin Jahan Vs. Asokan K.M. and others, 2018 AIR (SC) 1933**, observed that the Constitutional Courts in this country exercise parens patriae jurisdiction in matters of child custody treating the welfare of the child as a paramount concern although the same is required to be invoked in exceptional situations. This doctrine can be invoked and on certain other occasions when a girl is not a major and has eloped with a person and she is produced in a case of habeas corpus filed by her parents and she expresses fear of life if laced in the custody of her parents, the Court should send her to appropriate shelter home where her interest can be best taken care of till she becomes a major.

13. While considering the statutory provisions under various legislations as well as the judgments passed by the Hon'ble Supreme Court



and various other High Courts, in the present matter, the respondent no. 11 was directed to be sent to State Girls Care Home by the Child Welfare Committee while exercising powers under the Juvenile Justice (Care and Protection of Children) Act, 2015. [REDACTED] being a minor and below the age of 18 years has refused to go along with her father and has insisted to go along with her husband. The Hindu Marriage Act as well as the Prohibition of Child Marriage Act provide for penal provisions in case of a child marriage and performance of child marriage is also an offence. The plea taken by the learned counsel for the petitioner that the marriage was performed with consent of a minor girl would pale into insignificance in view of the fact that child marriage itself is an offence although it may not be illegal under the Hindu Marriage Act, 1955 but certainly it is a voidable marriage under the Prohibition of Child Marriage Act, 2006.

14. Furthermore, the welfare of a girl is always of paramount consideration. In several



cases where the girl does not marry with her choice then there is an apprehension that she may be forced to get married to any other person by her parents, steps which are required to be taken in that eventuality is to protect the girl by keeping her in a safe custody rather than permitting her to marry before she attains the age of majority. The consequences of girl child marriage are much more devastating. It exposes girls to increased health problems and violence, denies them access to social networks and support systems and perpetuates a cycle of poverty and gender inequality. The element of consent is always subservient to overall welfare of a child. Furthermore, the medical hazards in case of a child marriage cannot be overlooked. Fixing the age of marriage for females as 18 years by the Legislature is not without any reason as it is also based upon the evil effects of a child marriage in terms of medical, social, psychological, economic and other like factors. Considering the observations made by the Hon'ble Supreme Court in **Independent Thought**



(supra) that a girl child below the age of 18 years who is sought to be married is a child in need of care and protection and is required to be produced before the Child Welfare Committee under Section 27 of the Juvenile Justice (Care and Protection of Children) Act, 2015 so that she can be cared for, protected and rehabilitated in a society and that under no circumstances can a child below 18 years of age gives consent express or implied for sexual intercourse.

15. That when a girl is not a major and expresses fear of life in the custody of her parents, the Court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women till she becomes a major, this Court is of considered view that there is no inherent right vested in the husband to claim custody of minor girl by filing writ of habeas corpus on illegal detention, this observations was made by the Hon'ble Supreme Court in **Shafin Jahan (Supra)**.

16. In the present case, respondent no. 11, has specifically refused to go along with her



father, therefore, her stay at State Girls Care Home, cannot be said to be detrimental to her well being and her child, she cannot be directed to be released till she attains the age of majority by giving her custody to her husband (petitioner). It is hereby directed that, Child Welfare Committee constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015, shall monitor the well being of [REDACTED] by making periodical inspections of State Girls Care Home and shall comply with all the statutory obligations cast upon the Child Welfare Committee under the Juvenile Justice (Care and Protection of Children) Act, 2015. It has been unarguably admitted that the respondent no.11 gave birth to child out of the relationship with the petitioner. The petitioner is hereby directed to open a bank account in the name of the newborn child and regularly deposit a considerable amount of money for the newborn child's welfare.

17. It is made clear that if at any time [REDACTED] (respondent no. 11), even before attaining



the age of 18 years, expresses her desire to go to her father/parents, then the Child Welfare Committee shall permit her to do so in the presence of her father/parents and by passing an appropriate order in this regard.

18. In view of above, the present petition is hereby disposed of.

(Ramesh Chand Malviya, J)

(P. B. Bajanthri, J)

Brajesh Kumar/-

AFR/NAFR	A.F.R.
CAV DATE	05.01.2024
Uploading Date	16.01.2024
Transmission Date	

