

## Salamdin Miyan Vs State Of Bihar

**Court:** Patna High Court

**Date of Decision:** Feb. 24, 2022

**Acts Referred:** Indian Penal Code, 1860 " Section 366, 366A, 504, 506  
Protection Of Children From Sexual Offences Act, 2012 " Section 8  
Code Of Criminal Procedure, 1973 " Section 164, 397, 401  
Juvenile Justice (Care and Protection of Children) Act, 2015 " Section 94(2), 94(2)(i), 94(2)(ii)

**Hon'ble Judges:** Ashwani Kumar Singh, J; Rajeev Ranjan Prasad, J

**Bench:** Division Bench

**Advocate:** Binay Kumar, Prabhu Narayan Sharma

**Final Decision:** Dismissed

### Judgement

1. In para-1 of the writ petition, the petitioner has sought for the following reliefs:-

i. A writ in the nature of Habeas Corpus or any other appropriate writ/writs, order/orders, direction to release the victim (Respondent No. 6) and her

child in custody of petitioner, victim has been unlawfully detained at Balika Grih Motihari after ignoring the fact that she is major and has voluntarily

marriage with a person at her own choice.

ii. A writ in the nature of Certiorari or any appropriate writ/writs, order/orders for quashing the order dated 27.08.2021 and 02.11.2021 passed in

Sugauli P.S. Case No. 515 of 2020 by the learned 6th Additional Sessions Judge cum Special Judge, East Champaran, Motihari whereby and where

under the learned courts found the victim (Respondent No. 6) minor and sent her to Balika Grih Motihari, ignoring her medical report which suggest

her age more than 19 years.

iii. To any other relief/reliefs to which the petitioner is entitled for and the Hon'ble Court deems fit and proper.

2. The case of the petitioner is that on 22.08.2020, his minor daughter X (name changed) aged about 15 years went out of her house to attend the call

of nature at about 08:00 PM but she did not return in the night. A hectic search was made to hear from anyone who know her whereabouts. On

23.08.2020 at 10:00 AM, when an enquiry was made from Jaibun Khatoon regarding the whereabouts of her son Wosear Miyan @ Rahamdin Miyan,

she and her family members did not give any satisfactory reply. Hence, he suspected that his daughter X was abducted by Wosear Miyan @

Rahamdin Miyan and her family members for the purpose of marriage. When a complaint was made to the Mukhiya of the village in this regard, he

told to find out solution through Panchayati whereafter Panchayati was fixed on 09.10.2020 at 04:00 PM but the accused persons did not abide by the

directions given by the Mukhiya and the Panches. They threatened that if a complaint would be made to the police, they would have to face dire

consequences.

3. On the basis of the aforesaid written report, Sugauli P.S. Case No. 515 of 2020 dated 11.10.2020 was registered under Sections 363, 366A, 504 and

506 of the Indian Penal Code as well as Section 8 of the Protection of Children from Sexual Offences Act and the investigation was taken up.

4. During investigation, the victim was recovered and her statement was recorded under Section 164 of the Code of Criminal Procedure (for short

Cr.P.C.) in which she claimed herself to be major and disclosed that she had married to Wosear Miyan @ Rahamdin Miyan out of her

own sweet will and out of the wedlock a baby was born.

5. After her statement under Section 164 Cr.P.C. was recorded, the Investigating Officer produced the victim before the learned Special Judge,

POCSO Act, East Champaran, Motihari along with her medical report in which the age of the victim was assessed to be 19 years.

6. However, the learned Special Judge, POCSO Act, Motihari vide order dated 27.08.2021 sent the victim along with her minor child to the Balika

Grih till further orders ignoring the medical report and relying upon the educational certificate and Aadhar Card produced by the father of the victim in

which her date of birth was mentioned as 08.03.2005. The officials of Balika Grih and the Child Welfare Committee, Motihari were directed to

properly look upon the victim as well as her minor child with a further direction that the victim be produced before the court on 09.09.2021.

7. The further case of the petitioner is that on 01.11.2021, the petitioner filed an application before the learned Special Judge, POCSO Act, Motihari

for release of the victim, claiming her to be major who had voluntarily married Wosear Miyan @ Rahamdin Miyan and has also expressed her desire

to live in her matrimonial home, but the learned 6th Additional Sessions Judge, Motihari, East Champaran without considering the age mentioned in the

medical report issued by the Sadar Hospital, Motihari, dismissed the application for release of the victim in favour of the petitioner.

8. The contention of the learned counsel for the petitioner is that the orders under challenge dated 27.08.2021 and 02.11.2021 are illegal, improper and

against the provisions of law. He contended that as per the medical report based on radiological study by the Sadar Hospital, Motihari, it is clear that

the victim is above the age of 19 years. She herself has disclosed her age as 20 years. Thus, it cannot be said that she is minor. He submitted that

learned Special Judge failed to appreciate that being a major, the petitioner has a right to marry a person of her own choice. He further contended that

the petitioner has no other equally efficacious alternative remedy available to him for the redressal of his grievance.

9. On the other hand, Mr. Prabhu Narayan Sharma, learned counsel appearing for the State submitted that the writ petition is thoroughly

misconceived. The orders under challenge are revisable under Sections 397 and 401 of the Cr.P.C.. Hence, it cannot be said that the petitioner has got

no other alternative and efficacious remedy available to him for the redressal of his grievance. Referring to Sub-section (2) of Section 94 of the

Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the Act of 2015"), he submitted that only in absence of

date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available, the birth

certificate given by a corporation or a municipal authority or a panchayat can be relied upon for the age determination and only in absence of date of

birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, or the birth certificate given by a

corporation or a municipal authority or a panchayat, the age can be determined by an ossification test or any other latest medical age determination

test conducted on the orders of the Committee or the Juvenile Justice Board. Thus, he contended that the court below rightly relied upon the birth

certificate issued from the school for the purposes of age determination of the victim in the present case.

10. We have heard learned counsel for the parties and carefully perused the records.

11. We find force in the submissions made on behalf of the State.

12. Sub-section (2) of Section 94 provides the manner in which the Child Welfare Committee or the Juvenile Justice Board should undertake the

process of age determination. It reads as under:-

"Section 94(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-

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from concerned examination the Board, if available; and in

the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(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:

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.

13. Sub-section (2) of Section 94 of the Act 2015 is couched in a preferential term i.e. only in the absence of certificate mentioned in Section 94(2)(i),

any other certificate mentioned in Section 94(2)(ii) shall be acceptable and only in the absence of any certificate mentioned in (i) or (ii), age shall be

determined by an ossification test or any other latest medical age determination test. Thus where no certificate as mentioned in Sub-section (2)(i) or

(ii) of Section 94 is available, the residuary clause of Sub-section (2)(iii) of Section 94 regarding ossification test or any other latest medical age

determination test would come into picture.

14. In the instant case, the educational certificates produced from the school last attended by the victim clearly mentioned her age to be 08.03.2005.

Thus, on 27.08.2021 when the court below directed the victim to be sent to Balika Grih, Motihari till further orders, she was definitely a juvenile in the

eyes of law. The court below, thus, rightly relied upon it in view of Sub-section (2) of Section 94 of the Act 2015 and ignored the medical opinion given

in respect of the age of the victim.

15. Moreover, the orders under challenge are revisable orders under Sections 397 and 401 of the Code of Criminal Procedure. The petitioner has an

efficacious statutory remedy for the redressal of his grievance.

16. Another issue which would be relevant in the present case is as to whether in a petition for issuance of habeas corpus, an order passed by a court

of competent jurisdiction could be assailed and set aside and whether an improper order could be termed as an illegal detention. The aforesaid issues

are no more res integra.

17. In Saurabh Kumar vs. Jailor, Koneila Jail & Anr., [(2014) 13 SCC 436], the Supreme Court has held that since the petitioner was in judicial

custody by virtue of an order passed by a Judicial Magistrate and, hence, it could not be held to be an illegal detention. The Supreme Court has further

held that even if the Magistrate has acted mechanically in remanding the accused to judicial custody and has dealt with the process in a cavalier

fashion which shows inconsistencies towards the denial of personal liberty of citizen, a writ of habeas corpus would not be maintainable. In State of

Maharashtra & Ors. vs. Tasneem Rizwan Siddiquee, [(2018) 9 SCC 745], the Supreme Court has held that no writ of habeas corpus could be issued

when the detainee was in detention pursuant to an order passed by the Court. In *Serious Fraud Investigation Office vs. Rahul Modi & Anr.*, [(2019) 5

SCC 266], the Supreme Court has held that the action of directing remand of an accused is a judicial function and challenge to the same is not to be

entertained in habeas corpus writ petition.

18. Thus, the Supreme Court has consistently held that a writ of habeas corpus would not be maintainable, if the detention in custody is pursuant to

judicial order passed by a Judicial Magistrate or a court of competent jurisdiction. It is further evident that an illegal or irregular exercise of jurisdiction

by a Magistrate passing an order of remand cannot be treated as an illegal detention. Such an order can be cured by way of challenging the legality,

validity and correctness of the order by filing appropriate proceedings before the competent revisional or appellate forum under the statutory provisions

of law but cannot be reviewed in a petition seeking the writ of habeas corpus.

19. Similarly, the issue of maintainability of a writ of habeas corpus in cases of sending minor girls to Protection Home/After-Care Home/Remand

Home/Nari Niketan etc. was under consideration before a Full Bench of this Court in *Shikha Kumari v. State of Bihar* through Principal Secretary,

Home (Police) Deptt. & Ors. since reported in 2020 (2) PLJR 15. The Full Bench after taking into consideration the judgments passed by the

Supreme Court in several cases including the case of *Independent Thought vs. Union of India & Anr.*, [(2017) 10 SCC 800], categorically held that in

cases of elopement if a minor girl is sent to Protection Home/After-Care Home/Remand Home/Nari Niketan by a judicial order passed by a court of

competent jurisdiction, the same cannot be treated to be illegal confinement giving rise to a remedy under the writ of habeas corpus. The Full Bench

also expressly overruled the contrary view taken by the Division Bench in *Sahebi Khatoon @ Sahebi vs. State of Bihar & Ors.* [Cr.WJC No.991 of

2010].

20. Thus, we are of the considered opinion that the instant writ petition not only lacks merit but is also misconceived. It is dismissed accordingly.