(2011) 10 MAD CK 0058

Madras High Court

Case No: H.C.P. No. 907 of 2011

T. Sivakumar	APPELLANT
Vs	
The Inspector of Police, Thiru. Anbu and Thiru. Samandan	RESPONDENT

Date of Decision: Oct. 3, 2011

Acts Referred:

- Child Marriage Restraint (Amendment) Act, 1978 - Section 2, 5
- Constitution of India, 1950 - Article 226
- Guardians and Wards Act, 1890 - Section 11, 12, 17, 19, 25
- Hindu Marriage Act, 1955 - Section 11, 12, 12(1), 13, 18
- Hindu Minority and Guardianship Act, 1956 - Section 6
- Penal Code, 1860 (IPC) - Section 361, 363, 366(A)
- Prohibition of Child Marriage Act, 2006 - Section 12, 2, 3, 3(1), 3(3)
- Tamil Nadu Juvenile Justice (Care and Protection of Children) Rules, 2001 - Rule 18

Citation: (2011) 2 LW(Cri) 385

Hon'ble Judges: T. Sudanthiram, J; S. Nagamuthu, J; K.N. Basha, J

Bench: Full Bench

Advocate: R. John Sathyan, for R. Sivakumar, for the Appellant; M. Maharaja, Assistant Public Prosecutor for R1, Sudha Ramalingam, for RR 2 and 3, P.N. Prakash, Amicus Curiae, for the Respondent

Judgement

S. Nagamuthu, J.

Selvi. Sujatha, the detenue, is aged 17 years. She is the daughter of the Petitioner. Previously, she was studying in a Higher Secondary School at Tiruvallur and was staying at the house of the Petitioner''s sister. On 08.06.2011 at about 4.30 p.m. She had gone to a local temple, but she did not return thereafter. The Petitioner learnt that the 2nd Respondent along with others had kidnapped her. He preferred a complaint in this regard before the 1st Respondent on 20.06.2011 on which a case in

Crime No. 309 of 2011 for offence u/s 366(A) of Indian Penal Code has been registered. Alleging that the minor detenue was kept illegally by the kidnappers, the Petitioner filed the present habeas corpus petition.

2. The 3rd Respondent is the father of the 2nd Respondent. When this habeas corpus petition came up for hearing before a Division Bench, on 28.07.2011, the Division Bench ordered notice to the Respondents. In pursuance of the same, the minor detenue appeared before the Division Bench on 01.08.2011 and filed an affidavit to the effect that she had fallen in love with the 2nd Respondent for quite some time and that on knowing the same, her parents started arranging for her marriage with her maternal uncle much against her wish. Therefore, according to her, on 08.06.2011, she left the parental home on her own accord and on 12.07.2011, she married the 2nd Respondent. The said marriage has been accepted by the 2nd Respondent and his other family members and she is not illegally detained by anybody, she had stated.

3. Based on the above affidavit of the minor detenue, the Learned Counsel appearing for the Respondents 2 and 3 contended before the Division Bench that since the detenue was in a position to make intelligent preference to go with the 2nd Respondent and since after the said marriage, the 2nd Respondent is the legal guardian, the detenue should be set at liberty to go along with the 2nd Respondent.

4. But, the Learned Counsel appearing for the Petitioner opposed the same on several grounds projecting the welfare of the minor detenue. Having considered the rival submissions, the Division Bench presided over by Mr. Justice C. Nagappan directed the minor detenue to be kept in a Government Children''s Home. The Learned Counsel heavily placed reliance on the judgment of another Division Bench of this Court in G. Saravanan v. The Commissioner of Police, Trichy City and Ors. 2011 2 L.W. (Cri.) 114 wherein the Division Bench has held that a child marriage is neither void nor voidable and the same is valid and so, the husband of the child in marriage is entitled for custody of the child/wife. The Division Bench had doubt about the correctness of the said conclusion. The Division Bench also took note of the judgments in Saraswathi Ammal Vs. Dhanakoti Ammal and Others, , Seema Devi @ Simran Kaur v. State of Himachal Pradesh, (1928) 2 Crimes 68 (Himachal Pradesh High Court), Neetu Singh Vs. The State and Others, , Ravi Kumar Vs. The State and Another, , Manish Singh Vs. State Govt of NCT and Others, , Association for Social Justice and Research v. Union of India, (decided on 13.05.2010 by Delhi High Court), Latori Chamar v. State of Madhya Pradesh, (decided on 10.01.2007 by Madhya Pradesh High Court), Avinash v. State of Karnataka, CDJ 2011 KAR HC 373 (Karnataka High Court) and Jitendar Kumar Sharma v. State (decided on 11.10.2010 by Delhi High Court). In Association for Social Justice and Research Case cited supra, a Division Bench of Delhi High Court observed that the issue relating to custody of a minor girl who has been married has been referred to a Full Bench for decision in Lajja Devi''s case. We are informed that the said reference has not been so far

decided by a larger Bench of the Delhi High Court. But, without noticing the same, a Division Bench of the Delhi High Court in Jitendar Kumar Sharma v. State and Anr. reported in 2010 INDLAW DEL 1904, allowed the minor girl to go with the husband. In this background the Division Bench presided over by Mr. Justice C. Nagappan has referred this matter for answering the following questions:

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

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

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

(4) Whether in view of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law and whether in violation of the procedure mandated by the Juvenile Justice (Care and Protection of Children) Act, 2000, the Court dealing with a Writ of Habeas Corpus, has the power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an office punishable u/s 18 of the Hindu Marriage Act and Section 9 of the Prohibition of Child Marriage Act, 2006 ? and

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

Having considered the above, the Hon''ble The Chief Justice has constituted this Full Bench and that is how, the matter is before us.

5. When this matter came up for hearing before this Bench on 19.08.2011, the Respondents 2 and 3 in the HCP filed a miscellaneous petition in M.P. No. 1 of 2011 seeking an interim order to take the detenue to P.B. College of Engineering, Irrungattukottai, for admission in B. Tch course. Accordingly, this Court passed an interim order and permitted her to be taken to PB College of Engineering for admission. The minor detenue was thus admitted in the College. The detenue was also produced before this Court. On enquiries, she informed the court that she was not willing to go with her parents and she was ready to attend the college from the college hostel. Having considered the submissions made and having regard to the interest of the minor detenue, this Court directed the minor detenue to be kept in the Government Kellys Home for Children, Chennai and to allow her to go to the college every day, however, with the help of a women police constable. Accordingly, she was attending the college.

6. Again on 07.09.2011 when the matter was listed, the Learned Counsel appearing for the Respondents 2 and 3 submitted that the detenue found it very difficult to stay in Government Home for Children, Kellys, Chennai as she was facing lot of difficulties. Thus, she wanted the detenue to be allowed to stay in the hostel of the college. Mr. P.N. Prakash, Learned Counsel representing P.B. College of Engineering submitted that the college management was having an apprehension to allow her to stay in the hostel in view of certain untoward incidents taken place at the time of remitting the fees in the college. Ms. Geetha Ramaseshan the Learned Counsel appearing for a Non-Governmental Organization known as "TULIR" a voluntary organisation came forward to keep the detenue in the home known as "Mariyala" situated at Pidariyar Koil Street, George Town, Chennai. In the larger interest of the detenue and on considering the submissions made by the Learned Counsel on either side, the detenue was ordered to be accommodated in the said home namely Mariyala until further orders and the detenue was permitted to attend the college from there. The Assistant Commissioner of Police was directed to nominate a woman police constable to accompany the detenue to the college everyday in order to ensure her safety. Accordingly, now she is staying in the home.

7. In this background, this habeas corpus petition was heard at length. Mr. R. John Sathyan, Learned Counsel for the Petitioner, Mrs. Sudha Ramalingam, Learned Counsel for the Respondents 2 and 3 and Mr. M. Maharaja, learned Additional Public Prosecutor advanced elaborate arguments. Taking note of the importance of the questions referred to this Full Bench, we requested Mr. P.N. Prakash, the Learned Counsel to assist this Court as Amicus Curiae and accordingly, he rendered assistance.

8. Since the parties to the marriage in this case are admittedly Hindus, we confine our discussion in the context of the laws applicable to Hindus alone. Now let us commence our task to answer the questions under reference.

9. To trace the history of the child marriages, we have to state that until the introduction of the "Child Marriage Restraint Act, 1929" child marriages were prevalent in India among Hindus in abundance and there was no mechanism even to discourage the same. Such marriages were all recognized as valid. But, the ill-effects of the child marriage was taken note of even during the colonial period which prompted the law being brought into force to restrain the child marriages by enacting the "Child Marriage Restraint Act, 1929". A reference to the said Act would go to show that the said Act, was enacted to carry forward the reformists movement of prohibiting child marriages. While it made a marriage in contravention of the provisions of the Act punishable, simultaneously it did not render the marriage void. It needs to be emphasized that voidness of marriages is statutorily provided and the same is not to be readily inferred. Thus even after the advent of the Child Marriage Restraint Act such marriages were recognized as valid marriages.

10. Subsequently, the Hindu Marriage Act, 1955 came into being with effect from 18.05.1955. Section 4 of the said Act states that save as otherwise expressly provided in this Act, any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act. But, no inconsistency could be noticed between the provisions of the Hindu Marriage Act, 1955 and that of the Child Marriage Restraint Act, 1929. Both the Acts coexist.

11. Section 5 of the Hindu Marriage Act, as it was originally brought into force, contained six clauses as follows:

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party

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

or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(iii) the bridegroom has completed the age of (twenty-one years) and the bride the age of (eighteen years) at the time of the marriage;

(Emphasis supplied)

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

(vi) Where the bride has not completed the age of eighteen years, the consent of the guardian in the marriage if any has been obtained for the marriage.

(The sub Clause (vi) was repealed by the Child Marriage Restraint Act, 1978 w.e.f. 01.10.1978)

12. The effect of violation of the conditions enumerated in Section 5 of the Hindu Marriage Act are dealt with in Sections 11 and 12 of the Act. According to Section 11, any marriage solemnized after the commencement of the Act shall be null and void and may, on a petition presented by either party thereto, against the other party, be

so declared by a decree of nullity if it contravenes any one or more of the conditions specified in Clauses (i), (iv) and (v) of Section 5.

13. Similarly, Section 12 of the Hindu Marriage Act speaks of a voidable marriage which reads as follows:

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(a) that the marriage has not been consummated owing to the impotence of the Respondent; or

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

(c) that the consent of the Petitioner, or where the consent of the guardian in marriage of the Petitioner (was required u/s 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)) the consent of such guardian was obtained by force (or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the Respondent); or

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

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

(a) on the ground specified in Clause (c) of Sub-section (1), shall be entertained if.

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

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

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

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

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

(iii) that marital intercourse with the consent of the Petitioner has not taken place since the discovery by the Petitioner of the existence of (the said ground)

14. A close reading of these two provisions would go to show that a marriage solemnized in violation of Sub-section (iii) of Section 5 of the Hindu Marriage Act has not been declared either as void or voidable. The marriage which falls within the ambit of Section 11 has been held to be void from its very inception (vide Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another, . So far as a voidable marriage as provided in Section 12 of the Act is concerned, the said marriage may be annulled by a decree of nullity on any one or more of the grounds enumerated thereunder. Since the Hindu Marriage Act as well as the Child Marriage Restraint Act do not declare a marriage of a minor either as void or voidable, such a child marriage was treated all along as valid. There were number of judicial pronouncements to this effect. In this legal scenario, The Hindu Minority and Guardianship Act also provided that the husband of a minor wife is her natural guardian.

15. While so, it was felt that the Child Marriage Restraint Act, did not achieve the desired result. Despite the punishment provided for child marriages, and despite making the punishment more stringent, the menace of child marriage could not be completely eradicated. There were demands from various quarters for making an effective law for this purpose. The Law Commission also recommended for such a law. Responding to the same, at last, with effect from 10.01.2007, "The Prohibition of Child Marriage Act, 2006" was brought into force thereby repealing The Child Marriage Restraint Act, 1929. As envisaged in Section 1 of the said Act, it extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India; provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry. It is manifestly clear that this Act is secular in nature which has crossed all barriers of personal laws. Thus, irrespective of the personal laws, under this Act, child marriages are prohibited.

16. The term "child" has been defined in Section 2(a) of the said Act which states that "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. This provision is in pari materia with Sub-section (iii) of Section 5 of the Hindu Marriage Act. One of the important and salient features of the Prohibition of Child Marriage Act, 2006 is that Section 3 of the Act declares that every child marriage, whether solemnized before or after the commencement of the said Act shall be voidable at the option of the contracting party who was a child at the time of the marriage; provided that petition for annulling the child marriage by a decree of nullity may be filed in the District Court only by the contracting party to the marriage who was a child at the time of the marriage. Section 3 of the Prohibition of Child Marriage Act reads as follows:

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.

17. This is a great departure made by this Act from the Hindu Marriage Act. When the Prohibition of the Child Marriage Act, 2006 was enacted, the parliament was aware of the provisions of Sections 5, 11, 12 and 18 of the Hindu Marriage Act. By declaring that the Prohibition of Child Marriage Act shall apply to all citizens, the parliament has intended to allow the Prohibition of Child Marriage Act to override the provisions of the Hindu Marriage Act to the extent of inconsistencies between these two enactments. This is manifest from the statement of Objects and Reasons of the Prohibition of Child Marriage Act, 2006 which read as follows:

The Child Marriage Restraint Act, 1929 was enacted with a view to restraining solemnisation of child marriages. The Act was subsequently amended in 1949 and 1978 in order, inter alia, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnisation of child marriages yet it does not declare them to be void or invalid. The solemnisation of child marriages is punishable under the Act.

2. There has been a growing demand for making the provisions of Act more effective and the punishment thereunder more stringent so as to eradicate or effectively prevent the evil practice of solemnisation of child marriages in the country. This will enhance the health of children and the status of women. The National Commission for women in its Annual Report for the year 1995-96 recommended that the Government should appoint Child Marriage Prevention Officers immediately. It further recommend that (i) the punishment provided under the Act should be made more stringent; (ii) marriages performed in contravention of

the Act should be made void; and (iii) the offences under the Act should be made congnizable.

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

18. A close reading of the above objects and reasons of the Prohibition of Child Marriage Act,would keep things beyond any pale of doubt that the Prohibition of Child Marriage Act is a special enactment for the purpose of effectively preventing the evil practice of solemnisation of child marriages and also to enhance the health of the child and the status of women, whereas, the Hindu Marriage Act is a general law regulating the Hindu marriages. Therefore, the Prohibition of Child Marriage Act, being a special law, will have overriding effect over the Hindu Marriage Act to the extent of any inconsistency between these two enactments. In view of the said settled position, undoubtedly, Section 3 of the Prohibition of Child Marriage Act will have overriding effect over the Hindu Marriage Act.

19. But, the Division Bench which decided the case in G. Saravanan v. The Commissioner of Police, Trichy City and Ors., 2011 2 L.W. (Cri.) 114 held that such a child marriage solemnised between two Hindus is neither void nor voidable, but valid. After having referred to Section 5, 11, 12 and 18 of the Hindu Marriage Act, the Division Bench in Saravanan''s case has held as follows:

15. A Hindu marriage which is not a void marriage under HMA would continue to be such, provided the provisions of Section 12 of the Prohibition of Child Marriage Act, 2006 are not attracted. In the case in hand, none of the circumstances specified in Section 12 arises.

16. Therefore, the marriage between these two is not void or voidable or invalid and it would also be unaffected by the provisions of the Prohibition of Child Marriage Act, 2006

(Emphasis supplied)

20. We find it hard to agree with the above above observation of the Division Bench for, the marriage of a child (minor girl) shall certainly be affected by Section 3 of the Prohibition of Child Marriage Act and thus the said child marriage is voidable. After extracting Section 3 of the Prohibition of Child Marriage Act, the Division Bench, in paragraph 18 & 19 has held as follows:

18. The above provision makes it very clear that irrespective of whether the child marriage is voidable or not under Personal Law, makes every child marriage

voidable at the option of a party to the marriage, who was a child at the time of marriage. The important aspect of this provision is that a petition for annulling a child marriage by a decree of nullity can be filed only by a party to the marriage, who was a child at the time of marriage. Nobody other than a party to the marriage can petition for annulment of the marriage.

19. In the instant case, the marriage of the detenue with the Petitioner is neither void nor voidable nor invalid under both Act, HMA and the Prohibition of Child Marriage Act, 2006 as no petition was filed u/s 3 of Prohibition of Child Marriage Act, 2006 by the detenue who is still a minor....

(Emphasis supplied)

21. From a reading of the above, we infer that probably the Division Bench was of the view that if only a petition is filed u/s 3 of the Prohibition of Child Marriage Act, the said marriage will be voidable. We are unable to agree with the said conclusion arrived at by the Division Bench. In our considered opinion, the marriage shall remain voidable (vide Section 3) and the said marriage shall be subsisting until it is avoided by filing a petition for a decree of nullity by the child within the time prescribed in Section 3(3) of the Prohibition of Child Marriage Act. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a petition is not filed before the District Court u/s 3(1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period as provided in Section 12(3) occurs, the marriage shall continue to remain as a voidable marriage. If the marriage is annulled as per Section 3(1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time.

22. As per Section 11 of the Hindu Marriage Act, any marriage solemnized in violation of Clause (i) (iv) and (v) of Section 5 of the Hindu Marriage Act is void and the same may be declared by a decree of nullity, whereas u/s 12 of the Hindu Marriage Act, a voidable marriage may be annulled by a decree of nullity. The different expressions used in these two provisions cannot go unnoticed. So far as Section 11 of the Hindu Marriage Act is concerned, the marriage is not annulled and is only declared as void by a decree of nullity. Thus, what is done by the court is only a declaration and not annulment of marriage. But, u/s 12 of the Hindu Marriage Act, since the marriage is not void ab initio, the same requires to be annulled by a decree of nullity. Here, it is not declaration but a positive act of annulment of the marriage by a decree of nullity. Similarly, u/s 3 of the Prohibition of Child Marriage Act also, the court annuls the marriage by a decree of nullity. Thus, Section 12(1) of the Hindu

Marriage Act and Section 3(1) of the Prohibition of Child Marriage Act are in pari materia. Therefore, unless there is a positive decree passed by the competent court annulling the child marriage, the marriage shall be subsisting.

23. At this juncture, we may usefully refer to ''Mulla on principles of Hindu Law'' (14th Edition). While discussing about voidable marriages he has observed as follows:

The scheme of the Act is to treat the marriage as valid, void and voidable. Attention has been drawn for the interlocutory note to the distinction between a marriage void ipso jure and a marriage which is voidable at the instance of one of the parties to the same. A voidable marriage remains valid and binding and continues to subsist for all purposes, unless a decree is passed by the court annulling the same on any of the grounds mentioned in the Section. The grounds it will be noticed involve the elements of incapacity of either spouse to consummate the marriage, want of mental capacity of the spouses, absence of free consent of the parties or of a guardian in marriage in case of a bride who had not completed the age of eighteen years at the time of marriage and suppressio veri by a woman, who was pregnant at the time of marriage.

24. Hindu Law on marriages classifies the marriages into three categories namely, ''valid marriage'', ''void marriage'' and ''voidable marriage''. Though it is observed in Mulla that a voidable marriage remains valid and binding and continues to subsist for all purposes, unless a decree is passed by the competent court annulling the same, surely, we believe, he has not meant that a ''voidable marriage'' is a ''valid marriage'' in its stricto sensu as the expression denotes. Here, the term "valid" denotes the converse of the term "invalid". In other words, a voidable marriage is not invalid. But, at the same time, it cannot be construed stricto sensu that it is a ''valid marriage'' as per the classification referred to above. In our considered opinion, so far as the victim of the voidable marriage at whose option the marriage can be annulled is concerned, all rights emanating from a valid marriage will enure in favour of her / him. But, so far as the other spouse is concerned, the said marriage shall confer only limited rights upon him/her. But at the same time, it would impose all legal liabilities upon him/her towards the other spouse who is the victim of the voidable marriage. For example, if a minor girl is married to a boy aged more than 21 years, as per the Prohibition of Child Marriage Act, undoubtedly, the marriage is a child marriage and, therefore, the same is voidable. From out of the said voidable marriage, the minor girl will acquire all the rights against the male contracting party which are otherwise available to a wife of a valid marriage. But, the male contracting party who has contracted the minor''s marriage will not acquire all the rights which would otherwise emanate from a valid marriage as against the wife except certain limited rights. However, it will impose all liabilities upon the male contracting party such as liability to maintain the victim of the child marriage, liability to provide shelter and liability to afford protection, etc. For

instance, if the female child contracting the marriage declines to live in the matrimonial home and prefers to live elsewhere either with parents or with somebody else, the male contracting party will not have right to obtain a decree u/s 9 of the Hindu Marriage Act for restitution of conjugal rights. Similarly, until the female (child) attains the age of 18 years, the male cannot file a petition for divorce on any ground. If the marriage is construed to be valid stricto sensu as per the classification referred to above such rights under Sections 9 and 13 of the Hindu Marriage Act will very much be available to the male. Because the marriage remains to be voidable and the same is not valid stricto sensu, though out of the said marriage the male (major) burdens himself with liabilities towards his minor wife (child), he does not acquire all the rights against his wife like any husband of a valid marriage. This is the basic difference between a valid marriage stricto sensu and a voidable marriage. Therefore, the observation by Mulla that a voidable marriage remains valid and binding and continues to subsist shall not be understood that the marriage is a valid marriage stricto sensu as per the classification referred to above. In other words, a voidable marriage will not fall within the classification of valid marriages. The expression ''valid'' used therein is a lose language and not in its strict legal sense.

25. For better understanding of the legal position, at this juncture, we may have a look into the scheme of the Hindu Marriage Act. The expressions ''husband'' and ''wife'' have not been defined anywhere in this Act. But, in Sections 9 and 13 of the Act these two expressions have been used. Incidentally, we may notice that, reliefs under Sections 9 and 13 of the Act are available only to parties to a valid marriage. It is by virtue of such valid marriage, the parties to the marriage acquire the status of husband and wife. Obviously, this is the reason why, in Sections 9 and 13 of the Act, the legislature used the expressions ''husband'' and ''wife''. But, the legislature has intentionally omitted to use these expressions viz., husband and wife in Sections 11 and 12 of the Act. In Section 11, the expression used is ''either party thereto against the other party''. In Section 12, the expressions used are ''Petitioner'' and ''Respondent''. There can be no doubt that parties to a void marriage do not acquire the status of husband and wife at all since the marriage is ipso jure void. It is because of this reason, in Section 11 of the Act, the legislature has consciously omitted the expressions ''husband'' and ''wife'' and instead has used the expressions ''either party thereto against the other party''. Similarly, in Section 12 of the Act, had it been the intention of the legislature to give the parties to a voidable marriage, the full status of husband and wife, the legislature would have used the expressions ''husband'' and wife''. The omission to use these two expressions in Section 12 perhaps, would only reflect the intention of the legislature not to give the full status of the husband and wife to the parties to a voidable marriage, like the spouses of a valid marriage. Sections 9 and 13 are in pari materia in so far as the expressions referable to the parties to the marriage are concerned, whereas Sections 11 and 12 are in pari materia in terms of the expressions referable to the parties to a voidable

marriage. If we look into the provisions of the Prohibition of the Child Marriage Act, it is obvious that here also, the legislature has consciously omitted the expressions ''husband'' and ''wife''. In particular, in Section 3 of the Act, the expression ''contracting party'' has been used. The term ''contracting party'' is defined in Section 2(c) of the Act which states that a contracting party, in relation to a marriage means either of the parties whose marriage is or about to be thereby solemnized. Thus, to some extent, Section 3 of the Prohibition of Child Marriage Act is in pari materia with Sections 11 and 12 of the Hindu Marriage Act insofar as the expressions referable to the parties to the marriage are concerned. This would again go to strengthen our conclusion that the male who contracts a child marriage of a female child cannot attain the full status of a husband like a husband of a full fledged valid marriage. To repeat, by the said marriage, though he burdens himself with legal liabilities arising there from, he acquires only limited rights as we have illustrated above.

26. But, in Saravanan''s case cited supra, the Division Bench has held that such a marriage between a boy aged more than 21 years and a girl aged less than 18 years is not voidable. In other words, according to the Division Bench such a child marriage celebrated in contravention of the Prohibition of Child Marriage Act is a valid marriage. With respect, we are of the opinion that it is not a correct interpretation. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child marriage is only voidable. Therefore, we hold that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a court of law, such voidable marriage, cannot be either stated to be or equated to a ''valid marriage'' stricto sensu as per the classification referred to above. Accordingly, we answer the first part of the 1st question referred to above.

27. Let us now take up for consideration the later part of the 1st question referred to us which states as to whether the custody of the said girl be given to the husband (if he is not in custody). This question is inter-linked with the 2nd question which states as to whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody. Therefore, we deal with these two together.

28. As per the Hindu Minority and Guardianship Act, 1956, in the case of an unmarried girl the father shall be the natural guardian and after him the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. As per Sub-Section 6(c) of the Hindu Minority and Guardianship Act, in the case of a married minor girl, the husband shall be the natural guardian.

29. Undoubtedly, in the case of a void marriage under the Hindu Marriage Act, since the same is void ab initio, the parties never attain the status of the husband and

wife. Similarly, u/s 12 of the Prohibition of Child Marriage Act, a child marriage in certain circumstances has been declared as void. Therefore, a child marriage which falls within the ambit of Section 12 of the Act also shall not give the status of husband and wife to the parties to the child marriage. The male who contracts a marriage with a female child falling within the ambit of Section 12 is not a husband of the minor in the legal sense and, therefore, as per The Hindu Minority and Guardianship Act, he will not acquire the status of the natural guardian of such child at all.

30. But, in the case of a voidable marriage, whether the male contracting party to the marriage will attain the status of husband for the purposes of Section 6 of the Hindu Minority and Guardianship Act needs to be carefully analyzed.

31. This requires a great deal of discussion on the legislative history of the Hindu Minority and Guardianship Act. As we have already seen, a child marriage was recognized as a valid marriage in Hindu Law despite the implementation of the Child marriage Restraint Act, 1929. Even in the Hindu Marriage Act, 1955 as it was originally brought into force as per Clause (vi) of Section 5 of the Act, the child marriage was recognized as a valid marriage by the said express provision. Thus, between 1955 to 1978 by virtue of the express provision relating to the child marriage such marriage was recognized as a valid marriage. With effect from 01.10.1978, since Section 5(vi) and Section 6 of the Hindu Marriage Act were repealed, there was no other express provision declaring the child marriages as valid. However, Courts have held that such child marriages are valid because Section 5(iii) was not brought within the ambit of either Section 11 or Section 12 of the Hindu Marriage Act. For the first time, as a reformists measure, child marriages have been declared as voidable marriages only under the Prohibition of Child Marriage Act. It is noticeable that though the National Commission for Women recommended for making a provision to declare such child marriages as void marriages, the Parliament in its wisdom made it only a voidable marriage. Thus, it is crystal clear that child marriages were recognized as valid marriages till 10.01.2007 and thereafter, they have been declared as voidable whether solemnised before or after the commencement of the Act. As we have seen, the scenario prior to the advent of the Hindu Marriage Act, 1955, was that the child marriages were all recognized as valid in law.

32. The Hindu Minority and Guardianship Act came into effect from 25.08.1956. The scenario as on the date of coming into force of the said Act was that as per the express provisions contained in Section 5(vi) and Section 6 of the Hindu Marriage Act, the marriage of a child was valid and thus the male spouse of the said marriage undoubtedly acquired the status of the husband. Therefore, while enacting the Hindu Minority and Guardianship Act, 1956, the Parliament rightly thought it fit to make the husband of the minor wife as the natural guardian. Section 6(c) of the said Act states that the natural guardian of a married minor girl shall be the husband.

Thus, on such marriage, the husband would replace the father and the mother from the natural guardianship. Now the entire scenario has changed after the advent of The Prohibition of Child Marriage Act,2006. As we have already noticed, as per Section 3 of the Prohibition of Child Marriage Act, since the marriage is voidable, the bridegroom of the female child who had procured the marriage will not attain the status of the husband like that of any other husband of a valid marriage and, therefore, u/s 6(c) of the The Hindu Minority and Guardianship Act, he cannot be the natural guardian. However, when the Parliament took note of the provisions of the Hindu Marriage Act and amended even Section 18 of the Act by Act 6 of 2007 it did not think it fit to amend Section 6(c) of The Hindu Minority and Guardianship Act. Though Section 6(c) has not been repealed and though the same is in the statute book, still, the same is to be re-looked in the present scenario, more particularly, in the context of the Prohibition of Child Marriage Act. There have been several studies conducted and papers submitted on the ill-effects of child marriages. In one such study paper let by one Dr. Anitha Raj, a Doctor at Boston University School Public Health in Massachusetts she says:

Child marriage has serious consequences for national development, stunning education and vocational opportunities for a large sector of the population. Furthermore, marriage at a very young age has grave health consequences for both the young women and their children.

33. Almost it is widely accepted world over that child marriage is a human rights violation. Consummation at the young age affects the health of the girl as well as the children born out of the said child marriages. It is because of these reasons, more stringent law by way of the Prohibition of Child Marriage Act was put in place. In this totally changed scenario since we are called upon to interpret the law, we have no hesitation to hold that Section 6(c) of the Hindu Minority and Guardianship Act, impliedly stands repealed by the provisions of the Prohibition of Child Marriage Act and so, it cannot be held any more that the bridegroom of a marriage with a female child is the natural guardian of such minor female child.

34. We may also state that since a child marriage as defined in the Prohibition of Child Marriage Act itself is an offence and the same is cognizable, it does not require any complaint to the police to register a case and to investigate. On any information regarding such a child marriage, the Police has got a legal duty to register a case and to prosecute the offender by filing an appropriate final report. If the contracting party to the marriage of a female child is a male who is not a child undoubtedly, he is an offender punishable u/s 9 of the Act. The scheme of the Act would go to show that punishment has been provided only against an adult male marrying a female child but an adult female marrying a male child is not an offender as she does not fall within the ambit of Section 9 of the Act. Sections 10 and 11 provide for punishment for solemnising a child marriage and promoting or permitting solemnisation of child marriages. So, it needs to be underscored that only the male

namely the husband is liable to be punished and not the girl whether child or an adult. This scheme of the Act would also go to support the view that an adult male who marries a female child cannot be allowed to enjoy the fruits of such marriage because the solemnisation of the marriage itself is an offence insofar as the male is concerned. If we have to accept the contention that as per Section 6(c) of the Hindu Minority and Guardianship Act, the husband of a female child shall be the natural guardian, it will only amount to giving premium for the offence committed by the male. When the law aims at eradicating the evil menace of child marriages, declaring the adult male who marries a female child, as her natural guardian would only defeat the very object of the Act. A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence punishable u/s 9 of the Act, the adult male cannot acquire the legal status of the natural guardian of the female child. In view of these discussions, we hold that Section 6(c) of the Hindu Minority and Guardianship Act stands impliedly repealed by the Prohibition of Child Marriage Act. Therefore, we conclude that an adult male who marries a female child in violation of Section 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child.

35. With the aforesaid conclusion, let us now move on to the question of custody of a female child whose marriage has been procured in violation of the provisions of the Prohibition of Child Marriage Act. As per Section 2 of the The Hindu Minority and Guardianship Act, the provisions of the same shall be in addition to and not in derogation of The Guardians and Wards Act, 1890. There is no specific provision made in The Hindu Minority and Guardianship Act in respect of custody of a wife, who is a child. But, u/s 12(3) of the Guardians and Wards Act, the court namely, the District Court shall not place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with consent of her parents, if any. This provision makes it abundantly clear that even assuming that as per Section 6(c) of The Hindu Minority and Guardianship Act, the husband is the natural guardian, even then, temporary custody of the minor wife cannot be given to him unless she is already in his custody with the consent of her parents. Thus, unless these twin conditions namely, the consent of her parents and being in the custody already are satisfied, even the temporary custody of a female child cannot be entrusted to her husband. After the advent of the Prohibition of Child Marriage Act, the vigor of Section 12(3) is more. When the competent court namely, the District Court itself has not been authorised to entrust the custody of a minor wife to her husband, unless the twin conditions are satisfied, it is needless to point out that after the advent of the Prohibition of Child Marriage Act, until the female child of such child marriage elects to accept the marriage on attaining the age of 18 years, her custody cannot be entrusted to the male party to the marriage more so because he is not the natural guardian of the female child.

36. In this regard, let us now have a look into various judicial pronouncements. In Muthuswami Chettiar and Another Vs. K.M. Chinna Muthuswami Moopanar, , a Division Bench of this Court while considering the question of custody of a minor child which was claimed by the father u/s 25 of the Guardians and Wards Act, 1890, among other things, this Court held as follows:

...It was also held that both according to the Hindu law and English law a father is the natural guardian of his children during their minority and has therefore a paramount right to the custody of his children of which he cannot be deprived unless it is clearly shown that he is unfit to be their guardian Each case must depend upon its own circumstances, and however paramount the right of a father may be, that right in our opinion is liable to be defeated where it is shown that it is better in the interests of the minor and for its welfare that it should remain where it is....

37. A close reading of the above judgment in its entirety would make one to understand that simply because an individual happens to be a natural guardian or guardian of any other category, he does not have indefeasible right to have the custody of the minor. Being a natural guardian is only one of the factors which needs to be taken while considering the question of custody. All the circumstances prevailing put together should be weighed and the court should decide as to how the interests of the minor and his welfare could be well protected by granting custody.

38. The above judgment of the Madras High Court was approved by the Hon''ble Supreme Court in Smt. Anjali Kapoor Vs. Rajiv Baijal, . In paragraph 18 of the said judgment the Hon''ble Supreme Court while making a reference to the judgment of the Madras High Court in Muthuswami Chiettiar v. K.M. Chinna Muthuswami Moopanar, has observed as follows:

18. At this stage, it may be useful to refer to the decision of Madras High Court, to which reference is made by the High Court in the case of Muthuswami Chettiar and Another Vs. K.M. Chinna Muthuswami Moopanar, , wherein the Court has observed, that, if a minor has for many years from a tender age lived with grand parents or near relatives and has been well cared for and during that time the minor''s father has shown a lack of interest in the minor, these are circumstances of very great importance, having bearing upon the question of the interest and welfare of the minor and on the bona fides of the petition by the father for their custody. In our view, the observations made by the Madras High Court cannot be taken exception to by us. In fact those observations are tailor-made to 7 the facts pleaded by the Appellant in this case. We respectfully agree with the view expressed by the learned Judges in the aforesaid decision.

In paragraph 15 of the said judgment, the Hon''ble Supreme Court has held as follows:

15. Under the Guardians and Wards Act, 1890, the father is the guardian of the minor child until he is found unfit to be the guardian of the minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law (See Sumedha Nagpal Vs. State of Delhi and Others,

39. In Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42, the Hon''ble Supreme Court in para 8 has held as follows:

Whenever a question arises before Court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of parties but on the sold and predominant criterion of what would best serve the interest and welfare of the minor. We have twice interviewed Dustan in our Chambers and talked with him. We found him to be too tender in age and totally immature to be able to form any independent opinion of his own as to which parent he should stay with. The child is an American citizen. Excepting for the last few months that have elapsed since his being brought to India by the process of illegal abduction by the father, he has spent the rest of his life in the United States of America and he was doing well in school there. In our considered opinion, it will be in the best interests and welfare of Dustan that he should go back to the United States of America and continue his education there under the custody and guardianship of the mother to whom such custody and guardianship have been entrusted by a competent court in that country.

40. In these judgments, the Hon''ble Supreme Court has clearly laid down that irrespective of the legal rights of an individual, such as guardianship, when the question of custody of a minor child comes up for consideration before a court of law, the court is concerned with the paramount interest and welfare of the minor rather than considering the legal right of the parties fighting before the court for custody.

41. Very recently, in Ruchi Majoo Vs. Sanjeev Majoo, , the Hon''ble Supreme Court in para 58 has held as follows:

Proceedings in the nature of habeas corpus are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by the parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its parens patriae jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views that rival claims, if any, to such custody.

42. In the aforesaid judgment, the Hon''ble Supreme Court has followed Elizabeth Dinshaw''s case with approval. Thus, the Hon''ble Supreme Court has categorically

laid down that even while exercising its writ jurisdiction, the High Courts using its extraordinary jurisdiction may determine the validity of the detention and pass an appropriate custody of the minor having regard to paramount interests and welfare of the minor child.

43. In Gaurav Nagpal Vs. Sumedha Nagpal, , after making a thorough survey of various provisions of The Hindu Minority and Guardianship Act, Guardians and Wards Act and various judgments, the Hon''ble Supreme Court in paragraph 35 has held as follows:

35. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the ''welfare of the child'' and not rights of the parents under a statute for the time being in force.

In paragraph 43 of the aforesaid judgment, the Hon''ble Supreme Court has held as follows:

43. The word ''welfare'' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weight with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians maybe taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases.

44. A Division Bench of Gujarat High Court in Patel Verabhai Kalidas Vs. State of Gujarat, , has extensively considered the behavior pattern of the children of age group 15 and 18 while considering the welfare of such children and has held has follows:

It is well settled that in matter concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. See Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, . and '' what is truly the welfare of minor'' has to be seen. See Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, .

Now in the present case we are clearly of the opinion that welfare and liberty of the minor girl are and will better be attended to and protected in the institution in which she has been staying under the orders passed by this Court from time to time during the last more than a month.

A minor girl between her 15 to 18 years of age floats into a state of puberty, a state of innocence and yet lacking in mature understanding more guided by ''attractions''. The state of mind can hardly be described as mature. If that be not so, she can hardly leave her parents for a new entrant in her life, without being mindful of what the type of such new entrant in the life is. We cannot resist expressing our concern at the manner in which such girls are being cajoled and entrapped so as to see them

out of their parental home at a premature point of time. Here the third Respondent is aged around 28 years. Though according to him he is a divorcee, the first wife having committed suicide, he has described himself to be unmarried in the marriage registration form. One can hardly find any welfare of the minor girl in his association.

45. A Division Bench of this Court in N. Babu v. Sub Inspector of Police, 2000 (3) MWN Cri 69, had occasion to consider the question of custody of a minor girl as between the husband and the parents. While exercising the jurisdiction under Article 226 of the Constitution of India, in a habeas corpus proceeding, the Division Bench presided over by Hon''ble Mr. Justice V.S. Sirpurkar (as he then was) held as follows:

Again the question of marriage and the plea of marriage at this stage has no meaning for the simple reason that it is not known under what circumstances the consent for the marriage has been given. There is no question of a consent by the minor. For all practical purposes in law, the father and the mother who are the natural parents of the minor would alone be the natural guardian and at this stage when it is not decided as to whether the second Respondent was justified in taking the girl along with him. If the girl is allowed to stay with the second Respondent it would be giving an advantage to the second Respondent of his own wrong which may not be possible for this Court. The question as to who is the natural guardian, as to whether the marriage is proper or not, as to whether the second Respondent was justified in taking the minor along with him, are not questions in the purpose of this Court present. Presently, it is to be seen as to whether the minor girl should be allowed to stay with a person who is facing a charge of her abduction or kidnapping as the case may be. We are of the opinion that it may not be possible for us to allow the minor girl to stay with a person who is facing the charge u/s 366-A and or 363 of Indian Penal Code for taking away of that very person. We therefore, direct the girl Amudha who is secured and is present in the court shall be put in the custody of her parents, if necessary with the aid of the police. At this stage, the Learned Counsel for the second Respondent expresses, an apprehension that the parents may harm the minor and might act against her own interests. The learned Additional Public Prosecutor assures us that a close monitoring will be made by the police for the welfare of the girl. The parents are specifically warned not to treat the minor girl in any manner prejudicial to her welfare including getting her married against her wishes.

46. In Avinash Singh v. State of Karnataka, (CDJ 2011 KAR. HC 373), a Division Bench of Karnataka High Court, after noticing the provisions of Section 5 of the Hindu Marriage Act, 1955 and the provisions of Sections 361 and 363 of Indian Penal Code while considering the case of a minor girl married by an adult boy, the Bench dismissed the petition filed by the husband on the ground that the boy had committed an offence u/s 361 of Indian Penal Code and therefore, he was not

entitled for the custody of the minor girl.

47. But, a quite contrary view was taken by a Division Bench of Delhi High Court in Jitender Kumar Sharma v. State and Anr. 2010 INDLAW DEL 1904 wherein the Delhi High Court held as follows:

A reading of the 1890 Act and 1956 Act together reveals the guiding principles which are to be kept in mind when considering the question of custody of a minor hind. We have seen that the natural guardian of a minor hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor. (See Smt. Anjali Kapoor Vs. Rajiv Baijal, .

48. In our considered opinion, the judgment of the Division Bench of Delhi High Court does not persuade us more so because the Division Bench did not notice the reference pending in Lajja Devi v. State. Subsequently, another Division Bench of the Delhi High Court took notice of Lajja Devi''s case as well as Jitendar Kumar Sharma''s case and held in the case of Association for Social Justice and Research v. Union of India (decided on 13.05.2010), having regard to the provisions of the Prohibition of the Child Marriage Act, 2006 and after having taken note of the Sociological and psychological as well as physiological aspects of such marriages and their consequences, the Bench did not agree with Jitendar Kumar Sharma''s case. Thus, so far as the Delhi High Court is concerned, there are conflicting views taken by two different Division Benches and the matter is pending before a larger Bench on reference.

49. A close reading of the above judgments would clearly go to indicate that before the introduction of the Prohibition of Child Marriage Act, the courts were almost uniform in their opinion that the husband of a minor child is entitled for the custody of the minor wife. In the post Prohibition of Child Marriage Act scenario we are able to see considerable change in the approach of various High Courts. As we have referred to above a Division Bench of the Karnataka High Court has gone to the extent of declining to grant custody of the minor wife to the husband on the ground that the husband is an offender. In view of the said position, we are of the view that it will be very safe to hold that after the advent of the Prohibition of Child Marriage Act since the male contracting party to a child marriage does not attain the full status of the husband until the child attains the eligible age, like a husband of a full-fledged valid marriage and consequentially since he is not the guardian of the female child of such child marriage, he is not entitled for the custody of the minor. If

a different interpretation is adopted to say that such husband is entitled for the custody of minor wife will only defeat the very object of the Act. This is our answer to the latter part of the 1st question referred to us.

50. Nextly, coming to the question whether a minor could be said to have reached the aged of the discretion, we may refer to Section 17(3) of the Guardians and Wards Act which states that one of the matters to be considered by the court in appointing guardian is, if the minor is old enough to form an intelligent preference, the court may consider that preference also. Whether a minor has attained the intelligent preference is a question of fact which depends upon the capacity of the minor in each case. It cannot be put in a straight-jacket formula. As per the law laid down by the Hon''ble Supreme Court though the wish of the minor is also a factor to be taken into consideration by the Court while deciding the custody of the minor, it is not the only matter which is to be taken into consideration. Therefore, the minor cannot walk away to her whims and fancies from the lawful guardianship of her parents. At this juncture, we may refer to The Tamil Nadu Juvenile Justice (Care and Protection of Children) Rules, 2001 wherein Rule 18 states as follows:

18. Orders that may not be passed (i) No child shall be ordered to be kept in jail or prison.

(ii) No child shall be sent back to family against the wishes of the child who shall have an evolving capacity to determine the concept.

51. The aforesaid rule is almost in pari materia with Section 17 of the Guardians and Wards Act, 1890. Therefore, if the child, who has capacity to determine, expresses her wish not to go with her parents, it may not be appropriate for the court to compel her to go to the custody of her parents. The court may keep her in appropriate custody like, custody in a welfare home for children in need of care and protection set up under the Juvenile Justice (Care and Protection) Act. Here, it should not be misunderstood that the child could be sent either to a special home or an observation home which are meant for juveniles in conflict with law under the Juvenile Justice (Care and Protection of Children) Act. We make it clear that a female child who is a victim of child marriage, if expresses her wish not to go with her parents, the court may direct such female child be kept in a separate home for children in need of care and protection established under the Juvenile Justice (Care and Protection Act) and not in a special home or observation home meant for juveniles in conflict with law. Accordingly, we answer the 2nd question referred to us.

52. The next question is, ''Whether the minor child can be kept in protective custody of the State?'' In our considered opinion, if the welfare of the minor child will be well protected if she is kept in the protective custody of the State, the court can resort to such course also as dealt with in the previous paragraph.

53. The next question is ''Whether the minor girl who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law?'' In our considered opinion, a juvenile in conflict with law is the one who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Here, the minor, who enters into a marriage is not an offender under any of the provisions of the Prohibition of Child Marriage Act, 2006. Neither the minor girl is an offender u/s 18 of the Hindu Marriage Act. The said provision states that ''every person who procures a marriage of himself or herself.....'' is punishable. Here, the minor girl does not procure the marriage and instead her marriage is procured by the others. Thus,, such a minor girl is not a juvenile in conflict with law. Accordingly, we answer the 4th question referred to us.

54. The last question is, "Whether the principles of Sections 17 and 19(a) of the Guardians and Wards Act, 1890, could be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act?" As held by the Hon''ble Supreme Court in the judgments cited supra, Sections 17 & 19 of the Guardians and Wards Act can also be taken for guidance while deciding the question of custody of a minor girl whose marriage has been celebrated. We answer this question accordingly.

55. During the course of analysis of the provisions of the Prohibition of Child Marriage Act, we have come across a serious anomaly in Section 3(3) of the Act which we would like to highlight to draw the attention of the legislature. Sub-Section 3 of Section 3 of the Act reads as follows:

3. Child marriages to be voidable at the option of contracting party being a child: (1)....

(2)....

(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.

56. A plain reading of Sub-section (3) would reflect that a petition under the above Section may be filed at any time but before the child completes two years of attaining majority. When does a child attains the age of majority is not expressly defined in the Act. However, Section 2(f) of the Prohibition of Child Marriage Act denies the term "minor" which reads as follows:

2 (f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed not to have attained his majority

As defined in Majority Act, 1875, a minor, either male or female, attains the age of majority on completing eighteen years of age. Keeping in mind the same, if we again look into Sub-section (3) of Section 3 of the Prohibition of Child Marriage Act, the anomaly in the Act will emerge to light. In the case of a female, as per Sub-section (3) since she attains the age of majority on completing the age of

eighteen years, there can be no difficulty in understanding of the said provision to say that a petition for annulment should be filed within two years of attaining majority, i.e. before completing twenty years of age. But, in the case of a male, any marriage solemnised before he completes the age of twenty one years is a child marriage and the same is voidable. Therefore, he can be expected to file a petition for annulment within two years after attaining the age of twenty-one years. But, Sub-section (3) reads that such petition should be filed when he completes two years of attaining majority which means before completing twenty years of age. For example, if the child marriage of a male takes place on his completing twenty years of age and if a literal interpretation is given to Sub-section (3) of the Prohibition of Child Marriage Act, surely, he will not be in a position to file a petition to annul the marriage. Such literal interpretation in the case of a male would create anomalous situation. It is too well settled that no provision of any law shall be interpreted in such a way to make it either anomalous or unworkable. Therefore, in our considered opinion, Sub-section (3) of Section 3 shall be read that in the case of a male, a petition for annulment of child marriage shall be filed before he completes two years of attaining twenty-one years of age. We are hopeful that the parliament will take note of the above anomaly and make necessary amendment to Sub-section (3) to avoid any more complication.

57. In conclusion, to sum up, our answers to the questions referred to by the Division Bench are as follows:

i. The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent court u/s 3 of the Prohibition of Child Marriage Act. The said marriage is not a ''valid marriage'' stricto sensu as per the classification but it is ''not invalid''. The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.

ii. The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of Section 6(c) of the Hindu Minority and Guardianship Act, 1956.

iii. The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the court to set her at liberty if she is illegally detained by anybody.

iv. In a habeas corpus proceeding, while granting custody of a minor girl, the court shall consider the paramount welfare including the safety of the minor girl not withstanding the legal right of the person who seeks custody and grant of custody in a habeas corpus proceeding shall not prejudice the legal rights of the parties to approach the civil court for appropriate relief.

v. Whether a minor girl has reached the age of discretion is a question of fact which the court has to decide based on the facts and circumstances of each case.

vi. The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court cannot compel her to go to the custody of her parents and instead, the court may entrust her in the custody of a fit person subject to her volition.

vii. If the minor girl expresses her desire not to go with her parents, provided in the opinion of the court she has capacity to determine, the court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice (Care and Protection) Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice (Care and Protection) Act, 2000

viii. A minor girl whose marriage has been contracted in violation of Section 3 of the Prohibition of Child Marriage Act is not an offender either u/s 9 of the Act or u/s 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law.

ix. While considering the custody of a minor girl in a habeas corpus proceeding, the court may take into consideration the principles embodied in Sections 17 and 19(a) of the Guardians and Wards Act, 1890 for guidance.

58. We make it clear that the above answers have been arrived at by us only on discussions in respect of the laws relating to Hindus. Since the parties in this case are Hindus, we have confined our discussions only to the laws relating to Hindus and we have not examined the above questions referred to us in the context of laws relating to other religions.

59. Before concluding this judgment we would like to state that despite several legislations which we have referred to above, the evil menace of child marriages has not been eradicated in toto. Though the Central Government evolved "The National Plan of Action for Children 2005", aiming to eliminate child marriages entirely by the end of the year 2010, the same could not be achieved. Often, we see in news papers incidents of such child marriages including young children of less than ten years of age. There are also reports that there are widows of age group of less than 10 years. Undoubtedly, child marriage is a violation of human rights and it affects the health of the girls as well as the children born to them. We have also come across reports that minor girls and boys induced by infatuation elope resulting in number of habeas corpus petitions filed by the parents. We feel that adequate publicity has not been made to the Prohibition of Child Marriage Act, more particularly, about Section 9 of the Act which provides for punishment up to two years and that the offence is also cognizable and non-bailable. We are hopeful that if police register criminal cases against the offenders and file final reports bringing them to book, the incidents of child marriage can be at least reduced, if not completely eradicated.

Therefore, we direct the Government to give adequate publicity for the Act so that it could reach the people and also to sensitize them through Governmental and Non-Governmental Voluntary Organizations. The police may also be sensitized about their legal obligation to register criminal cases as and when there is information regarding commission of offence of child marriage in violation of the Act. We also direct the Government to ensure that the calendars and prospectus issued by Educational Institutions of and above Higher Secondary Courses including Colleges, both professional and non professional, to incorporate the salient features more particularly, the penal provisions of the Prohibition of Child Marriage Act so as to sensitize the students and parents. We feel, it is high time that the Government instructs the Educational Institutions to conduct counseling classes for the students in their teens and parents to sensitize them of the ill-effects of child marriages.

60. We direct the Registry to place the Habeas Corpus Petition before the Division Bench for disposal.

61. Before parting with this judgment, we would like to record our appreciation to the excellent assistance rendered by Mr. P.N. Prakash, the Learned Counsel who acted as amicus curiae.