

(2015) 09 GUJ CK 0011

In the Gujarat High Court

Case No : Misc. Criminal Application (For Quashing and Set aside F.I.R./Order)
No. 8290 of 2015

Yunusbhai Usmanbhai Shaikh

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Constitution of India, 1950 — Article 13(2), 13(3)(a), 14, 15, 15(1)
Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Dissolution of Muslim Marriages Act, 1939 — Section 2
Dowry Prohibition Act, 1961 — Section 6(1)(c)
Hindu Marriage Act, 1955 — Section 12, 13(2)(iv), 15, 18, 18(a)
Hindu Minority and Guardianship Act, 1956 — Section 13, 6, 6(c)
Majority Act, 1875 — Section 2, 3, 3(2)
Muslim Personal Law (Shariat) Application Act, 1937 — Section 2
Penal Code, 1860 (IPC) — Section 3, 302, 360, 361, 363
Prohibition of Child Marriage Act, 2006 — Section 10, 11, 12, 13, 15
Protection of Children from Sexual Offences Act, 2012 — Section 1(2), 12(a), 13(1), 18, 2(a)
Protection of Women From Domestic Violence Act, 2005 — Section 12, 15

Citation : (2016) CriLJ 717 : (2015) 3 GLR 2512 : (2016) 1 RCR(Civil) 758 :
(2016) 1 RCR(Criminal) 690

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Soeb R. Bhocharia and Valimohammed Pathan, for the Appellant; K.L. Pandya, Addl. P.P., for the Respondent

Judgement

J.B. Pardiwala, J.—Rule. Mr. K.L. Pandya, the learned Additional Public Prosecutor waived the service of notice of Rule for and on behalf of the respondent No. 1. The respondent No. 2 - the original first informant although served with the notice issued by this Court dated 23-6-2015 yet has chosen not to appear before this Court and oppose this application either in person or through an Advocate. By this application under Sec. 482 of the Code of Criminal Procedure, 1973, the applicant-the original accused seeks to invoke the inherent powers of this Court, praying for quashing of the First Information Report bearing CR. No. 1-38 of

2014 registered with the Gayekwad Haveli Police Station, District: Ahmedabad for the offence punishable under Secs. 363 and 366 of the Indian Penal Code (for short, "the I.P.C.") and also for the offence punishable under Sec. 18 of the Protection of Children from Sexual Offences Act (for short, "the P.O.C.S.O. Act").

2. The facts giving rise to this petition may be summarized as under:

2.1. The respondent No. 2 is a resident of Ahmedabad. He has two daughters, namely, Namira aged 16 years and 4 months, and Tahejib aged 10 years. At the time when the First Information Report was lodged, the elder daughter of the first informant, namely, Namira was studying in standard 11th. In the First Information Report, it has been stated that his daughter Namira was in love with the applicant herein. It is further stated that the family members used to persuade Namira to discontinue the relations with the applicant-accused. It is further stated that friends and relatives had also tried to persuade Namira not to keep any relations with the applicant-accused. It has been alleged in the F.I.R. that on 17-4-2015 in the night hours, the applicant-accused enticed the daughter of the first informant, namely, Namira and kidnapped her from the lawful guardianship of the first informant. It is alleged that on the date of the lodging of the F.I.R., Namira was a minor.

3. The applicant-accused has come up with this application, praying for quashing of the F.I.R., mainly on the following grounds:

(1) The first informant, as father of Namira, has admitted in so many words in the First Information Report that his daughter was in love with the applicant-accused.

(2) The first informant has also declared the age of his daughter as 16 years and 4 months on the date when the offence is alleged to have been committed.

(3) According to the applicant-accused, Namira had left her parental home on her own free will and volition and decided to get married with the applicant-accused. Accordingly, the Nikah was performed, and as on today, the applicant-accused and Namira are residing together as lawful wedded husband and wife.

(4) The applicant-accused and Namira are governed by their Personal Law i.e. the Mohammedan Law. A Muslim girl, who is above 15 years of age or has attained puberty, is at liberty to marry even if there is no consent from the parents.

(5) Article 251 of the Mohammedan Law deals with the capacity for marriage.

(6) Article 348 deals with the age of majority.

(7) According to the applicant-accused, no offence could be said to have been committed in view of the decision of this Court in the case of *Mujamil Abdulsattar Mansuri Vs. State of Gujarat and Others* .

(8) Mr. Soeb R. Bhocharia, the learned Counsel appearing for the applicant-

accused submitted that even if the entire case of the first informant is accepted as true, none of the ingredients to constitute the offence of kidnapping are spelt out.

(9) He submitted relying on the decision of this Court in the case of Mujamil (supra) that the continuation of the investigation by the police would be nothing, but an abuse of the process of law.

4. On the other hand, this application has been vehemently opposed by Mr. Pandya, the learned Additional Public Prosecutor appearing for the respondent-State of Gujarat. He pointed out that in the decision of this Court referred to above and which has been strongly relied upon, the provisions of the Majority Act were looked into in details, but there is no reference of the effect of the provisions of the Prohibition of Child Marriage Act, 2006 (for short, "the P.C.M. Act, 2006"). Mr. Pandya submitted that the decision of this Court in the case of Mujamil (supra) needs to be re-looked in light of the conflict between the Muslim Personal Law and the provisions of the Prohibition of Child Marriage Act, 2006.

5. He submitted that the Prohibition of Child Marriage Act, 2006 is a Special Act and it does not distinguish between the accused according to his community. A Muslim boy or any other person of the Muslim community is covered by the provisions of the Prohibition of Child Marriage Act, 2006. He submitted that the P.C.M. Act has the application for all the people belonging to all religions and regions. The only exception made is in the case of State of Jammu and Kashmir. He brought to my notice the provisions contained in Sec. 1(2) of the P.C.M. Act, 2006, which reads as under:

"1. Short title, extent and commencement-

(1)

(2) It extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens without and beyond India:

Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry."

6. Mr. Pandya submitted that the consequences of committing the offence under the P.C.M. Act cannot be avoided on the ground of the offender belonging to a particular religion.

7. He submitted that the statute can always extinguish the customary law and the customary right. Mr. Pandya relied on the decision of the Supreme Court in the case of High Court of Delhi and Another Vs. A.K. Mahajan and Others, , wherein it was held that a divorced Muslim woman is entitled to claim the maintenance from her husband under Sec. 125 of the Code of Criminal Procedure even after the expiry of the Iddat period so long as she does not remarry. Just because her Personal Law provides for the award of the maintenance only during the Iddat period, the maintenance cannot be restricted to the Iddat period only.

8. He submitted that considering the above, the decision of this Court in the case of Mujamil (supra) is not a good law. He submitted that what is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. Mr. Pandya severely criticized the Muslim Personal Law which permits a Muslim girl having attained the age of 15 or puberty to get married even without the consent of her parents. He submitted that the object behind enacting the P.C.M. Act was to curb the menace of child marriage; which is still prevalent in this Country. He submitted that the marriage of the applicant-accused with Namira is in violation of the provisions of the P.C.M. Act, 2006, inasmuch as Namira is minor being below the age of 18 years. He submitted that Namira might have fallen in love with the applicant-accused, who is 12 years elder to her, without understanding the implication of such marriage. He submitted that Namira could not be said to be psychologically or physically fit to get married. He submitted that consent of Namira is hardly of any consequence so far as the P.C.M. Act is concerned.

9. In such circumstances, referred to above, Mr. Pandya, the learned Additional Public Prosecutor prays that the First Information Report should not be quashed and the police should be permitted to complete the investigation. He submitted that the police has also overlooked the provisions of the P.C.M. Act, 2006 while registering the F.I.R. He submitted that the Police may have been guided by the dictum of law laid down by this Court in the case of Mujamil (supra) that a Muslim girl having attained the age of 15 or having attained the puberty can marry even without the consent of her parents.

10. He submitted that this application deserves to be rejected.

ANALYSIS:

11. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the following three questions fall for my consideration:

(1) Whether the decision of this Court in the case of Mujamil (supra) lays down the correct proposition of law so far as the right of a Muslim girl to get married at the age of 15 or having attained puberty is concerned vis-a-vis the provisions of the P.C.M. Act, 2006.

(2) Whether the Muslim Personal Law (Shariat) Application Act, 1937 would prevail over the P.C.M. Act, 2006.

(3) Even if the Muslim girl is a consenting party whether the offence could be said to have been committed under the P.C.M. Act, 2006, if she gets married being a minor in terms of the P.C.M. Act, 2006.

12. Before I proceed to consider the questions framed above, I deem it necessary to look into the decision of this Court in the case of Mujamil (supra). In the case of Mujamil (supra), the facts were almost identical. Mujamil had an affair with a girl, namely, Reshambanu aged 17. Reshambanu one day left her

parental home and got married with Mujamil. They got married by performing Nikah at the Ajmer Sharif. The father of Reshambanu lodged a report in that regard alleging the offence of kidnapping by Mujamil of his daughter. It was argued before this Court that Reshambanu being a Muslim girl was within her right under the Personal Muslim Law to get married since she had crossed the age of 15. It was also argued that Reshambanu was in love with Mujamil and had left her parental home on her own free will and volition.

13. This Court considered the provisions of the Mohammedan Law and also the decision of the Division Bench of the Patna High Court in this regard. This Court also considered one another decision of this Court in the case of Alimamad Mersha Shaikh Vs. State of Gujarat, . Taking into consideration the Muslim Personal Law and the case-law, it was held by this Court as under:

"12. Article 251 of the Mohammedan Law deals with capacity for marriage. It reads as under:

251. Capacity for marriage:-(1) Every Mahomedan of a sound mind, who has attained puberty, may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians,

(3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

Explanation:-Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

This provision clearly shows that every Mahomedan who has attained puberty, is capable to validly contract marriage. The Explanation of puberty is presumed, in the absence of evidence, on completion of the age of fifteen years. Therefore, every Mahomedan who has attained puberty can enter into a contract of marriage even if there is no consent of the parents or guardians. Further, in absence of evidence, puberty can be presumed on completion of the age of fifteen years.

13. Article 348 deals with the age of majority. It reads as under:

348. Age of majority.-In this Chapter, minor means a person who has not completed the age of eighteen years.

14. It shows that a person who has not completed 18 years of age is a minor. However, in the commentary on the text-book Mulla's, Principles of Mahomedan Law, 19th Edition, by M. Hidayatullah, it is stated as under:

Age of majority under the Mahomedan Law:-According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shia, puberty is presumed on the completion of the fifteenth year. Under the Majority Act (Sec. 3), minority ceases on the completion of the

eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years. Under the Mahomedan Law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Majority Act, and the only matters in which a Mahomedan is now entitled to act on attaining the age of fifteen years are: (1) marriage, (2) dower and (3) divorce. In all other matters his minority continues until the completion at least of eighteen years. Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act.

15. Thus, from the above, it is clear that when a person has attained puberty, when he or she has willingly contracted the marriage, it is a valid marriage under the Mohammedan Law.

16. I may quote with profit a Division Bench decision in the case of Md. Idris Vs. State of Bihar and Others, .

17. The Division Bench of the Patna High Court has observed as under:

"5. So far as the factum of marriage is concerned, I may say at the outset that in the instant case it has not been disputed at any stage. From the order of the learned Sessions Judge, it does not appear that the petitioner disputed the factum of marriage. His only assertion since the very beginning was that she is below 15 years of age, and, as such, she could not marry without the consent of her guardian. Even before this Court in the writ application there is no assertion that in fact there has been no marriage. This aspect of the matter has been considered by a Bench in the case of Mst. Bashiram v. Mohammad Hussain, , AIR 1941 Oudh 284 wherein it was observed:.....It is well settled that the Majority Act which fixes the age of 18 years, at which a minor becomes a major, exempt marriage and divorce. The result will be that respondent No. 5 on the relevant date may be minor under the Majority Act, or within the meaning of Sec. 361 of the Indian Penal Code, but certainly she could have married without the consent of her natural guardian. The necessary corollary to this will be that whatever may be the fate of the criminal case, which has been lodged by the petitioner for prosecuting respondent No. 4 for kidnapping, after the marriage, respondent No. 4 will be deemed to be the husband, and as such, entitled to live with respondent No. 5. In such a situation, in my opinion, learned Sessions Judge has not committed any error in directing the release of respondent No. 5 saying that she was at liberty to live with respondent No. 4 whom she claims to have married."

18. The Bench has further observed as under:

"6. I have not been able to appreciate under what provision of law respondent No. 5 was taken in custody because she is not alleged to have committed any offence, and as such, her detention in custody was without any authority in law.

We are informed that even today she has been kept in Bihar State (North) Care Home, Patna City-6 under some order passed either by the learned Magistrate or by the Sessions Judge subsequently. As she is not an accused in any case there is no justification for detaining her in any Care Home. She should be allowed to go with respondent No. 4 as directed by the learned Sessions Judge."

19. The aforesaid observations, in my view, completely support the submission advanced by Mr. Patel, the learned Advocate appearing on behalf of the applicant. The sum-total of the aforesaid discussion of Arts. 251 and 348 of the Mohammedan Law is that for the purpose of contracting marriage, a person is considered to be major when he or she attains puberty and such person can contract marriage even without the consent of the guardian, if he or she is of sound mind and not a lunatic.

20. In absence of any evidence, puberty can be assumed on completion of the age of 15 years. (See Alimamad Mersha Shaikh Vs. State of Gujarat,).

21. However, the issue does not conclude over here. No doubt, according to the Mohammedan Law, the occurrence of puberty or attaining 15 years of age determines minority of the right of the girl to contract a marriage without the consent of the parents, but in my opinion, for the present purpose i.e. so far as Secs. 360 and 366 of the Indian Penal Code are concerned, regard must be only to the definition of minority under Sec. 3 of the Majority Act (9 of 1875).

22. Let me look into the provisions of the Majority Act, more particularly the Objects and Reasons:

INTRODUCTION

During the British regime the mass of persons domiciled in India were roughly divided into (i) Hindus, (ii) Muhammadans, (iii) European British Subjects and (iv) persons to whom the Indian Succession Act applied. The ages at which persons belonging to these classes attain their majority were different according to the then prevalent laws. In the highly important matter of the age at which persons can enter into binding contracts with others and undertake responsibilities as majors, the law of the country was most confused and uncertain. To remedy this, the Majority Bill was introduced in the Legislature.

STATEMENT OF OBJECTS AND REASONS

The mass of persons domiciled in this country may roughly be divided into (1) Hindus, (2) Muhammadans, (3) European British subjects, (4) persons to whom the Indian Succession Act applies.

In the present state of law, the ages at which persons belonging to these classes respectively attain their majority may be stated as follows:

1. By the Hindu Sastras, except those prevailing in Bengal, the end of the sixteenth year is the limit of minority, in Bengal the end of the fifteenth year is deemed to be the limit of minority, according to the Hindu law as understood

there.

By Bengal Regulation XXVI of 1873 and Madras Regulation V of 1804, the minority of Hindu proprietors of estates paying revenue to Government was extended, in case of such persons in each Presidency respectively, to the end of the eighteenth year.

By Acts XL of 1858 and XX of 1864, for the care of the persons and property of minors in the Presidency of Fort William in Bengal and in the Presidency of Bombay, respectively, it was enacted that, for the purposes of those Acts, every person should be deemed to be a minor who had not attained the age of eighteen years. European British subjects are excluded from the purview of the Acts. The effect of those Acts clearly was, for the purposes of those Acts, to alter the Hindu law as to the age of majority in the cases of persons to whom the Acts applied, and in course of time the question was raised in the Calcutta High Court as to whether the Acts did not similarly affect the age of majority of Hindus subject to the ordinary original jurisdiction of that Court, and was decided in the affirmative. This opinion was not, however, accepted by other Judges of the same Court before whom the question arose and the matter having been by one of them expressed to be in a complicated and unsatisfactory state was the other day referred to a Full Bench of the Court, which decided that a Hindu resident in Calcutta, who had no property in the mofussil, attained his age of majority on the completion of his fifteen year, and refrained from deciding what was the effect of the Acts upon persons resident in Calcutta and possessed of property in the mofussil.

In Bombay it has been decided that, notwithstanding Act XX of 1864, a Hindu resident in the mofussil came of age on attaining sixteen years, so as to be able to prosecute a claim by suit.

In a case which came before the late Sadar Diwani Adalat of Bengal, it was held that, according to the Jain law, majority begins on the completion of sixteen years.

2. By Muhammadan Law, the end of the fifteenth year, or the attainment of puberty, is the age of majority; but Muhammadans are, equally with Hindus and other British subjects in this country not being Europeans affected by the Regulations and Acts already noticed.

3. European British subjects not domiciled in this country come of age at twenty-one, and it has been held that they and their legitimate descendants, even though domiciled in this country, do the same, so far as regards their capacity to contract. This opinion has been questioned in a recent case.

4. The class of persons to whom the Succession Act applies includes Europeans by birth or descent domiciled in British India, East Indians or Eurasians, Jews, Armenians, Parsis and Native Christians. The Succession Act defines a minor to be a person who has not completed the age of eighteen years, and defines

"majority" to be the status of such a person. In the case of *Rollo Vs. Smith and Others*--> , already referred to, Mr. Justice Markby said that it would be carrying implication much too far to suppose that this definition was intended by the Legislature as an alteration of the age of majority for all purposes; and held that a person of one of the classes to whom the Act applies did not attain his majority, so as to have the full capacity to contract, until he attained the age of twenty-one. In the later case of *Archer Vs. G.J. Watkins and Another*--> , Mr. Justice Phear treated the question as still an open one, and held that, by the provisions of Act XL of 1858, a person of one of the classes to whom the Succession Act applies attained the age of majority, for all purposes of contract, at eighteen years. The ground of this decision so far as regards the effect of Act XL of 1858, was overruled in the subsequent decision of the Full Bench in *Mullick v. Mullick*; and the law respecting the age of majority of persons in this class, is, perhaps, in a more unsatisfactory state than even that relating to persons in the other classes.

Such being, briefly, the present state of the law, it is obvious that, in the highly important matter of the age at which persons can enter into binding contracts with others and undertake responsibilities as majors; the law of this country is most confused and uncertain. To remedy this the present Bill has been drawn. The alteration proposed by it in the Hindu and Muhammadan Laws, in cases now governed on this point by those laws, is not one which affects any principle of those laws touching the religion or conscience of those persons who are subject to them. The change has, already, in part, been made by the Regulations and Acts above mentioned; and no objection has ever been made to the change thus effected.

To avoid, however, the possibility of any mistake on this point, it is expressly provided in the Bill that it is not to affect the capacity of any person to act in matters connected with marriage, dower, divorce and adoption. By their own laws Muhammadans and Hindus are empowered to act in these matters at an earlier age than that here fixed as the age of majority, and it is not intended to interfere with their capacity in these respects.

The Bill also provides that it shall not affect the religion or religious rites and usages of any class of Her Majesty's subjects or the capacity of any person who, before the commencement of the proposed Act, shall have attained majority under the law applicable to him.

It has been thought advisable to extend the Act to all persons, including European British subjects domiciled in British India. Were European British subjects excluded in all cases, it would be necessary for all persons dealing with them to ascertain whether they came within the legal definition of the term, an enquiry often difficult, and which would be most embarrassing were the exception extended, as in *Rollo v. Smith*, (1867 (1) Beng. LR (OC) 10), to all legitimate descendants, however remote, domiciled in British India, of European British subjects. The fourth Section states the law as it now stands.

THE MAJORITY ACT, 1875 (Act No. 9 of 1875)

(2nd March, 1875)

An Act to amend the law respecting the age of majority.

WHEREAS, in the case of persons domiciled in India it is expedient to specify the age of majority; It is hereby enacted as follows:

Section 1 : Short title:

This Act may be called the Majority Act, 1875.

Local extent: It extends to the whole of India except the State of Jammu and Kashmir;

Commencement and operation: and it shall come into force and have effect only on the expiration of three months from the passing thereof.

Sec. 2 : Savings:

Nothing herein contained shall affect -

- (a) the capacity of any person to act in the following matters (namely) - marriage, dower, divorce and adoption;
- (b) the religion or religious rites and usages of any class of citizens of India; or
- (c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

Sec. 3 : Age of majority of persons domiciled in India:

(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.

Sec. 4 : Age of majority how computed:

In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Sec. 3 , at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Sec. 3 , at the beginning of the eighteenth anniversary of that day.

Illustration:

(a) Z is born in India on the first day of January, 1850, and has an Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January, 1871.

(b) Z is born in India on the twenty-ninth day of February, 1852, and has an Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(c) Z is born on the first day of January, 1850. He acquires a domicile in India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868.

23. I shall now look into the provisions of the Secs. 361 , 363 and 366 of the Indian Penal Code:

"361. Kidnapping from lawful guardianship:-Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation:-The words lawful guardian in this Section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception:-This Section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping:-Whoever kidnaps any person from (India) or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.: -Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

26. I am of the view that so far as the offence under the Indian Penal Code is concerned i.e. of the offence under Sec. 361 , the girl could be termed as a minor, although under the Mohammedan Law she may have a right to contract the marriage on attaining 15 years of age or puberty, as the case may be, without the consent of her parents. To take the view that the parties would be solely governed by the provisions of the Personal Law ignoring the provisions of

the Majority Act would be extremely dangerous. In a given case, a Muslim girl might attain puberty even at the age of 12 or 13, in such circumstances, it cannot be said that she is a major and, therefore, no offence of kidnapping as defined under Sec. 361 of the Indian Penal Code is committed.

27. This brings me to the question, whether an offence under Sec. 363 could be spelt out in the background of the instant case.

28. Section 363 of the Indian Penal Code contemplates two kinds of kidnapping-- (a) kidnapping from India and (b) kidnapping from lawful guardianship. We are not concerned with the offence of kidnapping from India. Section 361 defines kidnapping from the lawful guardianship. It provides as follows:-

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Some observations would not be out of place. In order to come within the mischief of that Section the accused must have either taken away the minor girl or must have enticed the minor girl out of the keeping of her lawful guardian without the consent of such guardian. The two expressions taking and enticing evidently have two different connotations. But both the expressions call for some positive step having taken by the accused to remove the girl from the lawful custody of her guardians. Neither of the Sections would have any application if the girl has, of her own accord, come out of the custody or come out of the keeping of her lawful guardians and if it is thereafter that the accused had gone with her to some place. To illustrate, the accused may go to the house of the girl and may lift her from her house. He no doubt commits the act of kidnapping. But if the girl is of the age of understanding and has left her parental home of her own accord and meets some person and requests him to accompany her to some place for her safety, the person accompanying the girl is not guilty of kidnapping her. There may be cases in which the girl might leave the custody of her guardian and might in fact go to a third person and prevail upon him to take her to some distant place. In such cases even if the person knew that the girl is a minor girl and knew the names of her parents, still if he has not initiated the girl's coming out of the house, mere passive acquiescence on his part evidenced by his accompanying the girl to places would not necessarily spell the offence of kidnapping on his part. It cannot be said in such cases that it is the accused who has taken away the girl from out of her parents' custody. If any authority is necessary for this proposition the same is to be found in the judgment of the Supreme Court in the case of *S. Varadarajan Vs. State of Madras*, . In that case the girl who had reached the state of understanding had candidly admitted that on the morning of October 1st she herself telephoned to the accused to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. This is what the Supreme Court held further in that case in this context at page 36 of *Cri. L.J.*:

"Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's Office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances, we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him....."

29. The position in the instant case is not materially different. In the instant case, Reshambanu is admitting in so many words that she had accompanied the applicant on her own free will and volition and since she was in love with the applicant and the applicant also loved her, they decided to get married and, accordingly, got married at the Ajmer Sharif.

30. In my view, no case is made out to even prima facie show that Reshambanu had received a promise or assurance or any tempting offer from the applicant by virtue of which she was forced to leave her parental home. There is, thus, nothing to even prima facie show to the Court the taking of the girl by the accused, the evidence about his enticing her away is equally absent. If this is so, there is no kidnapping of the girl and hence the question for application of Sec. 363 of the Indian Penal Code does not arise.

31. In my view, when no offence is constituted, the Police should not be allowed to continue with the investigation. As on today, Reshambanu is happily residing at her matrimonial home with her husband i.e. the accused before me."

14. Mr. Pandya, is quite right in submitting that in the case of Mujamil (supra), referred to above, this Court had not considered the effect of the P.C.M. Act, 2006. Having regard to the importance and seriousness of the issue, which has fallen for my consideration, I deem it necessary to first look into the provisions of the P.C.M. Act, 2006 and in its objects.

15. The Statement of Objects and Reasons of the P.C.M. Act, 2006, reads as follows:

"(1) 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 197-8 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 marriage is punishable under the Act.

(2) There has been a growing demand for making the provisions of the 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 recommended 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 cognizable.

(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."

16. The statutory provisions of the P.C.M. Act which have bearing on this issue may be taken note of in the first instance:

Prohibition of Child Marriage Act, 2006.

"Sec. 2 - Definition:

In this Act, unless the context otherwise requires,--

(a) "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;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

xxx xxx xxx

(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed to have attained his majority."

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"Sec. 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."

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"Sec. 9 . Punishment for male adult marrying a child:-Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both."

"Sec. 10 . Punishment for solemnising a child marriage:-Whoever performs, conducts or directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage."

"Sec. 11 . Punishment for promoting or permitting solemnisation of child marriages:-(1) Where as child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of person who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend upto one lakh rupees:

Provided that no woman shall be punishable with imprisonment.

(2) For the purpose of this Section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised."

"Sec. 12 . Marriage of a minor child to be void in certain circumstances:-Where a child, being a minor--

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void."

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"Sec. 15 . Offences to be cognizable and non-bailable:-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under this Act shall be cognizable and non-bailable."

"Sec. 16 . Child Marriage Prohibition Officers:-(1) The State Government shall, by notification in the Official Gazette, appoint for the whole State, or such part thereof as may be specified in that notification, an officer or officers to be known as the Child Marriage Prohibition Officer having jurisdiction over the area or areas specified in the notification.

(2) The State Government may also request a respectable member of the locality with a record of social service or an officer of the Gram Panchayat or Municipality or an officer of the Government or any public sector undertaking or an office-bearer of any non-Governmental organization to assist the Child Marriage Prohibition Officer and such member, officer or office bearer, as the case may be, shall be bound to act accordingly.

(3) It shall be the duty of the Child Marriage Prohibition Officer-

(a) to prevent solemnisation of child marriages by taking such action as he may deem fit;

(b) to collect evidence for the effective prosecution of persons contravening the provisions of this Act;

(c) to advise either individual cases or counsel the residents of the locality generally not to indulge in promoting, helping, aiding or allowing the solemnisation of child marriages;

(d) to create awareness of the evil which results from child marriages;

(e) to sensitize the community on the issue of child marriages;

(f) to furnish such periodical returns and statistics as the State Government may direct; and

(g) to discharge such other functions and duties as may be assigned to him by the State Government.

(3) The State Government may, by notification in the Official Gazette, subject to such conditions and limitations, invest the Child Marriage Prohibition Officer with such powers of a police officer as may be specified in the notification and the Child Marriage Prohibition Officer shall exercise such powers subject to such conditions and limitations, as may be specified in the notification.

(4) The Child Marriage Prohibition Officer shall have the power to move the Court for an order under Secs. 4 , 5 and 13 and along with the child under Sec. 3."

17. I shall now look into the Sec. 2 of the Muslim Personal Law (Shariat) Application Act, 1937, which is extracted hereinbelow:

"2. Application of Personal Law to Muslims:-Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

18. Section 2(a) of the P.C.M. Act, 2006 defines the "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.

19. The argument before me and accepted in the case of Mujamil (supra) is that the prescription of the marriageable age has no application for the girls belonging to the Mohammedan community, as they are governed by the Muslim Personal Law (Shariat) Application Act, 1937, the provisions of which, are extracted hereinabove.

20. I find a lot of merit and substance in the arguments of Mr. Pandya, the learned Additional Public Prosecutor that a statute can always extinguish the customary law and the customary rights. In this regard, I may quote Paras 441 to 443 of Halsbury's Laws of England of IV Edition. They are extracted hereinbelow:

"441. Abolition only by statute:-Customs, being in effect local common law within the locality where it exists, can only be abolished or extinguished by Act of Parliament. An Act of Parliament may abolish a custom either by express provision or by the use of words which are inconsistent with the continued existence of the custom.

442. Status repugnant to custom:-As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words. Although the question whether the customs is destroyed or not has been said to turn on the question whether the statute is an affirmative or a negative statute, this distinction appears to be merely one of the factors to be considered in this rule, no one can allege a custom against an Act of Parliament, unless the custom be saved or preserved by another of Act of Parliament.

443. Effect of confirmation by statute:-Where an Act of Parliament has, according to its true construction, embraced and confirmed a right which has previously existed by custom, that right becomes henceforward a statutory right and the lower title by custom is merged in and extinguished by the higher title derived from the Act of Parliament, unless the Act of Parliament merely intended to confirm the right as a custom. Where the custom has been so extinguished, the old rights do not re-merge on the repeal of the Act or, it seems, at the termination or a temporary Act. It appears that the custom would not be affected by the repeal of the Act if the Act merely confirmed and recognised the custom.

An Act of Parliament which recognises the existence and validity of a custom may not operate to create new statutory rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute. Thus, some old customs in London have not or had the force of a custom, but also have been supported and justified by authority of Parliament.

In determining how far an Act of Parliament has effected rights of this kind, the whole Act must be considered to see whether the rights given by the Act are intended to supersede the rights which previously existed."

21. The Supreme Court in the case of Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, held that the transfer of property, where the Transfer of Property Act applies, has to be under the provisions of the said Act only; the Mohammedan Law of transfer of property cannot override the statutory law. The Court took the view that wherever the Transfer of Property Act is in force, the Mohammedan Law or any other transfer law would not be applicable to the transfer of properties.

22. The general rule, as enshrined in the maxims "generalia specialibus non derogant" and "generalibus specialie derogant", is that a special law prevails over the general law covering the same subject.

23. In the case of The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, their Lordships has held a view that if there is a special enactment on the subject then such an enactment shall prevail as against the general principles. It was observed by their Lordships as under:

"Conflict between specific provision and general provision - Specific provision prevails over general provision - General provision applied only to such cases which are not covered by special provision - Rule applies to resolve conflict between different provisions in different statutes as well as in same statute.

In *Pretty v. Solly*, 1859 (53) ER 1032 quoted in (Craies on Statute Law at P. 206, 6th Ed.) Romelly, M.R., mentioned the rule thus:

The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

24. A Division Bench of the Rajasthan High Court in the case of *Surajmal Roopchand and Co. Vs. The State of Rajasthan and Others*, observed as under:

"The maxim *Generalia Specibus Non-derogant* is, therefore, attracted and when a special law is found inconsistent with or repugnant to the subsequent law of general nature which is not confined to the subject-matter of the special Act, and where there is no express indication of the Legislature that the special law will give way to the general law the provisions of the special law will hold the field. Similarly in the case of *Pannala v. Balbir Singh*, 1969 WLN (Raj.) 284, it has been held as under:

Where there is a conflict between a special provision and a general provision, the special provision prevails over the general provisions and the latter applies only to such cases which are not covered by the special provisions."

25. The same principle would apply even in a case where there is a conflict between any special law with Personal Law.

26. A learned Single Judge of the Karnataka High Court in the case of *Seema Begaum v. State of Karnataka*, (W.P. Case No. 75889 of 2013 decided on 26-2-2013) had the occasion to consider this very issue and having gone through the entire decision, I find the view taken by His Lordship of the Karnataka High Court quite commendable and I propose to follow the same. The learned Single Judge made the following observations:

"(20) An operative Act is the expression of the will of sovereign Legislature; it overrides the consistent provisions of the existing Personal Law. The Personal Law has to submit to the statute law. The Personal Law cannot be repugnant, contrariant or derogatory to the statute.

(21) When a later statute makes a contrary provision to the earlier statute, it has to be taken that the Parliament has intended the earlier statute to be repealed, though it may not have said so expressly. The same is in accordance with the maxim *Leges posteriores priores contrarias abrogant*. (Later laws abrogate earlier contrary laws).

(22) The statement of Objects and Reasons can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. Reference to the statement of Objects and Reasons is permissible to understand the surrounding circumstances which render the remedying of the evil a paramount requirement.

(23) The prime reason for bringing in the P.C.M. Act is the prohibition of the solemnization of the child marriage. When the prescribed marriageable age of the girl is 18 years, this Court cannot be called upon to issue the sought declaration that the provisions of the P.C.M. Act are not applicable for the petitioner, as she belongs to Muslim community. The Courts have the power coupled with the duty to prevent and not to promote the child marriages. This Court cannot and would not pass an order by virtue of which little girls become child brides.

(24) It is also profitable to refer to Sec. 13 of the P.C.M. Act, which empower the Courts to issue injunctions prohibiting the solemnization of marriages in contravention of the said Act. Section 13(1) reads as follows:

"13. Power of Court to issue injunction prohibiting child marriages:-(1) Notwithstanding anything to the contrary contained in this Act, if, on an application of the Child Marriage Prohibition Officer or on receipt of information thought complaint or otherwise from any person, a Judicial Magistrate of the First Class or a Metropolitan Magistrate is satisfied that a child marriage in contravention of this Act has been arranged or is about to be solemnised, such Magistrate shall issue an injunction against any person including a member of an organization or an association of persons prohibiting such marriage."

(25) When there is legislative ban on the child marriages, the Courts cannot go out of their way to help the promoters of child marriages.

(26) The Courts will prefer the construction, which advances the object rather than the one which attempts to find some way of circumventing it. It is the duty of the Courts not to facilitate the circumvention of the parliamentary intent.

(27) As held by the Apex Court in the case of Radhakishan, when the statutory law has commenced to govern a particular field, the Personal Law becomes inapplicable. Reiterating this view in the subsequent case of Kumar Gonsusab, the Hon''ble Supreme Court has held that the Person Law dealing with the transfer of property cannot override the provisions of the Transfer of Property Act.

(28) In the case of Shabana Bano, it was contended that under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, the divorced wife is not entitled to maintenance after the expiry of the iddat period. Not accepting this contention, the Hon''ble Supreme Court has laudably held as follows:

The appellant's petition under Sec. 125 of the Cr.P.C. would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Sec. 125 of the Cr.P.C. cannot be restricted

for the iddat period only.

(29) In the case of Molly Joseph, the Apex Court has categorically held that when the Legislature enacts the law in respect of the Personal Law of a group of persons following a particular religion, then such statutory provisions would prevail over and override any Personal Law, usage or custom prevailing before the coming into force of such Act.

(30) In the case of Smt. Parayankandiyal, the Apex Court has negated the submissions that a person can be permitted to acquire a second wife during the life-time of the first wife and during the subsistence of the first marriage, just because the second marriage was customarily permitted under certain circumstances and for some purposes in the era of pre-Hindu Marriage Act, 1955.

(31) On the conspectus reading of Paras 441, 442 and 443 of the Halsbury's Laws of England, the contents of which are extracted hereinabove, it becomes clear that the customs stands abrogated or destroyed, if it is running contrary to the statutory provisions, unless the custom is saved or preserved by a statute. The previously existing rights do not re-emerge, as they are superseded by the statute.

(32) As the codified law prevails over all other laws, be they are ecclesiastical, personal or customary, the rights which the Muslim girls had under Muslim Personal Law (Shariat) Application Act, 1937 do not remain alive on the commencement of the P.C.M. Act.

(33) There can be no dispute with what Patna and Delhi High Courts have said. But then, in both the cases, the Courts were confronted with a situation where the child marriage had already taken place. But the said decisions cannot be used to demand that a Mohammedan girl be permitted to marry before she attained the age of 18 years.

(34) The issue can be examined with reference to the territorial dimension of the P.C.M. Act. That the P.C.M. Act has the application for the people of all States and Union Territories of India except the State of Jammu and Kashmir is spelt out in the P.C.M. Act itself. Section 1(2) of the P.C.M. Act, the provisions of which are extracted supra, makes it sternly clear that it applies to all the citizens of India, whether they are in India or outside India. The only exceptions made are in respect of State of Jammu and Kashmir and renuncants of the Union Territory of Pondicherry. Therefore, no Indian citizens on the ground of his belonging to a particular religion, can claim immunity from the application of the P.C.M. Act. The Legislature has not left anything to implication or interpretation as far as the application of P.C.M. Act is concerned.

(35) The childhood of a person is precious. On the child attaining the age of majority, anything may be given to it like the job, house, husband/wife; but what cannot be got back is its precious childhood. What is, therefore, of paramount importance is that the child should fully enjoy his/her childhood before entering

the wedlock. More often than not, it is the girl's happy childhood that would ensure a happy wifehood and happy motherhood. In whatever for it is, the child marriage is a gross violation of human rights of a girl or boy. For all the aforesaid reasons, I dismiss this petition. No order as to costs."

27. A Division Bench of the Madras High Court (Madurai Bench) in the case of M. Mohamed Abbas v. Chief Secretary, Government of Tamil Nadu, (W.P. (MD) No. 3133 of 2015 decided on 31-3-2015) had also the occasion to consider this issue. The very same arguments were canvassed before the Division Bench. Various case-laws were cited in support of the submissions that the Muslims are governed by the Mohammedan Law, being their Personal Law, so far as marriage, divorce and other matrimonial rights were concerned. It was submitted that a Muslim girl is entitled to marry on attaining her puberty or after the age of 15 years, for which, even the consent of her parents or guardian is not required. It was also argued before the Bench that invoking the provisions pertaining to the P.C.M. Act was improper and illegal so far as Muslims were concerned. It was argued that the provisions of the Prohibition of Child Marriage Act, 2006 stipulating the minimum age limit as 18 years, so far as, any Muslim girl was concerned, to be avoided. The case before the Division Bench of the Madras High Court was filed as "Probono publico", seeking an order in the nature of writ of mandamus or any other writ, forbearing the respondents from interfering with any marriage being solemnized according to the Muslim Personal Law, by invoking the provisions of the Prohibition of Child Marriage Act, 2006. The Division Bench, while dismissing the writ petition, made the following observations:

"10. It is well settled that custom, Rules or bye-laws cannot override any statute or Act enacted by Legislature. Even the enacted law or Act should be within the purview of the Constitutional mandate, otherwise, as per Art. 13(2) , the law made in contravention of Part III of the Constitution or to the extent of the contravention of such law be declared void. Similarly, the State shall not make any law which takes away or abridges the Fundamental Rights, guaranteed under Part-III of the Constitution. It is well settled that usage in a long run becomes custom and custom is accepted as a source of law, however, custom cannot override the statute. Even as per Art. 13(3)(a) , "laws" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law, in the Territory of India. When there is possibility for conflicting views, while interpreting two different Articles of the Constitution, the Court has to adopt the legal principle of harmonious construction.

11. Learned Additional Advocate-General, contended that the relief sought for in the writ petition is not legally sustainable and in support of his arguments, he relied on Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, and other decisions. In the decision reported in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , while deciding the Constitutional validity of Sec. 125 of the Code of Criminal Procedure, so far as Muslims are concerned, a Five-Judge

Constitution Bench of the Hon''ble Apex Court categorically held that the said provision is applicable to all the people in the territory of India, irrespective of their religion. It was also found in the decision that Mulla's Mahomedan Law (18th Edition); Tyabji's Muslim Law (4th Edition) are inadequate to establish the proposition that a Muslim husband is not under an obligation to provide maintenance to his divorced wife, who has not performed any remarriage, after the divorce and unable to maintain herself. Section 125 Cr.P.C., deals with any husband, who possess sufficient means but neglects or refuses to maintain his wife, including a divorced wife, who is unable to maintain herself. It was argued on the side of the petitioner that the Muslim Personal Law, limits the husband's liability to provide maintenance for the divorced wife till the period of iddat, which does not contemplate or countenance the situation envisaged by Sec. 125 Cr.P.C., and a Muslim husband, as per his Personal Law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife, even if she is unable to maintain herself.

12. However, Hon''ble Supreme Court has categorically ruled that Sec. 125 Cr.P.C., provides for payment of maintenance to a wife even after divorce, if she remains without any remarriage with another person, and hence, she is entitled to claim maintenance from her husband, irrespective of her religion. Mr. K. Chellapandian, learned Additional Advocate-General argued that the Hon''ble Supreme Court has ruled that statutory law prevails over Personal Law of any parties, as it is a welfare legislation with a noble object of providing financial assistance to any divorced wife, who is unable to maintain herself, irrespective of any religion.

13. Relying on the decision of the Hon''ble Apex Court in Javed and Others Vs. State of Haryana and Others, , learned Additional Advocate-General submitted that Personal Law does not prevail over the general law, as held by the Hon''ble Apex Court. While interpreting the scope of Art. 25 of the Constitution, the Supreme Court has held as follows:

"42. It was then submitted that the Personal Law of Muslims permits performance of marriages with four women, obviously for the purpose of procreating children and any restriction thereon would be violative of the right to freedom of religion enshrined in Art. 25 of the Constitution. The relevant part of Art. 25 reads as under:

"25. Freedom of conscience and free profession, practice and propagation of religion:-(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law--

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus."

14. In *Mohd. Ahmed Khan Vs. Shah Bano Begum and Others*, , it has been held by a Constitution Bench of the Apex Court that a Muslim husband is also bound to pay maintenance to his wife, as per Sec. 125 Cr.P.C. and cannot raise any defence under the Muslim Personal Law. In the decision, the legal question was: When the Personal Law makes a provision for maintenance to a divorced wife, whether the provision for maintenance under Sec. 125 Cr.P.C., would run in conflict with the Personal Law. The Constitution Bench of the Hon"ble Supreme Court has laid down two principles; firstly, the two provisions operate in different fields, and therefore, there is no conflict, and secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the Personal Law of the parties, in cases both are in conflict to each other.

15. In *Smt. Sarla Mudgal, President, Kalyani and others Vs. Union of India and others*, , the Supreme Court held that polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of sati in the interest of public order. The Personal Law operates under the authority of the legislation and not under any religion and, therefore, the Personal Law can always be superseded or supplemented by legislation.

16. Mr. W. Peter Ramesh Kumar, learned Counsel appearing for the petitioner submitted that minority rights are being taken away by way of interference in the personal Mahomedan law. According to him, as per Principles of Mulla's Mohammedan Law, Edition 9, on attaining puberty or at the age of 15, a Muslim girl is entitled to enter into a marital contract with a male member, for which even consent of her parents or guardian is not required and further he contended that "majority" under Mahomedan Law for a girl is, on her attaining puberty or attaining the age of 15.

17. It is well settled that as per Civil Laws in India, one could be a major only on attaining the age of 18 years, irrespective of any religion and for the purpose of marriage, a girl attaining the age of 18 years and a boy attaining 21 years of age are one of the eligible conditions. The Prohibition of Child Marriage Act, 2006 says "child" means a person who, if a male, has not completed twenty-one year of age, and if a female, not completed eighteen years of age.

18. The short question involved in the writ petition, is whether the minimum age limit fixed as 18 years for a girl and preventing Muslim girls before attaining the age of 18 years under the Prohibition of Child Marriage Act, 2006 is violating the Constitutional mandate, in view of Mahomedan Personal Law, which permits a girl to marry either on attaining puberty or completing 15 years.

19. The main issue involved in the writ petition relates to the validity and the legal bar of marriage being performed for any Muslim girl below the age of 18 years, in view of Prohibition of Child Marriage Act, 2006. The object of the Prohibition of Child Marriage Act, 2006, as stated in the Act is to enhance the

health of children and the status of women in the society, hence, marriage should not be performed below the age of 18 years for a girl child. Considering the maturity of mind required for the bride and the bridegroom in understanding their marital life, their health factor and also their right to have proper education and empowerment, the age-limit has been fixed for a girl as 18 years. It was argued by the learned Additional Advocate-General, that permitting to perform the marriage of a girl immediately after attaining puberty or at the age of 15 would not be a right of any Muslim to file P.I.L., since the right of the bride and the bridegroom should be paramount. Hence, the provisions of Prohibition of Child Marriage Act, 2006 cannot be construed, as it affects the rights of a Muslim girl. While deciding the age factor of a girl and boy, who are bride and bridegroom in a marriage, the Court cannot ignore the laudable object of the Act, which considers mainly the welfare of the bride and bridegroom.

20. Therefore, performing marriage of a girl below 18 years would not be a religious right as contemplated under Arts. 25 and 26 of the Constitution of India. The Court has to consider, whether performing marriage of a girl below 18 years would be for the welfare of the girl or bride in the marriage. Mr. W. Peter Rameshkumar, learned Counsel for the petitioner submitted that though Shariat Law permits polygamy, permitting Muslim male to have number of wives, as per the normal practice, every Muslim male member is having only one wife and the Counsel further submitted that even after marriage, there could be possibility for a Muslim girl to continue her studies. However, we are not inclined to accept the view, since it would not be a reasonable opportunity, that is available to a girl belongs to other religions. While interpreting the Fundamental Rights, Courts are considering Directive Principles of State Policy and various International Conventions, to which India is a party. International Conventions, relating to women and children emphasis "for gender equality and gender justice and accordingly, education and empowerment of a women are mandatory, in any civilized society. In public appointments, election to local bodies, 1/3 reservation is being provided for women in our country to maintain gender equality, in view of the provisions of CEDAW. In order to implement the mandate of Arts. 14 and 15 and also "CEDAW", providing opportunity to all the girl children for proper education, irrespective of any religion is a prerequisite, otherwise they will be the losers in the society. Even the Court can take a judicial notice that all educated people, having higher strata in the society used to perform marriage for their daughter, only after attaining the age of below 18 years. Only uneducated poor people living in remote rural areas and tribal areas, are indulging in child marriages, detrimental to the welfare of the girl child.

21. Therefore, we are of the view that any claim to perform marriage of a girl less than 18 years would not be for the welfare of the girl child, but such marriage would be against the interest of the girl, whereby education and empowerment of the girl is being denied unreasonably. In Saifuddin Saheb case (supra), it was held by the Hon"ble Supreme Court, that a divorced Muslim woman is also entitled to get maintenance from his husband like any other

divorced wife of other religion, in view of Sec. 125 of the Code of Criminal Procedure. Such interpretation of the Hon"ble Supreme Court has properly protected any helpless divorced Muslim woman, which cannot be considered as a view against Muslims. Judicial wisdom in the landmark decision has ruled that a Muslim woman is equally entitled to get rights like any other woman of other religions. In the same way, Prohibition of Child Marriage Act, 2006 would enable Muslim girls to get proper education, empowerment and also opportunity of understanding to lead proper marital life like other girls, which cannot be considered as an Act by implementing the Act against Muslim Community in general. Providing education and empowerment to any girl child will certainly strengthen the society, which would not be detrimental to any religion.

22. While deciding harmonious construction, in case of possibility of conflicting views pertaining to different Articles of the Constitution, the Court has to consider the prime object of the Articles towards the harmonious construction. In the instant case, the Court has to consider the mandate of Arts. 25, 26 with reference to Arts. 14, 15 and 21 of the Constitution. Articles 14, 15(1) and 16 prohibits discrimination. There shall be no discrimination, solely based on the ground of religion, race, caste, sex, place of birth. However, Art. 15(3) emphasises that if there is any concession or benefit in favour of women and children, that would not be a discrimination and if it is in favour of the male members, that would be a discrimination, violative of Arts. 14 and 15. Article 21 has been interpreted by the Hon"ble Supreme Court so as to maintain proper social justice, accordingly, right to life and personal liberty, guaranteed under Art. 21 emphasize for decent living, which should be available to everyone, including Muslim girls, to decide their future by getting proper education and empowerment and also to decide their marital life. Hence, merely referring Arts. 25 and 29, the Constitutional safeguards given under Arts. 14, 15(3), 16 and 21 cannot be taken away, as the prime objective is towards gender equality.

23. When the World community is considered as a global village in the modern society and the Constitution emphasises equal right for men and women, legitimate right of education and empowerment should not be denied for any girl. It is also relevant to note that Shariat Law, never says that marriage should be performed for a girl before she attains the age of 18 years. In olden days Hindus were also accepting "Balya Vivaha" or Child marriage, which is prohibited under the Prohibition of Child Marriage Act. Hence, the Act is not against Muslim religion and that the Prohibition of Child Marriage Act, 2006 would not be detrimental to the Muslim community.

24. Having considered the facts and circumstances as discussed above, we hold that the provisions of Prohibition of Child Marriage Act, 2006 are in no way against the religious rights guaranteed under Arts. 25 and 29 of the Constitution of India. In fact, the same is in favour of all the girl children in getting proper education and empowerment and equal status as that of men in the Society, as guaranteed under Arts. 14, 15, 16 and 21 of the Constitution. Therefore, the writ

petition is liable to be dismissed as not legally sustainable.

25. In the result, the writ petition is dismissed. The interim order passed, while handing over the minor girl Ms. Aysha Banu to her parents, on the undertaking given by her father not to perform marriage of the minor girl until further orders to be passed in the writ petition is made absolute. It is made clear that it is open to the minor Aysha Banu to solemnize her marriage independently or according to the wishes of her parents on attaining majority."

28. Thus, having given my thoughtful consideration to the issue in hand, I have no doubt in my mind that the proposition of law explained in the case of Mujamil (supra) to the extent it takes the view that a Muslim girl having attained the age of 15 or having attained the puberty has a right to marry even without the consent of her parents is not a correct statement of law or legal proposition.

29. In *Amnider Kaur and Another Vs. State of Punjab and Others*, decided by the Punjab and Haryana High Court, the Single Judge of the said Court has taken a view that having regard to the provisions of Sec. 12 of the P.C.M. Act, marriage with a minor girl would be void. A perusal of this judgment would show that the learned Judge has proceeded almost on same lines as taken by the Division Bench of the Madras High Court, which is clear from the following passages of this judgment:

"14. In this case the facts are not in dispute. Petitioner No. 1 was a minor girl being 16 years and 2 months of age at the time of alleged marriage. According to Sec. 3 of the Majority Act, 1875 every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before. According to Sec. 2(f) of the Act "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. According to Sec. 2(a) of the Act, "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 and according to Sec. 2(b) of the Act, "child marriage" means a marriage to which either of the contracting parties is a child. Then according to Sec. 12(a), the marriage of petitioner No. 1 which falls within the definition of child and within the definition of minor being the age of 16 years and 2 months who has been enticed away out of the keeping of the lawful guardian cannot contract the marriage and her marriage shall be null and void.

15. In view of those provisions, I have no other choice but to hold that marriage of petitioner Nos. 1 and 2 which is alleged to have been performed on 21-10-2009 as per Marriage Certificate (Annexure P-1 undated) as void marriage and none of the judgments which have been cited by the learned Counsel for the petitioners in support of their case, is applicable to the facts and circumstances of the present case because in the case of *Ravi Kumar* (supra), the Division Bench had considered only the provisions of Secs. 5 and 18 of the Act of 1955 to observe that in case of violation of Sec. 5(iii) of the Act of 1955, the punishment is only 15 days simple imprisonment with fine of Rs. 1,000/- or both but the

marriage is not illegal or void. However, much water has flown thereafter and now for the contravention of Sec. 5(iii) of the Act of 1955, the punishment under Sec. 18(a) has been enhanced to 2 years" rigorous imprisonment and/or with fine upto Rs. lac or with both. Moreover, the case of Ravi Kumar (supra) was decided on 5-10-2005. At that time, the Act was not in force as it did not receive the assent of President of India and has been notified w.e.f. 1-11-2007. Therefore, the learned Counsel for me petitioners cannot take the advantage of the observations made in the case of Ravi Kumar (supra). Insofar as the case of Ridhwana (supra) is concerned, in that case also this Court had prima facie found that there is evidence collected by the police that girl was more than 18 years of age but still while parting with-the judgment for the sake of argument, it was decided that even if girl is 16 years and 2 months age and has married with her own sweet will, no offence is said to have been committed. This Court had no occasion to refer to the provisions of Sec. 12 of the Act. Therefore, the ratio laid down in these cases is not applicable. The case of Lata Singh Vs. State of U.P. and Another, itself talks about the persons who were major at that time when they got married and on that premise, it was held that if the persons are major and have got married on their own, their life and liberty should not be threatened by the persons who are against their marriage. Hence, the said judgment is also of no help to the present petitioners. In the case of Pardeep Kumar Singh (supra) this Court had laid down as many as nine directions but in none of the directions it has been provided that if the girl is minor and has been enticed away for the purpose of marriage by alleged husband, the said marriage is valid. Hence, I have found that provisions of Sec. 12 of the Act would apply with full rigour in the present case and the marriage which has been solemnised by petitioner No. 2 with petitioner No. 1, who is child and a minor, is unsustainable in the eyes of law and is thus, declared as void.

16. The second question involved in this case is that whether the persons, who have performed the marriage are also liable for punishment. In this regard Secs. 10 and 11 of the Act provides for punishment for such persons and Sec. 15 of the Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence shall be cognizable and non-bailable. Therefore, I hold that the person who has performed or abetted the child marriage of petitioner No. 1, is also equally liable and for that purpose, I direct the State to take appropriate action by lodging the case against the persons who are responsible for the performance of the child marriage in the present case. In respect of the third question, the petitioners cannot be allowed to take the benefit of the constitutional remedy of protection of their life and liberty on the pretext of their void marriage. The life and liberty of petitioner Nos. 1 and 2 is only endangered and is being threatened by respondent No. 4 so long their marriage legally subsists but once their marriage is declared to be void, there is no threat left to their life and liberty. Moreover, such a case where the allegation against the husband is of enticing away minor girl from the lawful keeping of guardian/parents and a case has been registered under Secs. 363 /366-A I.P.C.,

no protection under Sec. 482 Cr.P.C. can be granted by this Court because in that eventuality police protection has to be granted to a fugitive of law."

30. The object behind enacting the P.C.M. Act was to curb the menace of child marriages, which is still prevalent in this country and is most common among the Muslim community and in rural areas. A Division Bench of the Delhi High Court in the case of Association for Social Justice and Research v. Union of India, (W.P. (Cri.) No. 535 of 2010 decided on 13-5-2010) took note of this menace, inter alia, pointing out as under:

"6. Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay, it is even punishable under the law. N.G.Os. as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute these phenomenon of child marriage to a variety of reasons. The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms. Other reasons are: low-level of education of girls, lower status given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent.

7. The present case is a telling example, which proves the sociologists correct.

8. It cannot be disputed that the aforesaid marriage is in violation of provisions of the Prohibition of Child Marriage Act, 2006 inasmuch as Chandni is minor and in below the age of 18 years. At the same time, marriage is not void under Civil Law. The circumstances under which Chandni is married to Yashpal are narrated above and presumably under these forced circumstances, economic or otherwise, Vijay Pal decided to marry Chandni to Yashpal even when she was less than 18 years. Be as it may, since Vijay Pal and Yashpal are already arrested and F.I.R. is also registered against them, insofar as that aspect is concerned, law will take its own course.

9. 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/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision-

making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under:

(i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including H.I.V. and obstetric fistula.

(ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social-isolation.

(iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.

(iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

(v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age, a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child brides, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that where these elements are linked with gender inequities and biases for the majority of young girls... their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore, more likely to experience domestic violence themselves. Violent behavior can take the form of physical harm, psychological attacks, threatening behavior and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband's family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage

has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights.

10. The Prohibition of Child Marriage Act has been enacted keeping in view the aforesaid considerations in mind."

31. A Full Bench of the Delhi High Court in the case of Court on its Own Motion (Lajja Devi) Vs. State, has dealt with this aspect at length. His Lordship A.K. Sikri, J. (as His Lordship then was) made the following observations:

"26. Thus, child marriage is such a social evil which has the potentialities of dangers to the life and health of a female child and plays havoc in their lives, who cannot withstand the stress and strains of married life and it leads to early deaths of such minor mothers. It also reflects the chauvinistic attribute of the Indian society. This menace is depicted in the following lines from a song sung during marriages in Rajasthan:

"Choti si umariya main parnanaya of babosa, kain main tharoo kario kusoor."

"Oh father why had you given me off in the marriage at such a tender age, for what sin did I commit."

27. These lines itself symbolize the mixed pain of leaving the father's house and at the same time the anguish as to why was she being married off at such a tender age. Such situation is unprecedented and the inner pain unimaginable. The word "Child Marriage" is itself contradictory in itself as one would wonder how marriage and child could go together.

28. When we look into the matter, keeping in view the aforesaid disastrous consequences of the child marriage, which is even treated as violation of human rights, including right to lead a life of freedom and dignity, the very first thing which comes in mind is that the menace of child marriage needs to be curbed. Even the legislative thinking is in the same direction. However, as would be seen hereafter, the Legislature has still not made adequate and effective provisions in the laws to make such a marriage as void.

29. We would like to mention that child marriage existed historically in India and over a period of time it was perceived to be a wrongful practice. The Legislature stepped in more than 80 years ago when the C.M.R.A. (popularly known as the Sarda Act) was enacted with the objective of eliminating the practice of child marriage. It forbade the marriage of a male with less than 21 years and female with less than 18 years of age. However, the penal provisions of the Sarda Act did not invalidate the effect of marriage. It laid down punishment for male adult below twenty-one years of age and for male adult above twenty-one years of age who contracted a child marriage and also for the person, who performed,

conducted or directed a child marriage. Some amendments were carried out in this Act but it was felt that it was not serving any purpose. It is for this reason that in 2006, the Prohibition of Child Marriage Act was passed by the Parliament which is before us in the present form. The Statement of Objects and Reasons of the P.C.M. Act, 2006 have been quoted above. The salient features of the Bill, which culminate in the enactment of the P.C.M. Act, 2006 are as follows:

"(i) To make a provisions to declare child marriage as voidable at the option of the contracting party to the marriage, who was a child.

(ii) To provide a provision requiring the husband or, if he is a minor at the material time, his guardian to pay maintenance to the minor girl until her remarriage.

(iii) To make a provision for the custody and maintenance of children born of child marriages.

(iv) To provide that notwithstanding a child marriage has been annulled by a decree of nullity under the proposed Sec. 3 , every child born of such marriage, whether before or after the commencement of the proposed legislation, shall be legitimate for all purposes.

(v) To empower the District Court to add to, modify or revoke any order relating to maintenance of the female petitioner and her residence and custody or maintenance of children, etc.

(vi) To make a provision for declaring the child marriage as void in certain circumstances.

(vii) To empower the Courts to issue injunction prohibiting solemnisation of marriages in contravention of the provisions of the proposed legislation.

(viii) To make the offences under the proposed legislation to be cognizable for the purposes of investigation and for other purposes.

(ix) To provide for appointment of Child Marriage Prevention Officers by the State Governments.

(x) To empower the State Governments to make rules for effective administration of the legislation."

30. A glance through the main provisions of the P.C.M. Act, 2006 brings out the following scheme of the Act:

Sec. 2(a) of P.C.M. Act defines "child" and Sec. 2(b) defines "child marriage". The Legislature has, however, taken care to define "minor" separately in Sec. 2(f) , as a person who under the provisions of the Majority Act, 1875 is deemed to have not attained the age of majority.

Section 3 of the P.C.M. Act relates to child marriages. It specifically states that a child marriage shall be voidable at the option of the contracting party to the

marriage, who was a child at the time of marriage. The term "child" in Sec. 2(a) 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. A voidable marriage does not become void on its own or immediately when the option is exercised. It requires a decree on adjudication issued by the District Court. The said decree can be only passed on a petition by a contracting party to the marriage who was a child at the time of the marriage. The petition has to be filed before or within two years of attaining "majority" (i.e. majority as defined in the Majority Act, 1875). Sub-section (2) to Sec. 3 states that the petition can be moved through a guardian or next friend along with the Child Marriage Prohibition Officer. The use of the term "guardian" in Sec. 3(2) does cause confusion and is ambiguous. A husband under the Hindu Minority and Guardianship Act, 1956 is the guardian of the minor wife (See Sec. 6(c)). Obviously, the husband, in such a situation, will not and cannot act as a guardian and move a petition on behalf of his minor wife. "Guardian" in this case will mean the natural father or the mother of the girl. Fortunately, the Legislature has permitted the next friend to also move an application for annulment of marriage. Sub-section (4) to Sec. 3 of the P.C.M. Act states that before passing such an order notices are required to be issued by the District Judge to the parties concerned. Sub-section (4) protects a female child, who was married, and stipulates that the District Court can pass an interim or final order directing payment of maintenance to her. In case the male contracting party is a minor, his parent or guardian is liable to pay maintenance.

Section 3 of the P.C.M. Act has to be contrasted with "void" marriages mentioned in Sec. 12 of the same Act. Void marriages are null and void ab initio and accordingly are treated as different and not similar to voidable child marriages. As per Sec. 12 , in three circumstances, a marriage of a minor child is to be treated as void. We record that sub-sec. (2) to Sec. 3 will not apply in case of a "child" after he has attained majority, for he or she thereafter do not have any lawful guardian.

Section 13(2)(iv) of H.M.A. gives the right to a wife to file a petition for dissolution of her marriage by a decree of divorce under the said Act. The said provision was introduced with effect from 27th May, 1976. It stipulates that a Hindu wife can file a petition for divorce if the marriage is solemnized before she had attained the age of 15 years and she repudiates the marriage before she attains the age of 18 years. The said right of the Hindu females to ask for divorce, does not mean that a petition before the District Court cannot be filed under Sec. 3 of the P.C.M. Act. P.C.M. Act as noticed above is a secular law and is a latter enactment, which specifically deals with the problem of child marriages. Religion of the contracting party does not matter. P.C.M. Act being a "Special Act" and being a subsequent legislation, to this extent and in case there is any conflict, will override the provisions of H.M.A. Act or for that matter any Personal Law. However, this should not be interpreted that we have held that a petition for dissolution of marriage under Sec. 13(2)(iv) is not maintainable. Both provisions i.e. Section 13(2)(iv) and Sec. 3 operate, apply and have their own

consequences. These are two concurrent provisions, which can be invoked by the "parties" satisfying the conditions stipulated in the two Sections.

As noticed below, a Division Bench of this Court in W.P. (Cri.) No. 1003 of 2010 decided on 11-8-2010 - Jitender Kumar Sharma v. State, has been held that P.C.M. Act is a secular law. On this aspect we respectfully agree with the view that P.C.M. Act is a secular law. Decision of the Full Bench of Madras High Court in T. Sivakumar v. Inspector of Police (supra) also accepts the said position.

31. We have already reproduced Secs. 2(a) , 9 , 12 and 15 of this Act. It is clear therefrom that marriage of a minor child is treated as void only under the circumstances mentioned in Sec. 12 . Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the Legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The Legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons. At the same time, except in certain circumstances contemplating under Sec. 12 of the Act, the marriage is treated as voidable. The interplay of this Act with other enactments compounds this anomaly and comments on such anomalies are stated in detail at the appropriate stage. At present, we confine ourselves to the issue at hand as the status of the child marriage needs to be determined on the basis of statutory provisions, which exists as of now. As pointed out above, under the Hindu Marriage Act, child marriage is still treated as valid and not a void marriage. It is Personal Law, in codified form, governing Hindus. On the other hand, P.C.M. Act, which is a secular law, treats this marriage as voidable except those events which are covered by Sec. 12 of the P.C.M. Act. In neither of the aforesaid statutes the child marriage is treated as void ab initio or nullity. Therefore, we cannot hold child marriage as a nullity or void. The next question that follows is as to whether the provisions of Personal Law, i.e., Hindu Marriage Act should be applied to declare such a marriage as valid or the provisions of P.C.M. Act would prevail over the H.M. Act.

32. It is distressing to note that the Indian Penal Code, 1860 acquiesces child marriage. The exception to Sec. 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Indian Penal Code, 1860 is a specific illustration of legislative endorsement and sanction to child marriages. Thus, by keeping a lower age of consent for marital intercourse, it seems that the Legislature has legitimized the concept of child marriage. The Majority Act, 1875 lays down

eighteen years as the age of majority but the non-obstante clause (notwithstanding anything contrary) excludes marriage, divorce, dower and adoption from the operation of the Act with the result that the age of majority of an individual in these matters is governed by the Personal Law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the Personal Law and customs of the religion. It is to be specifically noted that the other legislations like the Indian Penal Code and Majority Act are pre-Independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post-Independent era. Another post-Independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages. The words "when the woman was minor" used in Sec. 6(1)(c) reflects the implied legislative acceptance of the child marriage. Criminal Procedure Code, also contains a provision which incorporates the legislative endorsement of child marriage. The Code makes it obligatory for the father of the minor married female child to provide maintenance to her in case her husband lacks sufficient means to maintain her.

33. The insertion of option of dissolution of marriage by a female under Sec. 13(2)(iv) to the Hindu Marriage Act through an Amendment in 1976 indicates the silent acceptance of child marriages. The option of puberty provides a special ground for divorce for a girl who gets married before attaining fifteen years of age and who repudiates the marriage between 15-18 years.

34. Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the P.C.M. Act - to restrain and to prevent the solemnization of Child Marriage. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgment of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.

35. Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act, 2006, certain loopholes still remain, the legislations are weak as they do not actually prohibit child marriage. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.

36. Mr. Deep Ray of NALSAR University of Law, Hyderabad has pointed out the following three loopholes in his article "Child Marriage and the Law". Firstly, Child Marriages are made voidable at the option of the parties but not completely void. That means Child Marriages are still lawful. Making such marriages voidable doesn't really help matter in most cases as girls on attaining majority don't have the agency or adequate support from their families to approach the Court and go for annulment of the marriage. The reason behind not making such marriages void probably is that child marriages, once solemnized and

consummated makes it very difficult, if not impossible for girls to deny and step out of those marriages. Therefore, it is in keeping with the social reality that such marriages are not declared void. If the social reality largely remains the same, the likelihood that young girls will now choose to nullify their marriages, which would probably be consummated by the time she attains maturity and decides to approach the Courts, seems very unlikely.

37. Secondly, the applicability of Prohibition of Child Marriage Act, on various marriages of different communities and religion is unclear. Social customs and Personal Laws of different religious group in India allows marriage of minor girls and the Prohibition of Child Marriage Act, 2006 does not mention whether it prohibit all the underage marriages that are sanctioned by religious laws.

38. Thirdly, registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by Personal Laws.

39. As held above, P.C.M. Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions, and therefore, declaration by the Legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the Legislature which should take adequate steps by not only incorporating changes under the P.C.M. Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.

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 Sec. 2(a) of the P.C.M. Act, 2002 under Sec. 3 of the said Act seeking declaration of this marriage as void."

31.1. His Lordship also considered the question whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of the parents and refuse to go in their custody. While answering the said question, His Lordship observed as under:

"42. We are of the opinion that simply because the marriage is not void, it should

automatically follow that the husband is entitled to the custody of the minor girl. We have already noted in detail the serious re-percussions of child marriage. Some of the ill-effects of the child marriage were taken note of in the case of *Association for Social Justice and Research v. Union of India* (supra), some of which are reproduced again:

- (i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including H.I.V. and obstetric fistula.
- (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
- (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
- (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
- (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula can also be caused by the early sexual relations associated with child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child brides, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that where these elements are linked with gender inequities and biases for the majority of young girls.... their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control.

43. Section 6 of the Hindu Minority and Guardianship Act, 1956, reads:

"6. Natural guardians of a Hindu minor:-The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

- (a) In the case of a boy or an unmarried girl - the father, 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;

(b) In case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) In the case of married girl - the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section -

(a) If he has ceased to be a Hindu, or

(b) If he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation:-In this Section, the expression "father" and "mother" do not include a step-father and a step-mother."

44. It was stated that in the case of a minor married girl, the husband is the guardian and in case of unmarried minor girl father or the mother, is her guardian. It was accordingly submitted that the husband, even if a minor, would be the guardian of his wife. Fortunately, this argument has to be rejected. The overriding and compelling consideration governing custody of guardianship of the child is the child's welfare and claim to the status as a guardian under the said Section is not a right. This was declared long back in 1973 in *Rosy Jacob Vs. Jacob A. Chakramakkal*, .

45. We may also refer Sec. 13 of the Minority and Guardianship Act, 1956, which reads:

"13. Welfare of minor to be paramount consideration:-(1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

The said Section has been interpreted and it has been repeatedly held that while deciding the question of custody of a minor child, it is the interest of the child, which is paramount and important. (See *Kumar V. Jahgirdar Vs. Chetana K. Ramatheertha*,).

46. In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the P.C.M. Act, 2006 is that there should be a marriage of a child at a tender age as he 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, 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 straightforward 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."

32. I may clarify that the Full Bench of the Delhi High Court was concerned with the P.C.M. Act, 2006 in conjunction with the Hindu Marriage Act. However, the observations made by the Full Bench of the Delhi High Court go to the root of the matter and are apt for the purpose of deciding the present case.

33. The last question which the Full Bench considered was whether the F.I.R. under Secs. 363 of the I.P.C. or 376 of the I.P.C. could be quashed on the basis of the statement of such minor that she had contracted the marriage of her own. Answering the said question, His Lordship observed as under:

"47. This brings us to the anomaly with and in the Indian Penal Code. Consent below the age of 16 years is immaterial, except when the rape is committed by a male who is married to the girl. Section 376 , I.P.C. does not treat the rape committed by a husband on his wife above the age of 15 years as an offence. This certainly requires a relook. This provision is not in consonance with the P.C.M. Act. Section 376 , I.P.C. is required to be rationalized and amended in consonance with the P.C.M. Act, and it may be difficult to implement and effectively enforce the P.C.M. Act otherwise. The question of age of consent for the purpose of Indian Penal Code is a larger issue, and not being a subject-matter of the reference, has not been examined by us.

48. We often come across cases where girl and boy elope and get married in spite of the opposition from the family or parents. Very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep-seated social and cultural prejudices. However, both the boy and girl are in love and defy the society and their parents. In such cases, the

Courts face a dilemma and a predicament as to what to do. This question is not easy to answer. We feel that no straight-jacket formula or answer can be given. It depends upon the facts and circumstances of each case. The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Sec. 3 of the P.C.M. Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.

49. In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Sec. 376 , I.P.C. is made out. The charge-sheet cannot be quashed on the ground that she was a consenting party. However, there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.

50. Consummation, with the wife below the age of 15 years, is an offence under Sec. 375 . No exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not. Personal Law applicable to the parties is also immaterial.

51. If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Sec. 363 or 376 , I.P.C. Here again no straight-jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Sec. 3 of the P.C.M. Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration."

34. Thus, in my view, the arguments of the learned Counsel appearing for the applicant-accused that the Personal Law would prevail over the P.C.M. Act, 2006

cannot be countenanced and is rejected. To that extent, the dictum of law laid down in *Mujamil* (supra) is not a good law.

35. The Art. 44 of the Constitution of India states:

"The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

35.1. No doubt, Art. 44 is in the Directive Principles, and not the Fundamental Rights of our Constitution, but Art. 37 states:

"The provisions contained in this Part shall not be enforceable in any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The Constitution was made in 1950, and 64 years have passed since it was promulgated, but Art. 44 has till now been totally ignored."

36. Justice Markandey Katju (as His Lordship then was) in one of his Articles observed thus:

"It can be seen that much of the Muslim Personal Law is totally outdated and inhuman, but it is not allowed to be changed due to vote bank politics.

I submit that those who have not allowed changes in the Muslim Personal Law have done a great disservice to Muslim. Retaining the outdated Personal Law has contributed to keeping Muslims backward.

Law has to change with changes in society. To insist that laws made 1,500 years ago must continue in the 21st century is totally stupid and unrealistic. Among the comments to my previous post (regarding uniform Civil Code) was a comment that if the Muslim Law was amended by Parliament it will violate the fundamental right of Muslims to practice their religion.

To my mind this is a specious argument. The Hindu Law was drastically amended by Parliament in 1955, but that did not violate the right of Hindus to practise their religion. Moreover, much of Muslim law has already been amended and a uniform law made for all. For instance, the Muslim Criminal Law has been replaced by the Indian Penal Code and Criminal Procedure Code a hundred years ago. Now people cannot stone a person to death for adultery, as was permitted by Muslim law. In fact, it will amount to murder under Sec. 302 I.P.C. By abolishing the Muslim Criminal Law have the Muslims in India been deprived of their right to practise their religion? The land laws in rural India are also common to both Hindus and Muslims, e.g. the U.P. Zamindari Abolition Act, 1951, and to that extent the Muslim law has been abolished. Has that denied to the Muslims the right to practise their religion? Similarly, if there is a common Civil Code, Muslims will not in any way be denied the right to practise their religion.

Law reflects social relations in a society at a particular stage of its historical

development. Muslim law, like the old (non statutory) Hindu law, was a law made in the middle ages in feudal society. Obviously, that law is outdated in modern society. For instance, in feudal society, women were regarded as inferior to men. Hence, the law discriminated against them. Thus while a Muslim male can marry four wives, a Muslim female can marry only one husband. A Muslim husband can divorce his wife without going to Court and without giving any reason, but a Muslim wife who wants a divorce has to file a petition in Court, and plead and prove one of the grounds mentioned in Sec. 2 of the Dissolution of Muslim Marriages Act, 1939. That petition may take years to decide. A Muslim daughter gets only half what the son inherits. Many more examples of discrimination against women in Muslim Law can be given.

The modern age is the age of equality. Monogamy represents equality between men and women. The Muslim law, being a law of medieval society, is totally outdated in the modern age, and needs to be drastically amended.

In all modern countries there is one law for all communities. The Muslim law was not allowed to be amended by certain bigoted people and for vote bank politics, and this refusal to modernize Muslim law or enact a common Civil Code has contributed to keeping Muslims backward in our country, and has thus done great harm to Muslims."

37. The last question that falls for my consideration is whether the applicant could be said to have been committed any offence of kidnapping punishable under Secs. 363 and 366 of the I.P.C. including Sec. 18 of the P.O.C.S.O. Act.

38. At the cost of repetition, I may state that the marriage of the applicant with Namira is not in dispute. The first informant as father of Namira seems to have resigned to the fact that he has lost his daughter. This is the reason perhaps why he has not thought fit to appear before the Court and say something as regards this application filed by the applicant for quashing of the F.I.R. The father would definitely be feeling very bad as his feelings are hurt. The father must have toiled day and night to take care of his family, more particularly, his two minor daughters. One day, the father finds that the daughter has left the parental home and has got married with a man who is 12 years elder to her. This, in my view, is nothing, but the lack of maturity, understanding and education on the part of the girl. Sixteen years is not an age for a girl to get married. At this age, probably, a girl would not even clear her S.S.C. Exam. At times, I fail to understand that how she would be able to go ahead in life. Most of the time, unfortunately, this type of marriages fail, and one day, the girl would come back to her parents. By that time, it is too late in her life to realize her mistake as it would be very difficult for the parents to get her again settled in life.

39. Keeping the above in mind, it can be said that those who have not allowed to change the Muslim Personal Law have done a great disservice to the community. At the same time, it is also true that as the social condition in the Nation and through out the world continues to change, the reality of life is, that even

without a Code on Personal Law of Muslim insofar as the marriage is concerned, the child marriage is going into oblivion. Education, changing pattern of the family structure, the structure of the family in the context of reality of the world, and economic necessities are on their own precipitating the situation. The members of the community have realized the evil consequences of getting a Muslim girl married at a tendered age of 16 or 17 years.

40. As observed by the Full Bench of the Delhi High Court, noted above, that if the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and the Court would be within its power to quash the proceedings of the offence punishable under Sec. 363 or 376 of the I.P.C.

41. Section 3 of the P.C.M. Act, 2006 does not make the marriage as void marriage, but makes it voidable at the option of the contracting party being a child at the time of the marriage. However, Sec. 9 provides for punishment for a male adult about 18 years of age who contracts a child marriage. The marriage of a minor child would be void only in the circumstance as explained under Sec. 12 of the Act. Section 15 has made the offence under the P.C.M. Act, 2006, both cognizable and non-bailable.

42. Section 363 of the Indian Penal Code contemplates two kinds of kidnapping - (a) kidnapping from India and (b) kidnapping from lawful guardianship. I am not concerned with the offence of kidnapping from India. Section 361 defines kidnapping from the lawful guardianship. It provides as follows:

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. "Some observations would not be out of place. In order to come within the mischief of that Section the accused must have either taken away the minor girl or must have enticed the minor girl out of the keeping of her lawful guardian without the consent of such guardian. The two expressions taking and enticing evidently have two different connotations. But both the expressions call for some positive step having taken by the accused to remove the girl from the lawful custody of her guardians. Neither of the Sections would have any application if the girl has, of her own accord, come out of the custody or come out of the keeping of her lawful guardians and if it is thereafter that the accused had gone with her to some place". To illustrate, the accused may go to the house of the girl and may lift her from her house. He no doubt commits the act of kidnapping. But if the girl is of the age of understanding and has left her parental home of her own accord and meets some person and requests him to accompany her to some place for her safety, the person accompanying the girl is not guilty of kidnapping her. There may be cases in which the girl might leave the custody of her guardian and might in fact go to a third person and prevail upon

him to take her to some distant place. In such cases, even if the person knew that the girl is a minor girl and knew the names of her parents, still if he has not initiated the girl's coming out of the house, mere passive acquiescence on his part evidenced by his accompanying the girl to places would not necessarily spell the offence of kidnapping on his part. It cannot be said in such cases that it is the accused who has taken away the girl from out of her parents' custody. If any authority is necessary for this proposition the same is to be found in the judgment of the Supreme Court in the case of *S. Varadarajan Vs. State of Madras*, . In that case the girl who had reached the state of understanding had candidly admitted that on the morning of October 1st she herself telephoned to the accused to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. This is what the Supreme Court held further in that case in this context at page 36 of Cri. L.J.:

"Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's Office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand, the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances, we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him....."

43. The position in the instant case is not materially different. In the instant case, Namira is admitting in so many words that she had accompanied the applicant on her own free will and volition and since she was in love with the applicant and the applicant also loved her, they decided to get married.

44. In my view no case is made out to even prima facie show that Namira had received a promise or assurance or any tempting offer from the applicant by virtue of which she was forced to leave her parental home. There is, thus, nothing to even prima facie show to the Court the "taking" of the girl by the accused, the evidence about his enticing her away is equally absent. If this is so, there is no kidnapping of the girl and hence the question for application of Sec.

363 of the Indian Penal Code does not arise.

45. In view of the above, no case is made out so far as the offence under Secs. 363 and 376 of the I.P.C., including Sec. 18 of the P.O.C.S.O. Act, 2012 is concerned. To that extent, the F.I.R. could be quashed and is hereby ordered to be quashed. However, the police shall look into the matter from the point of view of the provisions of the Prohibition of Child Marriage Act, 2006 and file an appropriate report before the trial Court to add the provisions of the P.C.M. Act, 2006 in the F.I.R. After filing such report, the police shall proceed further in accordance with law and complete the investigation. The police, while investigating the F.I.R. shall keep in mind Secs. 10 and 11 of the P.C.M. Act, 2006. In the course of the investigation, if it is found out that a particular person had performed, conducted, directed or abetted the marriage (Nikah) of Namira, then according to Sec. 10 , such person would be an accused. With the above, this petition is disposed of.