Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No 366 OF 2018
[Arising out of SLP (Crl) No.5777 of 2017]

SHAFIN JAHAN **APPELLANT**

Versus

ASOKAN K M AND OTHERS **.....RESPONDENTS**

J U D G M E N T

Dr D Y CHANDRACHUD, J

1 While re-affirming the conclusions set out in the operative order, I agree with the erudite judgment of the learned Chief Justice. I have added my own thoughts on the judicial parchment to express my anguish with the grievous miscarriage of justice which took place in the present case and to formulate principles in the expectation that such an injustice shall not again be visited either on Hadiya or any other citizen. The High Court of Kerala has committed an error of jurisdiction. But what to my mind, is disconcerting, is the manner in

which the liberty and dignity of a citizen have been subjected to judicial affront. The months which Hadiya lost, placed in the custody of her father and against her will cannot be brought back. The reason for this concurring judgment is that it is the duty of this Court, in the exercise of its constitutional functions to formulate principles in order to ensure that the valued rights of citizens are not subjugated at the altar of a paternalistic social structure.

2 Asokan, the father of Akhila *alias* Hadiya moved a habeas corpus petition before the High Court of Kerala. His apprehension was that his daughter was likely to be transported out of the country. The Kerala High Court was informed during the course of the hearing that she had married Shafin Jahan. The High Court allowed the petition for habeas corpus and directed that Hadiya shall be escorted from a hostel in which she resided in Ernakulam to the house of her father holding that:

> "A girl aged 24 years is weak and vulnerable, capable of being exploited in many ways. This Court exercising *parens patriae* jurisdiction is concerned with the welfare of a girl of her age. The duty cast on this Court to ensure the safety of at least the girls who are brought before it can be discharged only by ensuring that Ms. Akhila is in safe hands."

3 With these directions, the Division Bench of the Kerala High Court declared that the marriage between Hadiya and Shafin Jahan is null and void and ordered "a comprehensive investigation" by the police. Hadiya continued to remain, against her will, in compulsive confinement at the home of her father in pursuance of the directions of the Kerala High Court. On 27

November 2017, this Court interacted with Hadiya and noted that she desires to pursue and complete her studies as a student of Homeopathy at a college where she was a student, in Salem. Accepting her request, this Court directed the authorities of the State to permit her to travel to Salem in order to enable her to pursue her studies.

4 The appeal filed by Shafin Jahan has been heard finally. Hadiya is a party to these proceedings.

5 This Bench of three judges pronounced the operative part of its order on 8 March 2018 and allowed the appeal by setting aside the judgment of the High Court annulling the marriage between Shafin Jahan and Hadiya. The Court has underscored that Hadiya is at liberty to pursue her endeavours in accordance with her desires.

6 Hadiya is a major. Twenty four years old, she is pursuing a course of studies leading up to a degree in Homoeopathic medicine and surgery at a college in Salem in Tamil Nadu. She was born to parents from the Ezhava Community. In January 2016, Asokan instituted a habeas corpus petition, stating that Hadiya was missing. During the course of the proceedings, Hadiya appeared before the Kerala High Court and asserted that she had accepted Islam as a faith of choice. From 7 January 2016, she resided at the establishment of Sathyasarani Education Charitable Trust at Malappuram. On

19 January 2016, the Kerala High Court categorically observed that Hadiya was not under illegal confinement after interacting with her and permitted her to reside at the Sathyasarani Trust premises. Nearly seven months later, Asokan filed another petition in the nature of habeas corpus alleging that Hadiya had been subjected to forced conversion and was likely to be transported out of India.

7 During the course of the proceedings, the High Court interacted with Hadiya. She appeared in the proceedings represented by an advocate. Hadiya, as the High Court records, declined to accompany her parents and expressed a desire to continue to reside at Sathyasarani. The High Court initially issued a direction that she should be "accommodated in a ladies' hostel at the expense of her father". On 27 September 2016, Hadiya made a serious grievance of being in the custody of the court for thirty five days without being able to interact with anyone. She stated that she had no passport and the allegation that she was likely to go to Syria was incorrect. Based on her request, the High Court directed her to reside at the Sathyasarani establishment. The High Court heard the case on 24 October 2016, 14 November 2016 and 19 December 2016. On 21 December 2016, the High Court was informed that Hadiya had entered into a marriage on 19 December 2016. The High Court recorded its "absolute dissatisfaction at the manner in which the marriage if at all one has been performed has been conducted".

Confronted with the undisputed fact that Hadiya is a major, the High Court still observed:

> "This Court exercising *Parens Patriae* jurisdiction has a duty to ensure that young girls like the detenue are not exploited or transported out of the country. Though the learned Senior Counsel has vociferously contended that the detenue is a person who has attained majority, it is necessary to bear in mind the fact that the detenue who is a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married. We consider it the duty of this Court to ensure that a person under such a vulnerable state is not exposed to further danger, especially in the circumstances noticed above where even her marriage is stated to have been performed with another person, in accordance with Islamic religious rites. That too, with the connivance of the 7th respondent with whom she was permitted to reside, by this Court."

Hadiya was under judicial order transported to a hostel at Ernakulam, with a direction that:

> "she is not provided the facility of possessing or using a mobile phone."

Save and except for her parents no one was allowed to meet her. An investigation was ordered into the "education, family background, antecedents and other relevant details" of Shafin Jahan together with others involved in the 'conduct' of the marriage. The High Court continued to monitor the case on 6 January 2017, 31 January 2017, 7 February 2017 and 22 February 2017. Eventually, by its judgment and order dated 24 May 2017, the High Court allowed the petition for habeas corpus and issued the directions noted above.

8 The principal findings which have been recorded by the High Court need to be visited and are summarised below:

(i) This was "not a case of a girl falling in love with a boy of a different religion and wanting to get married to him" but an "arranged marriage" where Hadiya had no previous acquaintance with Shafin Jahan;

(ii) Hadiya met Shafin Jahan on an online portal called "Way to Nikah";

(iii) During the course of the proceedings, Hadiya had stated before the court that she desired to complete her studies as a student of Homeopathy and "nobody had a case at that time that she wanted to get married";

(iv) Though on 19 December 2016, the High Court adjourned the hearing to 21 December 2016 to enable her to proceed to her college, the marriage took place on the same day;

(v) The marriage was "only a make-believe intended to take the detenue out of reach of the hands of this court";

(vi) The conduct of the parties in conducting the marriage without informing the court was unacceptable;

(vii) There is no document evidencing the conversion of Hadiya to Islam; the antecedents of Shafin Jahan and his Facebook posts show a radical inclination; and

(viii) No prudent parent would decide to get his daughter married to a person accused in a criminal case.

The High Court concluded that the marriage "is only a sham and is of no consequence", a charade to force the hands of the court.

9 During the course of the present proceedings, this Court by its order dated 30 October 2017 directed the First respondent to ensure the presence of his daughter on 27 November 2017. On 27 November 2017, Hadiya stated before this Court, in the course of the hearing, that she intends to pursue further studies towards the BHMS degree course at Salem, where she was admitted. Directions were issued by the Court to ensure that Hadiya can pursue her course of studies without obstruction. We clarified that while she could stay in the hostel of the college as she desired, she would be "treated like any other student".

10 Hadiya has filed an affidavit expressly affirming her conversion to Islam and her marriage to Shafin Jahan.

11 There are two serious concerns which emerge from the judgment of the Kerala High Court. The first is that the High Court transgressed the limits of its jurisdiction in issuing a declaration annulling the marriage of Shafin Jahan and Hadiya in the course of the hearing of a habeas corpus petition.

12 Undoubtedly, the powers of a constitutional court are wide, to enable it to reach out to injustice. Mr Shyam Divan, learned senior counsel appearing on behalf of First respondent emphasised the plenitude of the inherent powers of the High Court. The width of the domain which is entrusted to the High

Court as a constitutional court cannot be disputed. **Halsbury's Laws of England** postulates:

> "In the ordinary way the Supreme Court, as a superior court of record, exercise the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except insofar as that has been taken away in unequivocal terms by statutory enactment. The term "inherent jurisdiction" is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law."

Dealing with the ambit of the powers under Article 226, Gajendragadkar, CJ in **State of Orissa** v **Ram Chandra Dev and Mohan Prasad Singh Deo**[24] observed thus:

> "Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said Article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to case of illegal invasion of this fundamental right alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of that Article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226."

While dealing with the powers and privileges of the state legislatures, in **Keshav Singh**[25], a Bench of seven learned judges held thus:

24 AIR (1964) SC 685
25 (1965) 1 SCR 413

> "136…in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court [*Halsbury's Law of England*, Vol. 9, p. 349] ".

The High Court is vested with an extra-ordinary jurisdiction in order to meet unprecedented situations (**T K Rangarajan** v **Government of T.N.**[26]). Several decisions have noted the inherent and plenary powers of the High Court. Their purpose is to advance substantial justice. (i) **Roshan Deen** v **Preeti Lal**[27]; (ii) **Dwarka Nath** v **ITO, Special Circle D-ward, Kanpur**[28]; (iii) **Naresh Shridhar Nirajkar** v **State of Maharashtra**[29]; and (iv) **M V Elisabeth** v **Harwan Investment and Trading (P) Ltd**.[30]

13 These principles which emerge from the precedent are well-settled. Equally the exercise of all powers by a constitutional court must ensure justice under and in accordance with law.

14 The principles which underlie the exercise of the jurisdiction of a court in a habeas corpus petition have been reiterated in several decisions of the Court. In **Gian Devi** v **Superintendent, Nari Niketan, Delhi**[31], a three-judge

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26 (2003) 6 SCC 581
27 (2002) 1 SCC 100
28 (1965) 3 SCR 536
29 (1966) 3 SCR 744
30 1993 Suppl. (2) SCC 433
31 (1976) 3 SCC 234

Bench observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay:

> "…Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is **sui juris** no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter."

The ambit of a habeas corpus petition is to trace an individual who is stated to be missing. Once the individual appears before the court and asserts that as a major, she or he is not under illegal confinement, which the court finds to be a free expression of will, that would conclude the exercise of the jurisdiction. In **Girish** v **Radhamony K**[32] a two judge Bench of this Court observed thus:

> "3…In a habeas corpus petition, all that is required is to find out and produce in court the person who is stated to be missing. Once the person appeared and she stated that she had gone of her own free will, the High Court had no further jurisdiction to pass the impugned order in exercise of its writ jurisdiction under Article 226 of the Constitution."

In **Lata Singh** v **State of U P**[33], Bench of two judges took judicial notice of the harassment, threat and violence meted out to young women and men who marry outside their caste or faith. The court observed that our society is

32 (2009) 16 SCC 360
33 (2006) 5 SCC 475

emerging through a crucial transformational period and the court cannot remain silent upon such matters of grave concern. In the view of the court:

> "17…This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."

Reiterating these principles in **Bhagwan Dass** v **State (NCT OF DELHI)**[34], this Court adverted to the social evil of honour killings as being but a reflection of a feudal mindset which is a slur on the nation.

In a more recent decision of a three judge Bench in **Soni Gerry** v **Gerry Douglas**[35], this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus:

> "9…She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the

34 (2011) 6 SCC 396
35 (2018) 2 SCC 197

> Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.
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> 10**.** It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of *parens patriae*. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation."

These principles emerge from a succession of judicial decisions. Fundamental to them is the judgment of a Constitution bench of this Court in **Kanu Sanyal** v **District Magistrate, Darjeeling**[36].

15 The High Court was seized of the grievance of Asokan that his daughter was under illegal confinement and was likely to be transported out of the country. In the course of the hearing of an earlier petition for habeas corpus, the High Court by its order dated 19 January 2016 expressly noticed that Hadiya was not willing to return to her parental home. Taking note of the desire of Hadiya to reside at Sathyasarani, the High Court observed that "the alleged detenue needs to be given liberty to take her own decision with respect to her future life."

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36 (1973) 2 SCC 674

With the passing of that order the writ petition was withdrawn on 25 January 2016. Yet, again, when a second petition was filed, it was evident before the High Court that Hadiya had no desire to stay with her parents. She is a major. The Division Bench on this occasion paid scant regard to the earlier outcome and to the decision of a coordinate Bench. The High Court inexplicably sought to deviate from the course adopted in the earlier proceeding.

16 The schism between Hadiya and her father may be unfortunate. But it was no part of the jurisdiction of the High Court to decide what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person. Hadiya appeared before the High Court and stated that she was not under illegal confinement. There was no warrant for the High Court to proceed further in the exercise of its jurisdiction under Article 226. The purpose of the habeas corpus petition ended. It had to be closed as the earlier Bench had done. The High Court has entered into a domain which is alien to its jurisdiction in a habeas corpus petition. The High Court did not take kindly to the conduct of Hadiya, noting that when it had adjourned the proceedings to issue directions to enable her to pursue her studies, it was at that stage that she appeared with Shafin Jahan only to inform the court of their marriage. How Hadiya chooses to lead her life is entirely a matter of her choice. The High Court's view of her lack of candour with the court has no bearing on the legality of her marriage or her right to decide for herself, whom she desires to live with or marry.

17 The exercise of the jurisdiction to declare the marriage null and void, while entertaining a petition for habeas corpus, is plainly in excess of judicial power. The High Court has transgressed the limits on its jurisdiction in a habeas corpus petition. In the process, there has been a serious transgression of constitutional rights. That is the second facet to which we now turn.

18 Hadiya and Shafin Jahan are adults. Under Muslim law, marriage or Nikah is a contract. Muslim law recognises the right of adults to marry by their own free will. The conditions for a valid Muslim marriage are:

(i) Both the individuals must profess Islam;
(ii) Both should be of the age of puberty;
(iii) There has to be an offer and acceptance and two witnesses must be present;
(iv) Dower and Mehar; and
(v) Absence of a prohibited degree of relationship.

19 A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one’s personhood and identity. The choice

of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences.

20 Article 16 of the Universal Declaration of Human Rights underscores the fundamental importance of marriage as an incident of human liberty:

> **"Article 16.** (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

21 The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.

22 In **Justice K S Puttaswamy** v **Union of India**[37], this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:

> "The autonomy of the individual is the ability to make decisions on vital matters of concern to life… The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination… The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

A Constitution Bench of this Court, in **Common Cause (A Regd. Society)** v **Union of India**[38], held:

> "Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives."

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.

23 The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at

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37 2017 (10) SCC 1
38 Writ Petition(Civil) No. 215 of 2005

twenty four, Hadiya “is weak and vulnerable, capable of being exploited in many ways”. The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases. The concern of this Court in intervening in this matter is as much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction *parens patriae* do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation.

24 Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties

for fear of the reprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.

25 We have not been impressed with the submission of Mr Shyam Divan, learned senior counsel that it was necessary for the High Court to nullify, what he describes as a fraud on the Court, as an incident of dealing with conduct obstructing the administration of the justice. Whether or not Hadiya chose to marry Shafin Jahan was irrelevant to the outcome of the habeas corpus petition. Even if she were not to be married to him, all that she was required to clarify was whether she was in illegal confinement. If she was not, and desired to pursue her own endeavours, that was the end of the matter in a habeas corpus petition. The fact that she decided to get married during the pendency of the proceedings had no bearing on the outcome of the habeas corpus petition. Constitutionally it could have no bearing on the outcome.

26 During the course of the proceedings, this Court by its interim order had allowed the National Investigation Agency to assist the Court. Subsequently, NIA was permitted to carry out an investigation. We clarify that NIA may exercise its authority in accordance with the law within the bounds of the authority conferred upon it by statute. However, the validity of the marriage

between Shafin Jahan and Hadiya shall not form the subject matter of the investigation. Moreover, nothing contained in the interim order of this Court will be construed as empowering the investigating agency to interfere in the lives which the young couple seeks to lead as law abiding citizens.

27 The appeal stands allowed in terms of our order dated 8 March 2018. The judgment of the High Court is set aside.

.....J
[Dr D Y CHANDRACHUD]

New Delhi;
April 09, 2018.