REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 366 OF 2018
(Arising out of S.L.P. (Crl.) No. 5777 of 2017)

Shafin Jahan …Appellant(s)

Versus

Asokan K.M. & Ors. …Respondent(s)

J U D G M E N T

Dipak Misra, CJI [for himself and A.M. Khanwilkar, J.]

Rainbow is described by some as the autograph of the Almighty and lightning, albeit metaphorically, to be the expression of cruelty of otherwise equanimous "Nature". Elaborating the comparison in conceptual essentiality, it can be said that when the liberty of a person is illegally smothered and strangulated and his/her choice is throttled by the State or a private person, the signature of life melts and living becomes a bare subsistence. That is fundamentally an expression of acrimony which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. That is

reflection of cruelty which the law does not countenance. The exposé of facts in the present case depicts that story giving it a colour of different narrative. It is different since the State that is expected to facilitate the enjoyment of legal rights of a citizen has also supported the cause of a father, an obstinate one, who has endeavoured immensely in not allowing his daughter to make her own choice in adhering to a faith and further making Everestine effort to garrotte her desire to live with the man with whom she has entered into wedlock. The thought itself is a manifestation of the idea of patriarchal autocracy and possibly self-obsession with the feeling that a female is a chattel. It is also necessary to add here that the High Court on some kind of assumption, as the impugned judgment and order would reflect, has not been appositely guided by the basic rule of the highly valued writ of habeas corpus and has annulled the marriage. And that is why the order becomes a sanctuary of errors.

2. On 08.03.2018, this Court had allowed the appeal passing the following order:-

> "Leave granted.
>
> Heard Mr. Kapil Sibal and Ms. Indira Jaising, learned senior counsel along with Mr. Haris Beeran,

learned counsel for the appellant, Mr. Maninder Singh, learned Additional Solicitor General for the National Investigation Agency (NIA) and Mr. Shyam Divan, learned senior counsel along with Ms. Madhavi Divan, learned counsel for respondent No.1.

The reasoned judgment will follow. The operative part of the order reads as follows:-

Considering the arguments advanced on both sides, in the facts of the present case, we hold that the High Court should not have annulled the marriage between appellant No.1, Shafin Jahan and respondent No.9, Hadiya alias Akhila Asokan, in a Habeas Corpus petition under Article 226 of the Constitution of India. We say so because in the present appeal, by special leave, we had directed the personal presence of Hadiya alias Akhila Asokan; she appeared before this Court on 27th November, 2017, and admitted her marriage with appellant No.1.

In view of the aforesaid, the appeal stands allowed. The judgment and order passed by the High Court is set aside. Respondent No.9, Hadiya alias Akhila Asokan is at liberty to pursue her future endeavours according to law. We clarify that the investigations by the NIA in respect of any matter of criminality may continue in accordance with law."

3. Presently, we proceed to state the reasons.

4. The facts which are necessary to be stated are that Ms. Akhila alias Hadiya, respondent No.9 herein, aged about 26 years at present, the only child of Sh. Asokan K.M., respondent No.1 herein, and Smt. Ponnamma, had completed a degree in

Homeopathic Medicine, BHMS (Bachelor of Homeopathic Medicine and Surgery) from Shivaraj Homeopathic Medical College, Salem in Tamil Nadu. While pursuing the said course, she was initially residing in the college hostel and later she started staying in a rented house near her college together with five other students among whom were Jaseena and Faseena, daughters of one Aboobacker. During the college holidays, Hadiya used to visit the house of Aboobacker and there was also an occasion when both Jaseena and Faseena came to reside with Hadiya at the house of Asokan, respondent No.1 herein. On 6th December, 2015, Hadiya's paternal grandfather breathed his last. Hadiya on that day came back to her house and it is alleged that at that time, the family members and relatives of Asokan noticed some changes in her behaviour as she was showing reluctance to participate in the rituals performed in connection with the funeral of her grandfather. Thereafter, she went to Salem for her internship along with Jaseena and Faseena. Till 5th January, 2016, she was in constant touch with her family. Thereafter, on the next day, i.e., 6th January, 2016, Asokan received a telephone call from one of the friends of Hadiya informing that Hadiya had gone to the college on that day wearing a 'Pardah'. The

respondent No.1 was further informed that Hadiya was inspired by someone to change her faith.

5. Upon receiving the information, Asokan fell ill. Smt. Ponnamma, wife of Asokan, called Hadiya and informed her about the illness of her father. Jaseena and Hadiya left for Salem about 8 p.m. on 6th January, 2016 but Hadiya did not reach her father's house. Later Asokan went in search of Hadiya and came to know from one Ms. Archana that Hadiya was living at the house of Aboobacker. Thereupon, Asokan contacted Aboobacker for meeting his daughter Hadiya. Aboobacker promised Asokan that he would bring Hadiya to the house of Ms. Archana, a friend of Hadiya, but this never happened and later Asokan was informed that Hadiya had escaped from the house of Aboobacker and had run away somewhere. Disgusted and disgruntled, as he was, Asokan filed a complaint before S.P. Malapuram District, but as there was no progress made by the police in the investigation of the matter, Asokan filed a Writ Petition of Habeas Corpus before the Division Bench of the High Court of Kerala being W.P. (Criminal) No. 25 of 2016.

6. On 14.01.2016, when the case came up for admission, the Division Bench directed the Government pleader to get instructions regarding the action, if any, taken on the aforesaid complaint of Asokan. Thereafter, on 19.01.2016, when the case was taken up for further consideration, Hadiya appeared through a lawyer and filed an application for impleadment being I.A. No. 792 of 2016. The said application for impleadment was allowed and Hadiya was impleaded as a respondent. An affidavit dated 26.11.2016 was filed on her behalf stating, inter alia, the facts and circumstances under which she had left her house. The aforesaid affidavit mentioned that she had communicated to her father as well as Director General of Police by registered letter regarding the actual state of affairs. Further, she along with one Sainaba filed Writ Petition being W.P. (C) No. 1965 of 2016 seeking protection from police harassment.

7. The Division Bench in W.P. (Criminal) No. 25 of 2016 persuaded Hadiya to go along with her father, Asokan, to her parental house but the said persuasions were all in vain as Hadiya was not willing to go with her father. The Division Bench, thereafter, interacted with Sainaba who expressed her

unequivocal willingness to the Division Bench to accommodate Hadiya in “Satyasarani” institution and that Sainaba would render all necessary help to Hadiya to pursue her internship in BHMS degree course. As Hadiya had taken a stand that she wanted to join Satyasarani and she was not, in any case, willing to go back to her parental home along with Asokan, the Division Bench permitted Hadiya to stay with Sainaba at her house till she joined Satyasarani. The Division Bench thereafter adjourned the case for further hearing directing to produce proof regarding admission of Hadiya in Satyasarani.

8. The case was taken up for consideration by the Division Bench where the counsel appearing on behalf of Hadiya produced documents to show that Hadiya had got admission on 20.01.2016 in an institution, namely, ‘Markazul Hidaya Sathyasarani Educational & Charitable Trust’ at Karuvambram, Manjeri in Malappuram District. The counsel for Hadiya also submitted before the writ court that Hadiya was staying in the hostel of the said institution.

9. The Division Bench, vide judgment dated 25.01.2016, directed as follows:-

> "8. Under the above mentioned circumstances, we are convinced that the alleged detenue is not under any illegal confinement. She is at present staying in the above said institution on her own wish and will. She is not under illegal confinement. Therefore, there exists no circumstances warranting interference for issuance of any writ of Habeas Corpus. Hence the original petition is hereby disposed of by recording the fact that the alleged detenue is staying in the above said institution on her own free will. It will be left open to the petitioner and her family members to make visit to her at the above institution, subject to regulations if any regarding visiting time."

10. In view of the aforesaid order, the writ petition filed by Hadiya was withdrawn.

11. When the matter stood thus, the 1st respondent filed a second Writ Petition (Criminal) No. 297 of 2016 alleging that his daughter was likely to be transported out of the country and the High Court, vide interim order, directed the respondent to keep her under surveillance and to ensure that she was not taken out of the country without further orders of the Court. The averments made by the father in the writ petition need not be stated in detail. Suffice it to say that Hadiya alias Akhila categorically declined to go with her parents and stated in the affidavit filed by her that she was not being permitted to interact with anyone. Hadiya further stated that she wanted to reside at

a place of her choice and that she had not been issued a passport and, therefore, there was no likelihood of her being taken to Syria. The High Court, considering the affidavit, passed the following order:-

> "After hearing learned counsel on both sides, we are of the opinion that in the light of the finding entered by this court in the earlier round of litigation that this Court cannot compel the petitioner's daughter to go and reside with her parents and that she is not in the illegal custody of anyone, this court cannot any longer direct that the petitioner's daughter should continue to reside at Santhinikethan Hostel, Pachalam. When we asked the petitioner's daughter as to whether she is willing to appear on another day, she submitted that she will appear on the next hearing date. Learned counsel for the detenue also submitted that the detenue will be present in person on the next hearing date. We accordingly permit the detenue to reside at a place of her choice. We also record the statement of Ms. Akhila that she proposes to reside with the seventh respondent, Smt. A.S.Sainaba, whose address is mentioned in the instant writ petition. Sri. P.K.Ibrahim, learned counsel appearing for the seventh respondent submitted that the seventh respondent will cause production of the petitioner's daughter on the next hearing date, if she proposes to reside with her. If the petitioner's daughter proposes to shift her residence and to reside elsewhere, we shall inform that fact to the Deputy Superintendent of Police, Perinthalmanna in writing and furnish her full residential address and the telephone number if any over which she can be contacted. Call on 24.10.2016. The Deputy Superintendent of Police, Perinthalmanna shall cause production of the petitioner's daughter on that day. It will be open to

> the parents of Ms. Akhila to meet and interact with her."

12. On the basis of the aforesaid order passed by the High Court, Hadiya was permitted to reside with the 7th respondent. On 14.11.2016, the counsel for the writ petitioner before the High Court expressed serious apprehension regarding the continued residence of his daughter in the house of the 7th respondent therein. On 19.12.2016, the High Court noted that she had not completed her course and acquired competence to practise homeopathy and, accordingly, expressed the opinion that she should complete her House Surgeoncy without delay and obtain eligibility to practice. A statement was made on her behalf that she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem which has a hostel for women where she was willing to reside for the purpose of completing her House Surgeoncy. On the basis of the aforesaid, the High Court passed the following order:-

> "We have heard the learned Senior counsel Sri. S.Sreekumar, who appears for the detenue. We have perused the affidavit dated 26.11.2016 filed by the detenue producing documents, Exts. R8(d) and R8(e). We are not prepared to rely on Ext.R8(d) which purports to make it clear as though a registered Homeopathic Medical Practitioner has

permitted the detenue to work as a trainee in Homeopathic Medicine on a remuneration of Rs.2000/- per month for her day today expenses. We fail to understand how the detenue, who has not obtained a degree in Homeopathy can be permitted to train under him. The detenue has admittedly not completed her House Surgeoncy or obtained eligibility to practice. Therefore, it is only appropriate that she completes her House Surgeoncy without further delay and obtains eligibility to practice Homeopathic Medicine. Her Senior counsel Sri. S.Sreekumar informs us that, the detenue is desirous of completing her House Surgeoncy. However, we place on record our dissatisfaction at the continued residence of the detenue with the 7th respondent, who is a stranger. The counsel for the petitioner also expresses anxiety and concern at her continued residence with the 7th respondent. He is anxious about the safety and well being of the detenue. His anxiety and concern as the parent of an only daughter is understandable. Therefore, it is necessary that the detenue shifts her residence to a more acceptable place, without further delay. According to the learned Senior counsel Sri.S.Sreekumar, she has to complete her House Surgeoncy at the Shivaraj Homeopathic Medical College, Salem. The college has a hostel for girl students where she is willing to reside and complete her House Surgeoncy. The petitioner offers to bear the expenses for her education and stay at the Medical College Hostel. He offers to escort her to the Medical College and to admit her into the Hostel there. The detenue is also, according to the learned Senior counsel, willing to accompany her.

2. In view of the above, there shall be a direction to the detenue to appear before this Court at 10.15 a.m. on 21.12.2016. The petitioner shall also be present in person in Court on the said date. The petitioner who is stated to be in possession of the

> certificates of the detenue shall bring such certificates also to Court. We shall pass further orders in the matter, regarding the manner in which the detenue is to be taken to the Medical College and admitted to the ladies hostel, on 21.12.2016.
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> Post on 21.12.2016."

13. On 21.12.2016, Hadiya appeared before the High Court and a statement was made that she had entered into marriage with Shafin Jahan, the appellant herein. The High Court, at that juncture, as the order would reflect, noted that her marriage was totally an unexpected event and proceeded to ascertain the veracity of the statement made. It has recorded its displeasure as to the manner in which the entire exercise was accomplished. It passed a detailed order on 21.12.2016. The relevant part of the order reads thus:-

> "This court exercising its Parens Patriae jurisdiction is anxious and concerned about the safety of the detenue and her well being, viewed especially in the light of the allegations made in the Writ Petition and the continued obstinance of the detenue to return to her parents. The person who is stated to have got married to the detenue has appeared before us today, for the first time. He claims to be a graduate and a person who is employed in the Gulf. It is stated that, he is desirous of taking the detenue out of the country. It was precisely the said apprehension that was expressed by her father in the proceedings before this Court on the earlier occasion. This Court has on the said occasion recorded the fact that since she was not possessed

of a Passport, there was no likelihood of her being taken to Syria. The question that crops up now is whether the marriage that has been allegedly performed is not a device to transport her out of this country. We are not aware of the identity of the person who is alleged to have got married to the detenue. We are not aware of the antecedents of the said person or his family background. The address mentioned in the marriage certificate produced shows that he is from Kollam. In what manner he has come into contact with detenue and under what circumstances, the detenue has agreed to get married to a stranger like him are matters that require to be probed thoroughly. The marriage certificate shows that the marriage was performed by the Khazi at the house of the 7th respondent, Srambikal House, Puthur. Why the marriage was conducted at her house is not clear. Unless the above questions are answered, it cannot be accepted that the detenue is in safe hands. 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. 8. We place on record our absolute dissatisfaction at the manner in which the marriage if at all one has been performed, has been conducted. The 7th

respondent having been a party to these proceedings had a duty to at least inform this Court of the same, in advance. This Court had relying on her credentials and assurance, permitted the detenue to accompany her and to live with her. We would have expected a reasonable litigant, which includes the detenue also who as we have noticed earlier, is represented through an eminent Senior Counsel of this Court, to have informed this Court and obtained permission from this Court before such a drastic course was undertaken. Considering the manner in which the marriage has been conducted, the secrecy surrounding the said transaction and also the hurried manner in which the whole exercise was completed, the entire episode is shrouded in suspicion. Unless the suspicion is cleared the detenue cannot be permitted to go with the person who is seen to be accompanying her now. In view of the above, the following directions are issued.

1) The first respondent is directed to escort the detenue and to have her accommodated at the S.N.V.Sadanam Hostel, Chittoor Road, Ernakulam, until further orders. The first respondent shall ensure that she is not provided the facility of possessing or using a mobile phone. The petitioner and the mother shall be at liberty to meet her according to the rules and regulations of the hostel. No other person is permitted to meet her.

2) The first respondent shall cause an investigation to be conducted into the education, family background, antecedents and other relevant details of Sri. Shafin Jahan who is stated to be the bridegroom of the alleged marriage that is stated to have been conducted on 19.12.2016 as evidenced by the certificate dated 20.12.2016 produced before us. The first respondent shall also enquire into the circumstances surrounding the conduct of such marriage, the persons who were involved in the

> conduct of the same the organization that has issued the marriage certificate, as well as their antecedents. A report of such investigation shall be placed before us before the next posting date of this case. The 4th respondent shall oversee the investigation and see that all relevant details are unearthed and placed before us including any links with extremist organizations, of which allegations are made in the Writ Petition.
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> 3) The Secretary, Othukkungal Grama Panchayat is directed not to issue the marriage certificate sought for by the applicants Shafine Jahan and Hadiya as per receipt dated 20.12.2016, without further orders from this Court. The petitioner shall bear the expenses for the accommodation of the detenue at the hostel.
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> 4) Post on 6.1.2017."

14. Thereafter, the matter was taken up on various dates by the High Court and eventually, by the impugned judgment and order, it opined that a girl aged 24 years is weak and vulnerable and capable of being exploited in many ways and thereafter, the Court, exercising the *parens patriae* jurisdiction, observed that it was concerned with the welfare of the girl of her age. It has been further observed by the High Court that the duty is cast on it to ensure the safety of at least the girls who are brought before it and the said duty can only be discharged by ensuring that the

custody of Akhila alias Hadiya should be given to her parents. The High Court further directed to the following effect:-

> "She shall be cared for, permitted to complete her House Surgeoncy Course and made professionally qualified so that she would be in a position to stand independently on her own two legs. Her marriage being the most important decision in her life, can also be taken only with the active involvement of her parents. The marriage which is alleged to have been performed is a sham and is of no consequence in the eye of law. The 7th respondent and her husband had no authority or competence to act as the guardian of Ms. Akhila and to give her in marriage. Therefore, the alleged marriage is null and void. It is declared to be so."

15. The High Court also directed that a police officer of the rank of Sub-Inspector should escort Akhila alias Hadiya from the hostel to her father's house and the Superintendent of Police, Respondent No.2 therein, should maintain surveillance over them to ensure their continued safety. That apart, the High Court issued the following directions:-

> "iii) The 4th respondent shall take over the investigation of Crime No. 21 of 2016 of Perinthalmanna Police Station and shall have a comprehensive investigation conducted co-ordinating the investigation in Crime No.510 of 2016 of Cherpulassery Police Station which has been registered into the forcible conversion of Ms.Athira which is the subject matter of W.P.(Crl.) No. 235 of 2016 of this Court. The 4th respondent shall also investigate the activities of the organizations that

> are involved in this case of which reference has been made by us above. Such investigation shall be completed as expeditiously as possible and the persons who are found to be guilty shall be brought to the book.
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> iv) The 4th respondent shall conduct a full-fledged enquiry into the lapses on the part of the Investigating Officer in this case and shall, if necessary, pursue departmental proceedings against the Officer concerned."

16. Against the aforesaid order, the present appeal, by special leave, was filed by Shafin Jahan seeking permission to file the special leave which is granted by this Court.

17. This Court, vide order dated 4.8.2017, asked Mr. Maninder Singh, learned Additional Solicitor General, to accept notice on behalf of the Respondent No.6, the National Investigating Agency (NIA). Thereafter, various orders were passed by this Court with regard to investigation which are not necessary to narrate. It is worthy to mention that on 30.10.2017, this Court directed the 1st respondent to produce his daughter before this Court on 27.11.2017. On the date fixed, Hadiya was produced before this Court and a prayer was made to interact with Hadiya in camera and not in open Court but repelling the said submission, the following order was passed:-

"After due deliberation, we thought it appropriate to interact with Akhila @ Hadiya and we have accordingly interacted with her in Court. We were told that though she can communicate in English, she may not be able to effectively articulate in that language. Hence, we requested Mr. V. Giri, learned senior counsel, who also represents the State of Kerala to assist in translating the questions posed to her in Court and the answers given by her.

The range of questions that we posed basically pertained to her qualifications, interest in studies, perception of life and what she intends to do in future. In response to our queries, she responded by stating that she has passed Class X from Higher Secondary School in K.V. Puram, Vaikom in Kottayam District and thereafter she was prosecuting her BHMS course in Shivaraj Homeopathy Medical College in Salem in the State of Tamil Nadu. She has also stated that she intends to continue her internship/ housemanship which she had left because of certain reasons and her ambition is to become a full-fledged homeopathic doctor. She has expressed her desire to stay in the hostel and complete the course in the said college, if a seat is made available.

In the above view, we direct, as desired by her, that she be taken to Salem so as to enable her to pursue her internship/housemanship. We also direct the college to admit her and to allow the facility of a room or a shared room in the hostel as per practice to enable her to continue her internship/housemanship afresh. Be it stated, she herself has stated that the duration of the internship/housemanship is likely to be for 11 months. If any formality is to be complied with, the college shall communicate with the university and the university shall accede to the same. Our directions are to be followed in letter and spirit by all concerned. Needless to say, when she stays in the hostel, she will be treated like any other student

> and will be guided by the hostel rules. If necessary, the expenses for pursuing the course and for the hostel shall be borne by the State of Kerala. The Dean of the College shall approach this Court if there is any problem with regard to any aspect. 'Any problem' does not mean, admission in the hostel or continuance in the course.
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> We direct the State of Kerala to make all necessary arrangements so that she can travel to Salem at the earliest. She has made a request that she should be accompanied by policewomen in plainclothes. The State shall attend to the prayer appropriately. If any security problem arises, the State of Tamil Nadu shall make local arrangements for the same. We have been told that she is presently staying in Kerala Bhawan at New Delhi. Mr. V. Giri, learned senior counsel assures this Court that she shall be permitted to stay in Kerala Bhawan till she moves to Salem.
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> We make it clear that the NIA investigation shall continue in accordance with law."

18. The aforesaid adumbration calls for restatement of the law pertaining to writ of habeas corpus which has always been considered as 'a great constitutional privilege' or 'the first security of civil liberty'. The writ is meant to provide an expeditious and effective remedy against illegal detention, for such detention affects the liberty and freedom of the person who is in confinement.

19. In ***P. Ramanatha Aiyar's Law Lexicon*** (1997 Edn.), while defining "habeas corpus", apart from other aspects, the following has been stated:-

> "The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

20. In ***Cox v. Hakes***[1], Lord Halsbury observed as under: -

> "For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed."

21. In ***Secretary of State for Home Affairs v. O'Brien***[2], it has been observed that:-

> "... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of

1 (1890) 15 AC 506
2 [1923] AC 603 : [1923] ALL E.R. Rep. 442 (HL)

> illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of the liege."

22. In ***Ranjit Singh v. State of Pepsu (now Punjab)***[3], after referring to ***Greene v. Secy. of States for Home Affairs***[4], this Court ruled:-

> "*4.* ... the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."

The Bench quoted Lord Wright who, in ***Greene's case***, had stated:-

> "... The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."

23. In ***Kanu Sanyal v. District Magistrate, Darjeeling and Others***[5], a Constitution Bench, after adverting to the brief history of the writ of habeas corpus, opined that it is essentially a procedural writ that deals with the machinery of justice and not a substantive law. The object of the writ is to secure release of a

3 AIR 1959 SC 843
4 [1942] AC 284 : [1941] 3 All ER 388 (HL)
5 (1973) 2 SCC 674

person who is illegally restrained of his liberty. The Court further elaborated:-

> "… The writ of habeas corpus is one of the most ancient writs known to the common law of England. It is a writ of immemorial antiquity and the first threads of its origin are woven deeply within the "seamless web of history" and they are concealed and perhaps untraceable among countless incidents that constituted the total historical pattern."

24. Tracing the history, the Court proceeded to explicate:-

> "The writ of habeas corpus cum causa made its appearance in the early years of the fourteenth century. It not merely commanded the Sheriff to "have the body" of the person therein mentioned like its predecessor but added the words "with the cause of the arrest and detention". The person who had the custody of a prisoner was required by this writ to produce him before the Court together with the ground for the detention. The writ thus became a means of testing the legality of the detention and in this form it may be regarded as the immediate ancestor of the modern writ of habeas corpus. The writ of habeas corpus cum causa was utilised by the common law courts during the fifteenth century as an accompaniment of the writs of certiorari and privilege to assert their jurisdiction against the local and franchise courts."

25. In ***Ware v. Sanders***[6], a reference was made to the ***Law of Habeas Corpus*** by James A Scott and Charles C. Roe of the Chicago Bar (T.H. Flood & Company, Publishers, Chicago,

6 146 Iowa 233 : 124 NW 1081 (1910)

Illinois, 1923) where the authors have dealt with the aspect of Habeas Corpus. It reads as under:-

> "A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over technical nicety, and when ambiguous or doubtful, should be interpreted liberally to promote the effectiveness of the proceeding."
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> (See ***Ummu Sabeena v. State of Kerala and Others***[7])

26. In ***Ummu Sabeena***, the Court further ruled that the principle of habeas corpus has been incorporated in our constitutional law and in a democratic republic like India where judges function under a written Constitution and which has a chapter of fundamental rights to protect individual liberty, the judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India; and the same exercise of power can be done in the most effective manner by issuing a writ of habeas corpus.

27. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the

7 (2011) 10 SCC 781

primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

28. In the instant case, the High Court, as is noticeable from the impugned verdict, has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 herein with the appellant. It felt perturbed. As we see, there was nothing to be taken exception to. Initially, Hadiya had declined to

go with her father and expressed her desire to stay with the respondent No.7 before the High Court and in the first writ it had so directed. The adamantine attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him. True it is, she had gone with the respondent No.7 before the High Court but that does not mean and can never mean that she, as a major, could not enter into a marital relationship. But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to.

29. The High Court further erred by reflecting upon the social radicalization and certain other aspects. In a writ of habeas corpus, especially in the instant case, it was absolutely

unnecessary. If there was any criminality in any sphere, it is for the law enforcing agency to do the needful but as long as the detenue has not been booked under law to justify the detention which is under challenge, the obligation of the Court is to exercise the celebrated writ that breathes life into our constitutional guarantee of freedom. The approach of the High Court on the said score is wholly fallacious.

30. The High Court has been swayed away by the strategy, as it thought, adopted by the respondent No.7 before it in connivance with the present appellant and others to move Hadiya out of the country. That is not within the ambit of the writ of Habeas Corpus. The future activity, if any, is required to be governed and controlled by the State in accordance with law. The apprehension was not within the arena of jurisdiction regard being had to the *lis* before it.

31. Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the *parens patriae* doctrine. *Parens Patriae* in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal

caretaker, and to act as the parent of any child or individual who is in need of protection. "The *parens patriae* jurisdiction is sometimes spoken of as 'supervisory'"[8].

32. The doctrine of *Parens Patriae* has its origin in the United Kingdom in the 13th century. It implies that the King as the guardian of the nation is under obligation to look after the interest of those who are unable to look after themselves. Lindley L.J. in ***Thomasset v. Thomasset***[9] pointed out that in the exercise of the *Parens Patriae* jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare." The duty of the King in feudal times to act as *Parens Patriae* has been taken over in modern times by the State.

33. Black's Law Dictionary defines '*Parens Patriae*' as:-

> "1. The State regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.
>
> 2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. The State ordinarily has no standing to sue on behalf of

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8 P.W. Yong, C Croft and ML Smit, On Equity.

9 [1894] P 295

> its citizens, unless a separate, sovereign interest will be served by the suit."

34. In ***Charan Lal Sahu v. Union of India***[10], the Constitution Bench, while delving upon the concept of *parens patriae,* stated:-

> "35. ... In the "*Words and Phrases*" Permanent Edition, Vol. 33 at page 99, it is stated that *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons *non sui juris*, such as minor, insane, and incompetent persons, but the words *parens patriae* meaning thereby 'the father of the country', were applied originally to the King and are used *to designate the State referring to its sovereign power of guardinaship over persons under disability*. (emphasis supplied) *Parens patriae* jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term *parens patriae* differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the *parens patriae* theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for dischargings its obligations. Our Constitution makes it imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. ..."

10 (1990) 1 SCC 613

35. In ***Anuj Garg and Others v. Hotel Association of India and others***[11], a two-Judge Bench, while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public, opined thus in the context of the *parens patriae* power of the State:-

> "29. One important justification to Section 30 of the Act is parens patriae power of State. It is a considered fact that use of parens patriae power is not entirely beyond the pale of judicial scrutiny.
>
> 30. Parens patriae power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely *moralist* to a more objective grounding i.e. *utility*. The subject-matter of the parens patriae power can be adjudged on two counts:
>
> (*i*) in terms of its necessity, and
>
> (*ii*) assessment of any trade-off or adverse impact, if any.
>
> This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. (See ***City of Cleburne v. Cleburne Living Center***[12])"

11 (2008) 3 SCC 1
12 473 US 432, 439-41: 105 S Ct 3249 : 87 L Ed 2d 313 (1985)

36. Analysing further, the Court ruled that the *parens patriae* power is subject to constitutional challenge on the ground of right to privacy also. It took note of the fact that young men and women know what would be the best offer for them in the service sector and in the age of internet, they would know all pros and cons of a profession. The Court proceeded to state:-

> "31. … It is their life; subject to constitutional, statutory and social interdicts—a citizen of India should be allowed to live her life on her own terms."

37. Emphasizing on the right of self-determination, the Court held:-

> "34. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to self-determination is an important offshoot of gender justice discourse. At the same time, *security and protection* to carry out such choice or option specifically, and *state of violence-free being* generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix."

38. In ***Aruna Ramachandra Shanbaug v. Union of India***[13], the Court, after dealing with the decision in ***State of Kerala v. N.M. Thomas***[14] wherein it has been stated by Mathew, J. that

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13 (2011) 4 SCC 454
14 (1976) 2 SCC 310

"the Court also is 'State' within the meaning of Article 12 (of the Constitution) ...", opined:-

> "130. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight."

39. Constitutional Courts in this country exercise *parens patriae* jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the *parens patriae* principle and the same is required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give

shelter to women where her interest can be best taken care of till she becomes a major.

40. In ***Heller v. Doe***[15], Justice Kennedy, speaking for the U.S. Supreme Court, observed:-

> "The State has a legitimate interest under its *Parens Patriae* powers in providing care to its citizens who are unable to care for themselves."

41. The Supreme Court of Canada in ***E. (Mrs.) v. Eve***[16] observed thus with regard to the doctrine of *Parens Patriae*:-

> "The *Parens Patriae* jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity. The need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.
>
> While the scope of the *parens partiae* jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act

15 509 US 312 (1993)
16 [1986] 2 SCR 388

> because failure to act would risk imposing an obviously heavy burden on another person."

42. The High Court of Australia in ***Secretary, Department of Health and Community Service v. J.W.B. and S.M.B.***[17], speaking through Mason C.J., Dawson, Toohey and Gaudron JJ., has made the following observations with regard to the doctrine:-

> "71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *Parens Patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind."

43. Deane J. in the same case stated the following:-

> "4… Indeed, in a modern context, it is preferable to refer to the traditional *Parens Patriae* jurisdiction as "the welfare jurisdiction" and to the "first and paramount consideration" which underlies its exercise as "the welfare principle"."

44. Recently, the Supreme Court of New South Wales, in the case of ***AC v. OC (a minor)***[18], has observed:-

17 [1992] HCA 15 (MARION'S Case) : (1992) 175 CLR 218
18 [2014] NSWSC 53

> "36. That jurisdiction, protective of those who are not able to take care of themselves, embraces (via different historical routes) minors, the mentally ill and those who, though not mentally ill, are unable to manage their own affairs: *Re Eve* [1986] 2 SCR 388 at 407-417; Court of Australia in *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case* (1992) 175 CLR 218 at 258; PB v. BB [2013] NSWSC 1223 at [7]-[8], [40]-[42], [57]-[58] and [64]-[65].
>
> 37. A key concept in the exercise of that jurisdiction is that it must be exercised, both in what is done and what is left undone, for the benefit, and in the best interest, of the person (such as a minor) in need of protection."

45. Thus, the Constitutional Courts may also act as *Parens Patriae* so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the *Parens Patriae* doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.

46. Mr. Shyam Divan, learned senior counsel for the first respondent, has submitted that the said doctrine has been

expanded by the England and Wales Court of Appeal in a case **DL *v.* A Local Authority and others**[19]. The case was in the context of "elder abuse" wherein a man in his 50s behaved aggressively towards his parents, physically and verbally, controlling access to visitors and seeking to coerce his father into moving into a care home against his wishes. While it was assumed that the elderly parents did have capacity within the meaning of the Mental Capacity Act, 2005 in that neither was subject to "an impairment of, or a disturbance in the functioning of the mind or brain", it was found that the interference with the process of their decision making arose from undue influence and duress inflicted by their son. The Court of Appeal referred to the judgment in ***Re: SA (Vulnerable Adult with Capacity : Marriage)***[20] to find that the *parens patriae* jurisdiction of the High Court existed in relation to "vulnerable if 'capacitous' adults". The cited decision of the England and Wales High Court (Family Division) affirmed the existence of a "great safety net" of the inherent jurisdiction in relation to all vulnerable adults. The term "great safety net" was coined by Lord Donaldson in the Court of Appeal judgment which

19 [2012] 3 All ER 1064
20 [2005] EWHC 2942 (FAM)

was later quoted with approval by the House of Lords in ***In Re F (Mental Patient: Sterilisation***[21]. In paragraph 79 of ***Re: SA (Vulnerable Adult with Capacity : Marriage)***, Justice Munby observes:-

> "The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."

47. In relation to Article 8 of the *European Convention on Human Rights (ECHR)*, Justice Munby observes in paragraph 66:-

> "In terms of the ECHR, the use of the inherent jurisdiction in this context is compatible with Article 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and or to protect his right to enjoy his Article 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and

21 [1990] 2 AC 1

> proportionate to the facts of that case, again in like manner to the approach under the MCA 2005."

48. However, in paragraph 76, he qualifies the above principle with the following comment:-

> "It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are."

49. The judgment of ***Re: SA (Vulnerable Adult with Capacity : Marriage)*** (supra) authored by Justice Munby and cited in the above Court of Appeal case was in the context of the exercise of *parens patriae* to protect an eighteen year old girl from the risk of an unsuitable arranged marriage on the ground that although the girl did not lack capacity, yet she was undoubtedly a "vulnerable adult".

50. Interestingly, in another case, namely, ***A Local Authority*** **v.** ***HB, MB, ML and BL (By their Children's Guardian)***[22], the High Court's inherent jurisdiction was invoked to protect children who were allegedly going to be taken by their mother to Syria where they were at a risk of radicalization. Although the High

22 [2017] EWHC 1437 (Fam)

Court dismissed the applications on facts for want of evidence, yet it made certain observations regarding extremism and radicalization.

51. Mr. Divan has drawn our attention to the authority in ***A Local Authority* v. *Y***[23] wherein the High Court (Family Division) invoked its inherent jurisdiction to protect a young person, the defendant Y, from radicalization.

52. Relying upon the aforesaid decisions, he emphasized on the concept that when the major is a vulnerable adult, the High Court under Article 226 of the Constitution of India can exercise the *parens patriae* doctrine which has been exercised in this case. The aforesaid judgments, in our considered opinion, are not applicable to the facts of the present case. We say so without any hesitation as we have interacted with the respondent No. 9 and there is nothing to suggest that she suffers from any kind of mental incapacity or vulnerability. She was absolutely categorical in her submissions and unequivocal in the expression of her choice.

23 [2017] EWHC 968 (Fam)

53. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

54. Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.

55. In the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his view point or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant. Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and the respondent no.9 when both stood embedded to their vow of matrimony.

56. Resultantly, we allow the appeal and set aside the impugned order. However, as stated in the order dated 08.03.2018, the

investigation by the NIA in respect of any matter of criminality may continue in accordance with law. The investigation should not encroach upon their marital status.

……………………………….CJI
(Dipak Misra)

……………………………….J.
(A.M. Khanwilkar)

New Delhi;
09 April, 2018.