

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 891/2009**

% Date of Order: 9th February, 2010.

ROHIT KAUSHAL & ANR. Petitioners

! Through: Mr. Ashok Arora, Adv.

versus

\$ STATE & ORS. Respondent

^ Through: Mr. Pawan Sharma, Standing
Counsel for State.

Mr. C.S.S. Tomar, Adv. for R-5&6

* **CORAM:
HON'BLE MR. JUSTICE V.K. JAIN**

1. Whether the Reporters of local papers
may be allowed to see the judgment? NO
2. To be referred to the Reporter or not? NO
3. Whether the judgment should be
reported in the Digest? NO

: **V.K. JAIN, J. (ORAL)**

1. Petitioner No.2, who is present in the Court, has talked to her parents, petitioner No.4 Shri Jakir Hussain and petitioner No.5 Smt. Tuhina. Thereafter, statement of petitioner No.2 has been recorded. According to petitioner No.2, she left the house of her parents of her own, without any pressure, inducement or coercion from petitioner No.1. According to her, she went to a number of places with petitioner No.1 without any threat, coercion or inducement from him. She claims to have married petitioner No.1 on 8th July, 2009 and according to her, saptpadi was also performed at the time of her marriage.

2. The FIR was registered under Section 363 of IPC on a complaint made by the father of petitioner No.2. In order to constitute offence punishable under Section 363 of IPC, there has to be taking or enticing of a minor from the lawful guardianship of her parents/guardian. If the minor, of her own, abandons the guardianship of her parents and joins a boy, without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc. and without any offer or promise from the accused, no offence punishable under Section 363 of IPC will be made out when the girl is aged more than 16 years and is mature enough to understand what she is doing. Of course, if the accused lays a foundation by inducement, allurements etc. and that influences the minor or weighs with her in leaving her guardian's custody and keeping and going with the accused then it is difficult to accept that the minor had voluntarily come to the accused.

3. In "Shyam & Another Vs. State of Maharashtra", 1995 Criminal Law General 3974, the prosecutrix was a grown-up girl, though she had not touched 18 years of age. She claimed during trial that she was kidnapped under threat. The evidence produced during trial showed that she was seen going on the bicycle of the accused. The Hon'ble Supreme Court noted that it

was not unknown to her with whom she was going and therefore, it was expected of her then to jump down from the bicycle or put up the struggle and in any case raise an alarm to protect herself. As no such steps were taken by her, the Hon'ble Supreme Court felt that she was a willing party to go with the appellants of her own and, therefore, there was no taking out of the guardianship. The appellants were acquitted of the charge under Section 366 of IPC.

4. In "State of Karnataka vs. Sureshababu", 1994 CrL.L.J.1216(1), it was found that the girl went with the accused voluntarily. It was held by the Hon'ble Supreme Court that the requirement of Section 366 of IPC is that taking or enticing away a minor out of the keeping of the lawful guardianship was an essential ingredient of the offence of kidnapping. It was held that in such a case, it is difficult to held that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature, like inducement.

5. In "Mahabir vs. State" , 55(1994)DLT 428, the appellant and the prosecutrix were known to each other. The appellant took the prosecutrix to a place outside Delhi where they stayed for about fifteen days and had sexual intercourse with each other. The appellant was convicted under Sections 366 and 376 of I.P.C. A learned Single Judge of this Court noticed that she had gone to

Railway Station, had stood there with the appellant who also went to purchase tickets and then she had travelled with him in a compartment shared by other persons. She had then gone to a house in a tonga and yet she did not lodge any protest and made no attempt to flee despite having ample time and opportunity. The learned Single Judge noted that on the day of reckoning, she surely had crossed mark of sixteen years and since she was all along a willing party, the appellant was acquitted of both the charges against him. Thus, despite the prosecutrix being less than eighteen years of age, the appellant was acquitted not only of charge under Section 376 but also of the charge under Section 366 of I.P.C.

6. In “Piara Singh vs. State of Punjab”, 1998(3) Crimes 570, the High Court found that the prosecutrix was more than sixteen years of age at the time of this incident, though, the case of the prosecution was that she was fourteen years of old at that time. Since the High Court came into conclusion that no force was used in having sexual intercourse with him, the appellant was acquitted not only of charge under Section 376 but also of charge under Section 366 and 366-A of Indian Penal Code. In this case also, the prosecutrix was not found to be more than eighteen years of age.

7. In "Bala Saheb vs. State of Maharashtra", 1994 Criminal Law General 3044, it was found that the prosecutrix accompanied the appellant/accused from her village and stayed with him for two to three days. It was held that these circumstances clearly show that offence under Section 363 or 366 of I.P.C. was not made out.

8. The case of the petitioner before this Court stands on a much stronger footing as the girl, who is present in the Court herself is saying that no promise or inducement was extended to her by the boy and she of her own had abandoned the guardianship of her parents and had joined him, in order to marry him.

9. No offence punishable under Section 363 of IPC is made out against petitioner No. 1 merely on account of his having accompanied petitioner No.2 or having married her with her consent.

10. It has been submitted by the learned counsel for the parents of the petitioner No. 2 that the alleged marriage of petitioner No.2 with petitioner No. 1 was in contravention of Section 5(iii) of Hindu Marriage Act since she had not completed 18 years of age at the time of her marriage and the petitioner No.1 had not completed 21 years of age at that time.

11. The offence punishable under Section 18 of Hindu Marriage Act is non-cognizable offence since the maximum punishment

prescribed for the offence is two years. The police, therefore, could not have registered an FIR in respect of the offence alleged to have been committed under Section 18 of Hindu Marriage Act without obtaining permission from the Magistrate under Section 155 (ii) of the Code of Criminal Procedure. In any case, the State is not seeking to invoke Section 18 of Hindu Marriage Act against either of the petitioners.

12. In these circumstances, the FIR No. 116/2009 registered at Police Station Geeta Colony under Section 363 of IPC and the proceedings arising therefrom are hereby quashed. It shall, however, open to the Investigating Agency, if it is of the view that offence under Section 18 of Hindu Marriage Act has been committed by the petitioner and if it then decides to prosecute them, to seek permission of the Magistrate to investigate the offence alleged to have been committed under Section 18 of Hindu Marriage Act and to proceed further, in case the requisite permission is granted. Alternatively, it is also open to a person aggrieved by the alleged contravention of Section 5 of Hindu Marriage Act to file appropriate complaint before a Magistrate in respect of the offence punishable under Section 18 of Hindu Marriage Act. It is made clear that this Court is not examining as

to whether offence under Section 18 of Hindu Marriage Act is made out against the petitioners or not.

The petition stands disposed of with these directions.

(V.K.JAIN)
JUDGE

FEBRUARY 9, 2010/bg