2025:AHC:179468-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD

HABEAS CORPUS WRIT PETITION No. - 875 of 2025

Neha and another

.....Petitioner(s)

Versus

State of U.P. and others

.....Respondent(s)

Counsel for Petitioner(s)	:	Shakti Shanker Tiwari, Subhash Chandra Tiwari
Counsel for Respondent(s)	:	G.A.

A.F.R.

Court No. - 44

HON'BLE J.J. MUNIR, J.
HON'BLE SANJIV KUMAR, J.

1. The first petitioner 'A' is a mother and yet a minor. The second petitioner, Anurag Yadav is her minor son, aged two months begotten of Mukesh whom 'A' assertes to have married. This petition is supported by an affidavit filed by the first petitioner's mother-in-law, that is to say, Mukesh's mother. The first petitioner being a minor, who married Mukesh of her free will, 'A's father reported the incident to the police giving rise to Crime No. 271 of 2025 under Section 137 (2) of the Bartiya Nyay Sanhita, 2023 (for short, 'B.N.S.'), P.S. Rasoolabad, District Kanpur Dehat. It must be noticed that the parties married on 03.07.2025, and according to 'A's High School Marksheet, her date of birth is 05.10.2008. Therefore, on the date of her marriage, the prosecutrix was three months shy of 17 years. She has now turned 17. After registration of the crime, Mukesh was arrested on 22.07.2025 and remanded to judicial custody. Before his arrest, the second petitioner was born to Mukesh and 'A' on 14.07.2025. 'A' too was detained by the Police on 22.07.2025 and produced before the Child Welfare Committee, Kanpur Dehat, where she made a statement that she wants to go back to her husband Mukesh's house. She refused to go along with her parents citing peril to her life. Bearing in mind the aforesaid stand that 'A' took, the Child Welfare Committee, Kanpur Dehat directed her to be lodged in the Rajkeeya Bal Grih (Balika) Unit-1/Rajkeeya Visheshgya Dattak Grahan Ekai 7/202

Swarup Nagar, District Kanpur Nagar (hereinafter referred to as 'Rajkeeya Bal Grih (Balika)'). She is currently lodged there.

2. This habeas corpus petition has been filed with a prayer that the detenue be summoned from custody of the Rajkeeya Bal Grih (Balika) and set at liberty.

3. A counter affidavit has been filed in the matter on behalf of the State.

4. Admit.

5. Heard forthwith.

6. Heard Mr. S.C. Tiwari, learned Counsel for the petitioners and Mr. Anil Kumar Mishra, learned AGA appearing on behalf of the State.

7. Learned Counsel for the petitioner, in support of his case, has placed reliance on the authority in **K.P. Thimmappa Gowda vs. State of Karnataka (2011) 14 SCC 475.**

8. The case relied upon by the learned Counsel for the petitioner was a judgment rendered in a criminal appeal arising out a conviction for the offence of rape, where the High Court had convicted after reversing the Trial Court. There was doubt about the prosecutrix's age. The Trial Court had opined that the prosecutrix was aged about 18 years, a finding which the High Court set aside. It was in view of the said facts and the law at the time when the case of **K.P. Thimmappa Gowda** was decided, that their Lordships of the Supreme Court held that on the facts, a reasonable view of the evidence was that the prosecutrix had sex with the appellant with her consent and no offence under Section 376 IPC was made out because sex with a woman above 16 years of age with her consent is not rape.

9. The law regarding the age of consent has undergone a sea change since **K.P. Thimmappa Gowda** was decided. The age of consent under the Clause sixthly of Section 375 IPC, when **K.P. Thimmappa Gowda** was decided, was 16 years. Clause sixthly of Section 375 IPC was amended by the Criminal Law (Amendment) Act, 2013, which came into force on 02.04.2013 to provide that any of the enumerated sexual activities in Clauses (a) to (d) of Section 375 IPC would constitute rape under clause

sixthly of Section 375 with or without consent of the prosecutrix when she is under the age of 18 years. The submission of the learned Counsel for the petitioner, therefore, based on the authority of the **K.P. Thimmappa Gowda** is away from the statutory context and of no assistance to him. The other submissions advanced by the learned Counsel for the petitioner that the parties being married, sexual intercourse between the petitioner and 'A', 'A' being his wife and not below the age of 15 years is not rape, is again misconceived. The said submission is based upon the provisions of Exception 2 to Section 375 IPC as that Statue stood before the provisions of Exception 2 were read down by the Supreme Court in **Independent Thought vs. Union of India and another (2017) 10 SCC 800** and the age of consent was to be read as 18 instead of 16.

10. It was held in **Independent Thought vs. Union of India and another** *(supra):*

> "**196.** Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.
>
> **197.** In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:
>
> (*i*) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India;
>
> (*ii*) it is discriminatory and violative of Article 14 of the Constitution of India; and
>
> (*iii*) it is inconsistent with the provisions of the Pocso Act, which must prevail.
>
> Therefore, Exception 2 to Section 375 IPC is read

down as follows:

> "*Exception 2*.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

It is, however, made clear that this judgment will have prospective effect."

11. These submissions are utterly ill-founded because we do not have to look to the prvosions of the law as it stood under the Indian Penal Code or the way the provisions of Section 375 I.P.C. were read down by the Supreme Court in **Independent Thought vs. Union of India and another.** The reason is that the Penal Code has been repealed and substituted by the B. N. S.

12. The statutory context has much changed since the last mentioned case was decided. Under the B.N.S., which is the successor Statute to the Indian Penal Code that has come into force with effect from 01.07.2024, the age of consent under Section 63 (vi) is stipulated to be 18 years. For the facility of ready reference Section 63 of the B.N.S.-2023 reads:

> **63. Rape.**—A man is said to commit "rape" if he—
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions—

(i) against her will;

(ii) without her consent;

(iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;

(iv) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

(v) with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent;

(vi) with or without her consent, when she is under eighteen years of age;

(vii) when she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1..—A medical procedure or intervention shall not constitute rape.

Exception 2..—Sexual intercourse or sexual acts

> by a man with his own wife, the wife not being under eighteen years of age, is not rape.

(emphasis by Court)

13. The offence in the present case has been committed on 03.07.2025, which is much after the B.N.S. came into force. The learned Counsel for the petitioner can, therefore, derive no profit from the holding in **K.P. Thimmappa Gowda.**

14. There is another vantage to the matter. Permitting a minor to cohabit with an adult would make the husband liable for offences punishable under the POCSO Act as well.

15. So far as the custody of the minor being given to her mother-in-law is concerned, there is no assurance that there would be no carnal relations with her major husband as soon as he is set at liberty. There is no mechanism by which the law can ensure the two remaining away. In the circumstances, the first petitioner having taken a stand that she would not go back to her parents, a position which she could legitimately take, the only course open is to house her in the Rajkeeya Bal Grih (Balika), where she is currently lodged.

16. At this stage, Mr. Tiwari, learned Counsel for the petitioner has urged the human angle of the matter. He says that the first petitioner has a child of two months in her lap and she is herself in detention in the Rajkeeya Bal Grih (Balika). She can hardly take care of her child and the child cannot be weaned away from her at this young age. He, therefore, submits that if the first petitioner cannot be set at liberty, her mother-in-law should be given the liberty of taking care of her by providing food and other necessaries in the Rajkeeya Bal Grih (Balika).

17. We did spare a thought to the matter, but the difficulty is that the safety and security of a detenue is the responsibility of Rajkeeya Bal Grih's administration. A constant access if permitted to the mother-in-law, except meetings permissible under the law, would expose the administration to the peril of facing disciplinary action if something untoward happens to the first petitioner while staying in the Rajkeeya Bal

Grih (Balika).

18. The other relief, which Mr. Tiwari seeks, is that the first petitioner's mother-in-law may be permitted to meet 'A', a facility which she is being denied treating her as the accused's mother.

19. In the totality of the circumstances, we think that, that is a reasonable relief to which the first petitioner is entitled. This, however, would not include the first petitioner's mother-in-law providing any eatables or food to the first petitioner or the child while visiting the Rajkeeya Bal Grih (Balika). The visitation, of course, has to be in accordance with the rules of the Rajkeeya Bal Grih (Balika), where the first petitioner is interned.

20. We also take note of the fact that after the first petitioner attains the age of 18 years on 05.10.2026, she would be entitled to her liberty with freedom to go anywhere that she likes, including her husband or her parent's house. That liberty would come to the first petitioner on 05.10.2026; not earlier. Until then, the only liberty that can be given to the first petitioner is a passage back home to her parents, which she has herself elected out of.

21. There is one more aspect of the matter, which has to be taken care of. Learned Counsel for the petitioner has pointed out that conditions in the Rajkeeya Bal Grih (Balika) are deplorable, as a result of which the health of the petitioner and her new born child are both in peril. This is a matter which has to be taken care of and which we propose to do by the order that we shall presently make.

22. In the circumstances, this petition stands **disposed of** in terms of the following orders:

> 1) The first petitioner shall be set at liberty by the Incharge, Rajkeeya Bal Grih (Balika) Unit-1/Rajkeeya Visheshgya Dattak Grahan Ekai 7/202 Swarup Nagar, District Kanpur Nagar on **05.10.2026** without hassle. This order would apply to any other Protection Home, where the first petitioner may be interned upon transfer due to administrative exigencies etc.

2) During the period of time that the first petitioner is interned in the Rajkeeya Bal Grih (Balika), her mother-in-law, Smt. Vitola wife of Munshi shall be at liberty to visit her and take care of her emotional and other needs, as well as that of the first petitioner's child and Vitola's grandson, but shall not be entitled to bring them any food or eatables. These visitation shall be regular and in accordance with the rules of the Rajkeeya Bal Grih (Balika).

3) The Incharge, Rajkeeya Bal Grih (Balika) Unit-1/Rajkeeya Visheshgya Dattak Grahan Ekai 7/202 Swarup Nagar, District Kanpur Nagar is ordered to ensure that the first petitioner is housed along with her child under conditions that are conducive to her good health and that of her child and the well being of both. A doctor would attend on them regularly at least twice a month or whenever required by the first petitioner. There shall also be a paediatrician to take care of the child, who shall be available on call. The Chief Medical Officer, Kanpur Nagar or the Chief Medical Officer of the district wherever the Protection Home is located to which the first petitioner might be transferred, shall ensure that a doctor and a paediatrician, as above directed, are available on schedule and also on call.

The learned District Judge, Kanpur Dehat is directed to assign a senior lady Judicial Officer to visit the first petitioner and her child in the Rajkeeya Bal Grih (Balika) at least once a month, preferably in the first and the third week every month, and ensure that these directions of ours are regularly carried out. In the event, she notices any violation of these orders of ours, which she cannot remedy on the spot, she would make a report to this Court through the learned Registrar General and upon such a report being received, the same shall be laid for orders before the Bench holding roster.

Let this order be communicated to the learned District Judge, Kanpur Dehat and the Chief Medical Officer, Kanpur Nagar and the Incharge,

Rajkeeya Bal Grih (Balika) Unit-1/Rajkeeya Visheshgya Dattak Grahan Ekai 7/202, Swarup Nagar, District Kanpur Nagar, through the learned Chief Judicial Magistrate, Kanpur Nagar by the Registrar (Compliance) **within a week.**

(Sanjiv Kumar, J.) (J.J. Munir, J.)

October 9, 2025
Deepak