

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(CRL.)591/2008 & Crl. M.A. 5507/2008

MOHD. NIHAL Petitioner through
Mr. K. Sunil, Adv.

versus

\$ STATE Respondent through
^ Ms.Mukta Gupta, Advocate for the
State.
Mr.Sanjeev Bhandari, Additional
Standing Counsel (Criminal) with
ASI Nathu Ram
Mr.Najmi Waziri, Advocate/Amicus
Curiae.

Date of Hearing : 01st July, 2008

% Date of Decision : 08th July, 2008

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE V.K. SHALI

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

J U D G M E N T

1. A Muslim husband, Mohd. Nihal, seeks the custody of his Muslim wife, Mst. Afsana, by means of this habeas corpus petition. Nihal (the Petitioner) asserts that he is 22 years of age and was married to Mst. Afsana on 31.3.2008 in consonance with Muslim rites and ceremonies at Madarasa Alia, Masjid Fatehpuri, Delhi. The age of Mst. Afsana is the cause of controversy, both factual

and forensic. One of the witnesses to this marriage is the husband of the sister of Mst. Afsana who, according to Nihal, had acted as her guardian (Wali). An F.I.R. under Section 363 IPC has been registered on 31.3.2008 at the instance of Mst. Akhatari Begum (mother of Mst. Afsana) who has appeared in these proceedings and has opposed the handing over of her daughter to the Petitioner. These are the adversaries before us. Since complex questions of Muslim Law have arisen, and Mst. Akhatari Begum is not financially sound to engage an Advocate, we had requested Mr. Najmi Waziri, Advocate to act as *amicus curiae*.

2. The Prohibition of Child Marriage Act, 2006 (No.6 of 2007) [for short 'PCM' Act hereinafter] having been published in the Gazette of India Extraordinary on January 11, 2007 and was Notified in the Gazette to come into force on November 1st, 2007. It has repealed the Child Marriage (Restraint) Act, 1929. Section 2 thereof differentiates between a "child" and a "minor". The word "child" is stated to mean a person, who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age; whereas the word "minor" means a person who under the provisions of the Indian Majority Act, 1875 (for short Majority Act) is deemed to have attained his majority. The provision of the PCM Act defines a child marriage as one to which either of the contracting party is a child. In other words the purpose of this Act

is to disable a major male from entering into matrimony before reaching the age of 21 years and a female before attaining the age of eighteen. PCM Act so far as its applicability is concerned makes no distinction between race or religion. Section 3 thereof declares every child marriage to be voidable at the option of the contracting party who was a child at the time of marriage. This roughly corresponds to the position that obtains under the Hindu Marriage Act, 1955 ('HM Act' for short). Section 12 declares a child marriage to be null and void in circumstances where some enticement or force, deceit or inducement may have occurred or where a child having been sold in marriage has been made to go through a form of marriage after which the minor is sold or trafficked or used to immoral purpose. Punishment is prescribed by this enactment for an adult male contracting a child marriage, and for performing, promoting or permitting a child marriage. The significance of the PCM Act so far as the present case is concerned is that it applies throughout India, except in the State of Jammu & Kashmir, and to all Indian citizens, without and beyond India, regardless of their religious affiliations. Thus, it applies to Muslims also. The question that requires an immediate answer is whether the PCM Act has the effect of rendering void the marriage of a Muslim girl who has attained puberty but is below the age of 18.

3. In this regard, it should be noted that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 gives pre-eminence to Muslim Personal Law (Shariat), notwithstanding any customs or usage to the contrary. This Section reads as under:

“2. Application of Personal Law to Muslims.—

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

4. *Mohammad Yunus -vs- Syedunnisa* (AIR 1961 SC 808) has construed this provision as an injunction directed against each and every Court, thereby enjoining a Judge to apply Shariat law in all cases concerning Muslims notwithstanding any custom or usage to the contrary. In contradistinction to custom and usage, the word “law” is conspicuous by its absence in this Section. Therefore, Section 2 of the Majority Act immediately assumes significance as it declares that it shall not affect (a) the capacity of any person to act in the matters of marriage, dower, divorce and adoption; and

(b) the religion or religious rites and usages of any class of citizens. Section 3 of the Majority Act stipulates that every person shall attain the age of majority on his completing the age of 18 years and not before it. Section 6 of the Guardians and Wards Act, 1890 (for short G&W Act) also preserves this pre-eminence of personal laws inasmuch as it directs that in the case of a minor, nothing contained in the Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject. Accordingly, even if some doubt should prevail pertaining to the applicability of Shariat laws in guardianship matters, it stands clarified by virtue of Section 6 of the G & W Act. When a Court is called upon to determine the welfare of a minor so far as appointing a guardian of his person or property or both is concerned, this exercise will have to be determined in consonance with Shariat Law in disputes between persons adhering to the Muslim faith.

5. It is quite often posited that a Muslim marriage partakes of the nature of a contract. If this is so, it would become necessary to advert to the Indian Contract Act, 1872 ('Contract Act' for short) which extends to the whole of India without any exception of religion. Section 10 of Contract Act articulates that all agreements are contracts if they are made by the free consent of parties

competent to contract. Section 11 thereof specifies that every person is competent to contract who is of the age of majority according to the laws to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Thus an exception requiring the application of personal laws has been carved out even in the Contract Act. Our attention has been drawn to the opinion of Dr. Tahir Mahmood in The Muslim Law of India to the effect that “it is only the form of marriage that in Muslim law is contractual and non-ceremonial; marriage itself as a concept is not merely a ‘contract’.” The learned Author emphasizes that the Holy Quran does not treat marriage as an ordinary contract. The submission has been made before us that if the provisions of the Contract Act are made applicable to Muslim marriages, it will render nugatory most of the provisions of the Shariat law. We find no need to delve further into this aspect for the reason that Section 11 of the Contract Act in terms prescribes the applicability of personal laws on the issue of the competency of a person to enter into a contract. Furthermore, as we have already pointed out, Section 2 of the Majority Act indicates that its provisions do not impact on matters of marriage, dower, divorce and adoption. The Division Bench of the High Court of Judicature at Madras has opined in *Arulananda -vs- Ponnuswami*, AIR 1922 Madras 1 that “as regards questions of marriage, adoption, etc. the capacity of minors is left untouched by

the Indian Majority Act ...". The same conclusion was reached in *Bhagwati -vs- District Judge*, AIR 1933 Allahabad 480, where it was held that a person who has attained majority under Hindu Law would be legally competent to marry even though she had not reached the age prescribed under the Majority Act, that is, eighteen years. Although the nodus before the Division Benches in *Abdul Azeez -vs- Pathumma Bi*, AIR 1952 Mad. 754, *Ahmed Suleman -vs- Bai Fatma*, (1930) 32 BOMLR 1372:55 Bom 160, and of a Single Judge in *Naksetan Bibi -vs- Habibab Rahman*, AIR 1948 Cal 66 was whether a suit filed by a person below the age of eighteen was maintainable, all of them unequivocally posit that the marriage of a Muslim after reaching puberty but before turning eighteen is valid, because the personal laws to which she is subject permit it. In this analysis, it is our opinion that a Muslim girl who has reached puberty or is presumed to have reached puberty on attaining the age of fifteen, is competent to enter into matrimony even if this partakes of a contract simplicitor.

6. We must, at once, clarify that under Muslim law the marriage of a girl who has not attained puberty is nevertheless legitimate provided it has the consent of her Guardian(Wali). In such cases, however, the wife has the option to repudiate the marriage when she reaches puberty. At the very threshold of this Judgment we had recorded the contention of the Petitioner that the

brother-in-law of Mst. Afsana was not just a witness to the marriage but had acted as her Guardian/Wali. Remarkably, there is no evidence or material whatsoever reflecting the presence or consent of the father of Mst. Afsana to her marriage. Our attention has been drawn to affidavits submitted by the Petitioner to the Qazi in which his age is stated as 22 years and that of Mst. Afsana as 19 years. If she was in fact 19 years old at the time of her marriage, there would not have been any requirement for the consent of her father. It has been established in these proceedings that the statements in these affidavits are not correct, as Mst. Afsana is much younger than 19 years. On the contrary, it is nebulous and uncertain whether she was even 15 years of age or had actually reached puberty on the date of her so-called marriage. As regards the factum of her Wali having consented to the marriage, it must be noted that this important function cannot be fulfilled by a brother-in-law. It appears to be common to all schools of Muslim Law that the father, and in his absence the paternal grandfather, must perform the rights, duties and obligations of a Wali. During the lifetime of the father no other relative is competent to function as the Wali. In the absence of the father, the grandfather, the great grandfather, the brother, the uncle or granduncle and the mother, in this sequence, are competent to act as the Wali. It would be of advantage to refer to *Khatija Begum -vs- Gulam Dastagir*, AIR 1976 AP 128 and *Abdul Ahad -vs- Mst. Shah*

Begum, AIR 1997 J&K 22 where the Division Bench has expounded upon this aspect. In the absence of the mother, the paternal or maternal grandmother, the maternal grandfather, the sister, or uterine brother or sister, paternal aunt, maternal aunt, maternal uncle or aunt, in that order, can perform the duties of a Wali. The uncontroverted position before us is that Mst. Afsana's father, mother and elder brother, amongst others, are alive and available but were not present when the marriage took place. Accordingly, the marriage could have been legally performed, only if Mst. Afsana had attained puberty or must be presumed to have attained puberty on having reached her 15th birthday. **Ayub Khan – vs- Mst. Akhtari**, AIR 1963 All 525 remains authority for the proposition that the marriage of a Muslim minor (one who has not attained puberty) without the consent of her Wali is completely void, irrespective of her consent.

7. Medical Tests are indeterminate as to whether Mst. Afsana was 15 years of age at the time of her marriage. It is trite that upon the party which asserts and alleges a particular event rests the burden of proving it as a fact. The Petitioner has not tendered any proof in this connection. The Medical Tests, however, unequivocally indicate that Mst. Afsana is not 19 years of age. It is quite clear that the Petitioner has submitted a false Affidavit pertaining to the age of Mst. Afsana. Since he is a major and

Mst. Afsana is not, the responsibility must weigh heavily on his shoulders alone so far as this mis-declaration is concerned.

8. Mst. Afsana had narrated to us through her mother and lady attendants that the marriage has been consummated. Medical Opinion, however, is to the contrary as her hymen is intact and she, therefore, remains a virgin. One of the reasons why we have mentioned this fact is that it manifests near total lack of knowledge on the part of Mst. Afsana as to biological/physical functions. On previous dates of hearing she was unable to state whether she had started menstruating. The Medical Report confirms that she has now started menstruation. However, it is unclear whether she had attained puberty on the date of her marriage. Our impression is that she had not. We reiterate that these events should have been proved by the Petitioner, as it is he who asserts them.

9. In the event, the Petitioner has failed to establish that Mst. Afsana had obtained puberty at the time of marriage, that is, 31.3.2008 and/or that she has reached the age of 15 years. Since her father is alive, only he was competent to act as her Wali for the purposes of her marriage as prima facie she was a minor at that time. Therefore, the purported marriage is *batil* or void *ab initio*.

10. We had mentioned at the commencement of this Judgment that there were competing claims for the custody of Mst. Afsana, that is between the Petitioner (as her husband), and her mother. Muslim law stipulates that the mother has primacy so far as claims of custody over her minor daughter are concerned. Since our findings for the purposes of this Petition are to the effect that a valid marriage was not performed between the Petitioner and Mst. Afsana, he has no right to claim her custody. In this regard we wish to emphasise the views of the Division Bench in *Shama Beg – vs- Khawaja Mohiuddin Ahmed*, ILR(1972) 2 Del.73. In the course of the last hearing we had inquired from Mst. Afsana who she wishes to reside with. Her answer to us was that while she would like to meet the Petitioner, she desires to reside with her mother. It appears that these habeas corpus proceedings have accelerated her maturity or precociousness. Although she has attained majority as per her personal laws by the last date of hearing, thereby rendering ineffectual and irrelevant her mother's decision as to her custody, we have no option or reason but to fashion our Judgment as per **Ayub** decision and reject the claim for conjugal custody.

11. Our attention has also been drawn to the decision of the Division Bench comprising Manmohan Sarin and Manju Goel, JJ. in **Ravi Kumar –vs- State** which has resulted in the filing of the Petition titled National Commission for Women –vs- Government of

NCT of Delhi. In **Ravi Kumar** the conclusion was that the marriage of two Hindus, where one of the spouses was 15 years, did not render it void or illegal. The custody of the minor wife was handed over to the husband and proceedings under Section 363 IPC were quashed. Similar orders were also passed in respect of the other Petitioner. These views have again been reiterated by another Division Bench of this Court comprising Manmohan Sarin and S.L. Bhayana, JJ. in *Sunil Kumar -vs- State NCT of Delhi*, 2007(2) LRC 56 (Del) (DB). It requires to be underscored, however, that the law pertaining to Muslims is dissimilar to that pertaining to Hindus. In this regard we have perused the decision of the Division Bench in *Mst. Shabnam -vs- Mohd. Shafiq*, AIR 2004 Rajasthan 303 and *Mustafa -vs- Smt. Khursida*, AIR 2006 Rajasthan 31. The Division Bench of the High Court of Judicature at Bombay in *Manik Dinkar Jagtap -vs- State of Maharashtra* has also handed-over the custody of minor Hindu wife to her husband following the decision in *Makemmal Sailoo -vs- Superintendent of Police*, II (2006) DMC 4, predicated on the opinion that although a marriage of a minor is an offence under the HM Act, nevertheless the marriage is not invalid.

12. The views of the Division Bench in *Md. Idris -vs- State of Bihar*, 1980 CrL. L.J. 764 are of no assistance to the Petitioner even though in that case the custody of a girl of 15 years was granted to

her husband even in the face of the opposition of her father because her age has not been adequately proved in these proceedings. We are aware that criminal proceedings are pending against the Petitioner and therefore we hasten to record that our findings are prima facie and are restricted to this habeas corpus petition only.

13. This Petition is accordingly dismissed leaving Mst. Afsana free to decide her own fate and the future.

14. We record our gratitude to Mr. Najmi Waziri who, as an *amicus curiae*, has assisted us on the relevant aspects of Mohammedan law. Mr.Waziri has availed of the assistance of Dr.Saif Mahmood, to whom we are also thankful. There shall not be any order as to costs.

(VIKRAMAJIT SEN)
JUDGE

July 08, 2008
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(V.K. SHALI)
JUDGE