

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

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Judgment delivered on: 15.05.2009

**+ WP(CRL) 13/2009**

**SHAMSUDDIN**

... Petitioner

- versus -

**STATE & ORS**

... Respondents

**Advocates who appeared in this case:**

For the Appellant : Mr R. D. Rana

For the Respondent : Ms Mukta Gupta with Mr Rajat Katyal

**CORAM:-**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR. JUSTICE AJIT BHARIHOKE**

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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 Digest?                    | YES |

**BADAR DURREZ AHMED, J (ORAL)**

1. This petition seeking a writ of habeas corpus has been filed by Shamsuddin for the production of his daughter, Gulshan. It was alleged in the petition that his daughter (Gulshan) was being illegally detained by one Bhura @ Furqan, who was also a tenant in the house in which the petitioner is residing, namely, C-216, Gali No. 8, Mullah Colony, Gharoli Extension, Delhi. Through efforts made by the respondent/ State, Gulshan was located and has been produced before Court.

Earlier, she made a statement under Section 164 of the Code of Criminal Procedure, 1973 on 20.04.2009 before the learned Metropolitan Magistrate at Karkardooma Courts, Delhi. In the said statement, she categorically stated that she left her house about five months ago of her own volition with Bhura @ Furqan. Thereafter, they went to Aligarh and got married in Court. At the outset, we may note that there is no evidence produced before us to indicate a court marriage. However, she further stated that she as well as Bhura lived as husband and wife first of all in his village Choudhera, Police Station Chhatri, District Bulandshahar, U. P. and thereafter moved back to Delhi and lived in Seemapuri as husband and wife in a rented accommodation. According to her said statement she is 20 years of age.

2. According to the petitioner, she is below 15 years of age inasmuch as as per her school record her date of birth has been indicated as 12.07.1994. We had explored the possibility of ascertaining her age through medical evidence by directing her to undergo an ossification test. However, the learned counsel for the State submitted that that would not be possible because Gulshan is in the family way. Therefore, in the wake of rival claims with regard to her age, we are left to consider this case. On the one hand the petitioner, that is, the girl's father is claiming custody over the minor girl Gulshan

and on the other hand she herself has categorically and clearly indicated her preference to reside with her husband and not returning to her parental home. There is, however, another complication. Because of the missing person's report lodged vide DD No. 13-A at Police Station New Ashok Nagar, Delhi on 28.12.2008 and action pursuant thereto, an FIR was registered on 07.01.2009 under Section 363 IPC in which Gulshan's husband Bhura @ Furqan has been named as a suspect. It is pertinent to point out that the offence punishable under Section 376 IPC has also been added later on. As a result of the registration of the case, Gulshan's husband Bhura @ Furqan has been arrested and is in custody.

3. The parties are *Sunni* Muslims and are governed by *Hanafi* law. Under the law applicable to them, any person who has attained the age of puberty is entitled to contract a marriage. There is no *nikahnama* which has been produced before us or any other documentary evidence to indicate that Gulshan and Bhura entered into a *nikah*. However, Gulshan asserts that she has been married and that a *nikah* had been performed between her and her husband Bhura @ Furqan. Under Muslim law, the mere fact that a couple cohabits for a length of time as a husband and wife also raises the presumption of marriage. In any event, normally it is for either party to the marriage to assert or deny the factum of marriage. In the present case, neither party to the

marriage has denied the factum of marriage. With regard to the question as to whether Gulshan has attained the age of puberty or not, it is now abundantly clear that she has attained the age of puberty inasmuch as she is now in the family way. Ms Mukta Gupta, the learned counsel who appears on behalf of the State, referred to the MLC dated 19.04.2009 prepared at Lal Bahadur Shastri Hospital, Kichdi Pur, Delhi which indicates that her pregnancy test was positive. Thus, there is no doubt that even if Gulshan is considered to be a minor, she has attained the age of puberty and has been cohabited with Bhura @ Furqan as wife and husband. In any event, the age of puberty, in the absence of any evidence under Muslim law, in the case of a girl, is to be taken as 15 years. Although there is no conclusive finding with regard to her exact age, it would not be necessary for the purposes of considering whether a valid marriage had been contracted or not in view of the fact that she has attained puberty.

4. We may also point out that a Division Bench of this Court in the case of **Mohd. Nihal v. State: WP (Crl) 591/2008 & Crl. M. A. 5507/2008** decided on 08.07.2008 had occasion to consider the aspects of validity of the marriage of a minor Muslim girl. The said decision surveyed the law on the subject. It also considered the provisions of the Guardians and Wards Act, 1890. In that case there were rival claims of custody with regard to Mst. Afsana. Mohd. Nihal,

who claimed to be the legally wedded husband, claim custody over her by means of a habeas corpus petition whereas on the other hand, her mother claimed custody over Mst. Afsana on the ground that the marriage was invalid and that the custody of a minor is to be restored to the parents/ natural guardians.

5. Construing Section 6 of the Guardians and Wards Act, 1890, this Court in *Mohd. Nihal* (*supra*) came to the conclusion that when a Court is called upon to determine the welfare of a minor so far as appointing a guardian of his /her person or property or both is concerned, the exercise would have to be determined in consonance with Muslim Personal Law (*Shariat*) in disputes between persons adhering to the Islamic faith. The said decision then examined the provisions of the Indian Contract Act, 1972 in view of the fact that a Muslim marriage is in the form of a contract. Referring to Section 11 of the said Act, the Division Bench held that the section 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. The Court specifically observed that Section 11 of the Indian Contract Act in terms prescribed the applicability of personal laws on the issue of competency of a person to enter into a contract. From this principle as well as upon a consideration of several other decisions, the

said Division Bench in *Mohd. Nihal* (*supra*) concluded that a Muslim girl, who has reached puberty or is presumed to have reached puberty on attaining the age of 15, is competent to enter into matrimony even if this partakes of a contract *simpliciter*.

6. In *Mohd. Nihal* (*supra*), the Division Bench, of course, found as a fact that Mst. Afsana had not attained the age of puberty and, therefore, her marriage could not have been performed without the consent of her *Wali* (guardian). Consequently, the Court held that her marriage was *batil* or void *ab initio*. Since the Court had come to the conclusion that the marriage was void, there was no question of granting custody to Mohd. Nihal, who claimed to be her husband and consequently, the petition was dismissed leaving Mst. Afsana free to decide her own fate and future.

7. In the present case, the facts are slightly different. Here, we have Mst. Gulshan, who has attained the age of puberty. She has entered into matrimony with Bhura @ Furqan. Though there is no documentary evidence thereof, there is evidence of the fact that they resided as a husband and wife and the presumption of marriage has to be drawn. Nothing has been presented by the petitioner to rebut any such presumption. In fact, Mst. Gushan is in the family way.

Therefore, we can safely come to the conclusion that her marriage with Bhura @ Furqan was not a void marriage.

8. We may also notice certain provisions of the Prohibition of Child Marriage Act, 2006 as also the Guardians and Wards Act, 1890. Under the former Act, a child, if a female, has been defined under Section 2 (a) as being a person who has not attained the age of 18 years. Section 3 (1) of the Prohibition of Child Marriage Act, 2006 stipulates that every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district Court only by a contracting party to the marriage, who was a child at the time of the marriage. This clearly indicates that a child marriage even under the secular laws is not void *ab initio* but voidable at the option of the contracting party who was a child at the time of marriage. Interestingly, this is also in consonance with the principle under Muslim law where a minor has the option of annulment of marriage on her attaining the age of majority / puberty. The principle is well-known and is commonly referred to as the option of puberty or *khiyar-ul-bulugh*. This clearly indicates that the marriage of a ‘child’ is not void but voidable.

9. Section 12 may also be noticed where certain marriages are treated as void. However, none of those circumstances mentioned in Section 12 arise in the present case.

10. Section 17 (1) of the Guardians and Wards Act, 1890 specifically stipulates that in appointing or declaring a guardian of a minor, the Court shall, subject to the other provisions of the said Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This makes it clear that while appointing a guardian of a minor, the Court has to consider the personal laws of the minor and more importantly the welfare of the minor. What is more important is Section 17 (5) which says that the Court shall not appoint or declare any person to be guardian against his will. Section 19 is also of great significance insofar as the present case is concerned. It prescribes that nothing in Chapter –II of the said Act authorizes the Court to appoint or declare a guardian of the person of a minor, who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of a person. We may also note that in the case of a minor not being a married female, no guardian can be appointed for such a minor, whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of a minor.

11. In the present case, nothing has been pointed out or brought to our notice for us to declare that the Mst. Gulshan's husband, namely, Bhura @ Furqan is unfit to be her guardian of her person. As such the applicability of Section 19 (b) of the said Act which pertains to minors in general whose fathers are living, would not come into play.

12. There is, however, one complication in this case, as pointed out above and that is that Mst. Gulshan's husband Bhura @ Furqan is presently in custody. Mst. Gulshan is present in Court and so are her mother-in-law and father-in-law. She was residing with Bhura @ Furqan at Seema Puri. But, since he is in custody, till such time, he is released from custody, she has expressed her clear desire to reside with her parents-in-law. Her mother-in-law Momina is present in Court and so is her father-in-law Mausam Ali. Both have acknowledged the fact that their son Bhura @ Furqan is legitimately married to Mst. Gulshan. Both of them have expressed their desire and willingness for the return of their daughter-in-law Mst. Gulshan. It may be reiterated that immediately after their marriage Mst. Gulshan and her husband Bhura @ Furqan first resided with Mausam Ali and Momina at their village Choudhera, Police Station Chhatri, District Bulandsahar, U. P. It is only subsequently that they shifted to Seemapuri, Delhi.

13. In view of the discussion above, we dismiss the writ petition and we direct that Mst. Gulshan is at liberty to reside with her parents-in-law till the release of her husband and thereafter it is up to her as to where she wants to reside with him.

**BADAR DURREZ AHMED, J**

**AJIT BHARIHOKE, J**

**MAY 15, 2009  
SR**