

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 22.01.2013

W.P.(CRL) 1025/2012

FURQAN

..... Petitioner

Through: Petitioner in person.

Versus

STATE

..... Respondents

Through: Mr. Pawan Sharma, Standing Counsel
with Ms. Richa Kapoor & Mr. Sanjay
Lao, APP

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SANJIV KHANNA, J. (ORAL)

1. Furqan has filed this writ petition for issue of writ of habeas corpus and direction against the respondents to produce his wife Khushboo @ Aarti daughter of Hari Kishan. Hari Kishan and his wife Seema are respondent Nos.2 and 3 respectively to the writ petition.

2. On the basis of a report made by Hari Kishan, FIR No.205 dated 29.05.2012 was registered in Police Station Mangol Puri. In the said FIR Hari Kishan had made an allegation that his daughter Khushboo @ Aarti, aged 16 years, was missing and remained untraceable, despite all efforts.

Allegation was made against the petitioner herein that he had probably enticed or allured Khushboo @ Aarti.

3. Notice in the writ petition was issued vide order dated 27.07.2012 for 14.08.2012.

4. On 14.08.2012 Khushboo @ Aarti was produced from Nirmal Chhaya and was spoken to in the chamber. She expressed her desire to remain in Nirmal Chhaya for the time being but requested that she may be permitted to meet her parents, as well as, the petitioner and his family members. She accepted that she had married Furqan. To resolve the matter the case was adjourned to 05.10.2012 and liberty was given to Furqan and his family members, as well as, the family members of Khushboo @ Aarti to meet her at Nirmal Chhaya, on alternative days.

5. Thereafter, on 06.11.2012 Khushboo @ Aarti, Furqan and parents of Khushboo were spoken to in the chamber at some length. Furqan had stated that he would deposit a sum of ₹1,00,000/- in the account of Khushboo @ Aarti but required 40-45 days for the said purpose. We had requested the Welfare Officer associated with Nirmal Chhaya to interact with Khushboo @ Aarti and be present in Court, on the next hearing.

6. On 20.12.2012 Khushboo @ Aarti, her parents and Furqan were heard in the chamber. Furqan's mother was also present. We conveyed our anxiety and apprehension to the Child Welfare Officer, Children Home for Girls, in the chamber. Furqan was asked to attend counseling sessions/guidance and the matter was, thereafter, directed to be relisted on 22.01.2013.

7. Khushboo @ Aarti has been in Nirmal Chhaya since 06.06.2012 i.e. for more than seven months. On each and every date of hearing, Khushboo @ Aarti has categorically stated that she willingly married Furqan and wants to live with him. She is unwilling to go and stay with her parents. Seven month's stay in Nirmal Chhaya has not changed her mind and she remains firm as ever. Throughout and on each date she has beseeched us to allow her to go with Furqan and his family. To her, Nirmal Chhaya is a confinement and detention, which infringes upon her liberty and right of choice. Prolonged detention of Khushboo @ Aarti for next one year would be detrimental and against her interest and well being. This confinement will deprive her of love, affection and care which she requires and needs from Furqan and his family. Her parents are not willing to accept her relationship with Furqan but this condition is totally unacceptable to Khushboo @ Aarti. It appears that fear and apprehension of Furqan and Khushboo @

Aarti was that if Khushboo @ Aarti does not get married to Furqan, her parents would have married her to a third person.

8. The difficulty remains that Khushboo @ Aarti is not 18 years old and her date of birth is 03.01.1996. However, we have spoken to her at great length, in the chamber, and found that she is mature and understands what she is doing. She is clear, fully conscious and aware of the consequences of the choices she is making in her life. During her stay in Nirmal Chhaya she was counselled by the Welfare Officer numerous times.

9. The petitioner, along with the writ petition, has filed a copy of the Nikahnama dated 31.05.2012. Khushboo @ Aarti accepts her signatures on the said Nikahnama. We notice that, in the said Nikahnama there are wrong averments regarding Khushboo @ Aarti's age, parentage etc but, this may be immaterial since Khushboo @ Aarti admits her signatures on the Nikahnama and accepts Furqan as her husband.

10. In **Mrs. Tahira Begum vs. State of Delhi & Ors.** : W.P. (Crl.) **446/2012** decided on 09.05.2012, a Division Bench of this Court examined the Muslim Law and observed that a Muslim girl can get married, without consent of her parents, once she attains the age of puberty. Reference was made to the decision of **Mohd. Idris vs. State of Bihar & Ors.** : 1980

Crl.L.J. 764 and a decision of this Court in **Vivek Kumar @ Sanju and**
W.P.(CRL) 1025/2012

Anjali @ Afsana vs. The State and Another : CrI.M.C. No.3073-74/2006

decided on 23.02.2007. **Shamsuddin vs. State : W.P. (CrI.) 13/2009**

decided on 15.05.2009 in which the provisions of the Prohibition of Child Marriage Act, 2006 were also considered.

11. Recently, Full Bench of this Court in **Court on its own motion (Lajja Devi) vs. State : 2012 (193) DLT 619** had examined the issue/question at great length and, thereafter, noted that the Prohibition of Child Marriage Act, 2006 is a secular legislation, and being special law, would have an overriding effect over personal law but observed as under:-

“We have already reproduced Sections 2(a), 9, 12 and 15 of this Act. It is clear therefrom that marriage of a minor child is treated as void only under the circumstances mentioned in Section 12. Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons. At the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as voidable. The interplay of this Act with other enactments compounds this anomaly and comments on such anomalies are stated in detail at the appropriate stage. At present we confine

ourselves to the issue at hand as the status of the child marriage needs to be determined on the basis of statutory provisions, which exists as of now. As pointed out above, under the Hindu Marriage Act, child marriage is still treated as valid and not a void marriage. It is personal law, in codified form, governing Hindus. On the other hand, PCM Act, which is a secular law, treats this marriage as voidable except those events which are covered by Section 12 of the PCM Act. In neither of the aforesaid statutes the child marriage is treated as void *ab initio* or nullity. Therefore, we cannot hold child marriage as a nullity or void. The next question that follows is as to whether the provisions of personal law, i.e., Hindu Marriage Act should be applied to declare such a marriage as valid or the provisions of PCM Act would prevail over the HM Act.”

(The word PCM Act refers to the Prohibition of Child Marriage Act, 2006)

12. Thereafter, on the question of right to reside, that is whether an underage (below 18 girl) can be allowed to stay and reside at a place of her choice or can be directed to live with her parents, in cases of elopement, the Court held:-

“48. We often come across cases where girl and boy elope and get married in spite of the opposition from the family or parents. Very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep-seated social and cultural prejudices. However, both the boy and girl are in love and defy the society and their

parents. In such cases, the courts face a dilemma and a predicament as to what to do. This question is not easy to answer. We feel that no straight jacket formula or answer can be given. It depends upon the facts and circumstances of each case. The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Section 3 of the PCM Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.

49. In case the girl is below 16 years, the answer is obvious that the consent does not matter. Offence under Section 376 IPC is made out. The chargesheet cannot be quashed on the ground that she was a consenting party. However, there can be special or

exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.

50. Consummation, with the wife below the age of 15 years, is an offence under Section 375. No exception can be made to the said constitutional mandate and the same has to be strictly and diligently enforced. Consent in such cases is completely immaterial, for consent at such a young age is difficult to conceive and accept. It makes no difference whether the girl is married or not. Personal law applicable to the parties is also immaterial.

51. If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.”

(emphasis supplied)

13. The present case, according to us, is peculiar and falls into exception carved out in the aforesaid decision. Keeping in view the aforesaid aspects and relevant judgments, considering the wishes of Khushboo @ Aarti, undesirable effect and consequence of prolonged stay in Nirmal Chhaya and

noticing that this is a case of inter religious marriage, opposition by the parents of the girl, we are passing the following order/directions:-

- (1) An FDR of ₹50,000/- valid upto 1st March, 2014 would be made in the name of Khushboo @ Aarti by Furqan and she shall not be entitled to encash the same till the time she attains the age of majority i.e. 18 years. The application form of the said FDR will be duly signed by Furqan and his mother Husan Ara and will be entertained by the Bank. The FDR should be produced before the Incharge, Nirmal Chhaya for verification but will be retained by Khushboo @ Aarti.
- (2) Another amount of ₹50,000/- will be deposited in the Saving Account No.4171001500149485 of Khushboo @ Aarti in Pubjab National Bank, Nikhil Plaza Complex, Sector-5, Rohini. The said amount will be deposited in instalments of ₹3,500/- per month. The amount deposited in the account will not be withdrawn till the time Khushboo @ Aarti attains the age of 20 years. First deposit will be made between the period 01.04.2013 to 30.04.2013.
- (3) Both Furqan and Khushboo @ Aarti will be given counselling

by the Counsellor in Nirmal Chhaya for two days about the effects and consequences of such marriages and in case the girl conceives at a young age. Till the counselling is over, Khushboo @ Aarti will continue to remain in Nirmal Chhaya.

- (4) Parents of Khushboo will be counselled separately or will be asked to join the above said counselling session.
- (5) After the counselling sessions are over and FDR has been shown, Khushboo @ Aarti would be allowed and permitted to go to her matrimonial house, if she so desires. She will not be detained at Nirmal Chhaya.
- (6) Khushboo @ Aarti and Furqan will continue to visit Nirmal Chaya for counselling once every month after Khushboo @ Aarti is released, till January, 2014. We have explained to Furqan and Khushboo @ Aarti the need for Khushboo to continue her studies and undertake skill development. Both of them have stated that Khushboo @ Aarti will continue with her studies and would also take up courses for skill development. The counselling sessions at Nirmal Chaya will keep the said aspect in mind.

(7) Khushboo @ Aarti will be given one telephone number of the Police Officer/Child Welfare Officer with whom she can get in touch in case she faces any difficulty. It will also be open to Khushboo @ Aarti to contact her parents, if she desires and they are ready and willing to talk to her.

14. With the above directions, the writ petition is accordingly disposed of.

15. Dasti.

SANJIV KHANNA, J

SIDDHARTH MRIDUL, J

JANUARY 22, 2013

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