

In the High Court of Punjab and Haryana at Chandigarh

CRM-M No.2121 of 2015

Date of decision: 23.3.2015

Jaswinder Kaur

.....Petitioner

Versus

State of Punjab and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Vivek Goel, Advocate,
for the petitioner.

Mr.Varun Sharma, AAG, Punjab.

Mr.H.P.S.Ishar, Advocate,
for respondent No.5.

RAJ MOHAN SINGH, J.

1. This petition has been filed by Jawinder Kaur, mother of Harwinder Singh @ Happy, under Section 482 Cr.P.C. against order dated 2.1.2015 passed by Additional Sessions Judge, Moga (Annexure P-5) refusing to grant custody of respondent No.4 Satvir Kaur @ Gagan (daughter-in-law of the petitioner) along with her minor child to the petitioner.

2. Harwinder Singh @ Happy married to respondent No.4. FIR No. 132 dated 9.12.2013 under Sections 363, 366-A, 382, 354, 376, 506, 323 and 120-B IPC at Police Station Nihal Singh Wala, District Moga was registered by father of respondent No.4, namely,

Gurdeep Singh (respondent No.5). Harwinder Singh @ Happy was arrested in the aforesaid case and respondent No.4 was sent to Nari Niketan i.e. State Protective Home, Jalandhar. During the stay of respondent No.4 in Nari Niketan, she has been blessed with a son, who is now aged more than six months.

3. Respondent No.4 is still minor. Parents of the girl/ respondent No.4 submitted an application before Sub Divisional Judicial Magistrate, Nihal Singh Wala for taking custody of minor-respondent No.4. The girl was produced from Nari Niketan and was allowed to talk to the parents. Thereafter, statement of respondent No.4 was recorded, wherein, she stated that she does not want to go with her parents as she has threat perception at their hands. Accordingly, custody in favour of parents of respondent No.4 was declined and respondent No.4 was sent back to Nari Niketan (Protection Home), Jalandhar, vide order dated 10.3.2014 (Annexure P-2) passed by Sub Divisional Judicial Magistrate, Nihal Singh Wala.

4. The statement of respondent No.4-prosecutrix has been recorded in the Court as PW-1, wherein, she has reiterated the factum of marriage with accused Harwinder Singh @ Happy with her own sweet will without any pressure whatsoever. Even before the Additional Sessions Judge, Moga, respondent No.4 got her statement recorded that she does not want to accompany her parents and she wants to go her in-law's house, where her mother-in-law and father-in-law are living.

5. Additional Sessions Judge, vide order dated 2.1.2015 (Annexure P-5), dismissed the application filed by the petitioner for

taking custody of the prosecutrix Satvir Kaur (minor) by observing that prosecutrix is not ready to accompany with her father. Prosecutrix is minor being born on 24.3.1998, therefore, custody of minor cannot be given to mother-in-law. For the custody of minor child, Additional Sessions Judge relegated the parties to take recourse to civil proceedings. Respondent No.4 was accordingly sent back to Nari Niketan, Jalandhar. The aforesaid order dated 2.1.2015 has been assailed in the present petition.

6. Learned counsel for the petitioner relies upon **Smt.Lila Gupta vs. Laxmi Narain and others, AIR 1978 Supreme Court, 1351**. The Court observed, while referring to Sections 5, 11 and 12 of Hindu Marriage Act, 1955 (for short 'the Act') in the following manner:-

“A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention or one of other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 tenders marriage solemnised in contravention of conditions (i), (iv) and (v) of Section 5 only, void. Two incontrovertible propositions emerge from a combined reading of Sections 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid

marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of any one of them would be treated as a breach of a prerequisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent on the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted in Section 15. A further aspect that stares into the face is that while a marriage solemnised in contravention of clauses (iii), (iv), (v) and (vi) of Section 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year had not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the Court of first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (i), (iv) and (v) are expressly declared void and marriages in breach of conditions Nos. (iii), (iv), (v) and (vi) of

Section 5 are specifically made punishable by Section 18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of marriage being void though not covered by Section 11 such as in breach of proviso to Section 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy as to make it punishable.

Similarly, a reference to Child Marriage Restraint Act would also show that the Child Marriage Restraint Act was enacted to carry forward the reformist movement of prohibiting child marriages and while it made marriage in contravention of the provisions of the Child Marriage Restraint Act punishable, simultaneously it did not render the marriage void. It would thus appear that voidness of marriage unless statutorily provided for is not to be readily inferred.

Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in

contravention of the proviso to Section 15, it cannot be said that such marriage would be void.”

7. The proposition is that if a minor girl marries against wishes of her parents and child is born to her; FIR is registered against husband of the minor and he is arrested therein and the minor is sent to Nari Niketan against her wishes, then in such a situation minor cannot be kept in Nari Niketan against her wishes. The marriage of a minor girl cannot be said to be void. The parties to such a wedlock can only be punished under Section 18 (5) of the Act.

8. In **Neetu Singh vs. State 1999 (3) RCR (Crl.) 26**, the Division Bench of Delhi High Court held that minor cannot be kept in Nari Niketan against her wishes and the marriage of minor girl is neither void nor voidable. The Court relied upon **Mrs.Kalyani Chaudhary vs. State of U.P. and others, 1978 Cr.L.J.1003** and **Seema Devi @ Simaran Kaur vs. State of H.P. , 1998 (2) Crimes 168**, in which following proposition came to the fore:-

"It is not in dispute that the parties are Hindus and they are governed by the Hindu Marriage Act, 1955. Section 5 (iii) provides that a marriage may be solemnised between any two Hindus if the conditions set out in subsection (iii) is that the bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of the marriage. For the purpose of this petition, I will assume that the complaint of the 2nd respondent that the petitioner herein was aged only 15 years is true. Even so, the marriage has not been invalidated by the provisions of

the Hindu Marriage Act. Section 11 of the Act deals with void marriages. That Section relates only to marriages held in contravention of clauses (i), (iv) and (v) of Section 5. That Section does not refer to clause (iii) of Section 5. Section 12 refers to voidable marriage. That Section deals only with marriages in contravention of the conditions specified in clause (ii) of Section 5. That Section does not also deal with clause (iii) of Section 5. Thus, the marriage in contravention of clause (iii) of Section 5 is neither void nor voidable under the provisions of the Hindu Marriage Act. The only other relevant provision is Section 18 of the Act, which provides for punishment for contravention of the conditions specified in Section 5(iii) also. The punishment will be imprisonment, which may extend to 15 days or with fine which may extent to Rs. 1,000/ or both. Thus, the only provision which will come into play in the event of contravention of Section 5(iii) is Section 18 of the Hindu Marriage Act and nowhere does the Act declare the marriage to be illegal or in valid or void."

In **Seema Devi's case (supra)**, it was held that minor girl should be allowed to go with her husband and the Court cannot pass an order against her wishes even if she is minor.

9. In **Rukshana and another vs. Govt.of NCT of Delhi and others 2007 (3) RCR (Criminal) 542**, Delhi High Court emphasized upon the same view and even FIR under Sections 363/ 364-A and

365 IPC was quashed in the interest of accused, prosecutrix and the child and it was held that the relief cannot be denied only because the girl was found to be minor.

10. In **Lalla @ Ranjeet vs. State of U.P. and others 2013 (96) ALR 568**, Division Bench of Allahabad High Court held that if the corpus has given birth to a child in Nari Niketan then keeping the corpus in Nari Niketan is not proper and she may be released from Nari Niketan. Firstly, preference be made to her for living with her natural guardian. If she does not agree then she may be allowed to live according to her free will.

11. In **Santosh vs. State of Rajasthan 2004 (2) CrI.L.R. 1394**, Rajasthan High Court also quashed the detention of the girl and it was held that marriage of minor in contravention of Section 5 of the Act is neither void nor voidable unless it is so declared.

12. A perusal of numerous precedents on subject matter reveals that it is only the welfare of minor which is to be seen. This Court in **Shamsher vs. U.T.Chandigarh and another 2011 (5) RCR (CrI.) 677** also endorsed the aforesaid observations. This Court in **Balwinder Singh @ Binder vs. State of Punjab and others 2008 (3) RCR (CrI.) 1** also held in the aforesaid context, endorsing the view propounded by different Courts.

13. On the other hand, learned counsel for respondent No.5 strongly opposed the custody of respondent No.4 in favour of the petitioner on the ground that respondent No.4 is still minor and husband is facing trial. At this stage, giving custody to the petitioner may aggravate the situation and it would lead to adverse effect on

the prosecution version. Learned counsel cites Full Bench judgment of Delhi High Court in **Court On Its Own Motion (Lajja Devi) vs. State 2012 (4) RCR (Civil) 821** to contend that for a minor girl below 16 years consent is inconsequential. The facts of the aforesaid case relate to consent of minor below 16 years for constituting the offence under Section 376 IPC. So far as child marriage is concerned, it was observed by the Court that such marriage is not void marriage but at the most can be treated as voidable and the same become valid if no steps are taken by the child within the meaning of Section 2 (a) of the Prohibition of Child Marriage Act, 2006 and Section 3 of the said Act seeking declaration of the marriage to be voidable.

14. The aforesaid judgment does not support the respondent in the context as has been propagated by learned counsel for respondent No.5.

15. This Court has considered the submissions made by learned counsel for both the parties. Respondent No.4 has reiterated her stand of going to matrimonial house in the company of her mother-in-law. She has specifically refused to accompany her father-respondent No.5. The close relative of husband i.e. maternal uncle has also come to the Court. Petitioner and maternal uncle have shown their willingness to part with any reasonable tangible security for the well being of respondent No.4.

16. Looking to the facts and circumstances of the case, this Court feels that it would be just and expedient to allow respondent No.4 to go with the petitioner and accordingly be released from Nari Niketan forthwith. However, as per willingness of the petitioner and

maternal uncle of husband of respondent No.4, let FDR in a sum of ₹ 5,00,000/- in favour of respondent No.4 be executed to serve as social security to respondent No.4 and also in consonance with the plea of bona fide raised by the petitioner before this Court. Chief Judicial Magistrate, Moga is directed to inform the parties to do the needful to facilitate the release of respondent No.4 from Nari Niketan thereafter forthwith.

Petition stands disposed of in the above terms.

(RAJ MOHAN SINGH)
JUDGE

March 23, 2015
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