

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.24990 of 2015

Arising Out of PS.Case No. -376 Year- 2014 Thana -BODHGAYA District- GAYA

1. Saba Praveen wife of Arbind Paswan, daughter of Md. Kamrul Hoda resident of Mohalla - Manpur Koyali Pokhar, P.S. - Buniyadganj, District - Gaya at present resident of village - Rati Bigha, P.S. - Bodh Gaya, District - Gaya.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Md. Islam Ansari son of late Md. Siddik Ansari resident of village - Bakraur, P.S. - Bodh Gaya, District - Gaya.

.... Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Ramakant Sharma, Sr. Adv.
Mr. Rajesh Kumar, Adv.
Mr. Rakesh Kumar Sharma, Adv.
Mr. Santosh Kumar Pandey, Adv.

For the State : Mr. Raj Kishore Singh, APP

For Opposite Party No.2 : Mr. Nagendra Kumar, Adv.

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 31-03-2016

By way of the present application preferred under Section 482 of the Code of Criminal Procedure (for short 'CrPC'), the petitioner has sought for quashing of the order dated 30th April, 2015 passed by the learned 6th Additional Sessions Judge, Gaya in Cr. Revision No. 2/15/7/15, whereby he has affirmed the order dated 13th January, 2015 passed by the learned Chief Judicial Magistrate, Gaya (for short 'CJM') in Bodh Gaya P.S.Case No. 376 of 2014 by which he has directed the petitioner to be released in favour of her parents.



2. The Opposite Party No.2, Md. Islam Ansari submitted a written report on 29th November, 2014 addressed to the S.H.O. of Bodh Gaya Police Station alleging therein, inter alia, that his niece Saba Praveen (petitioner), aged about 16 years, was abducted by one Arbind Paswan in conspiracy with Guddu Paswan, Pankaj Paswan, Gautam Paswan, Padum Paswan, Surendra Paswan, Deepak Paswan, Lakhan Paswan, Laxmi Paswan, Shravan Paswan and others, all resident of village Rati Bigha, for the purpose of marriage. On query, they threatened the informant that they would sell his niece in some big city and implicate him in false case of raping a lady of Scheduled Caste community.

3. On the basis of the aforesaid written report, Bodh Gaya P.S.Case No.376 of 2014 was registered under Sections 363 and 366A of the Indian Penal Code against altogether 10 accused persons and investigation was taken up.

4. In course of investigation, the victim was recovered and her statement was recorded under Section 164 of the CrPC wherein she professed her age to be 19 years and disclosed that out of her own accord she had gone together with Arbind Paswan and willingly married him without any pressure or coercion. She also expressed her desire to live with her husband. After recording her statement, since the petitioner was prima facie found to be minor, she was sent to

Observation Home.

5. While the petitioner was lodged in Observation Home, Md. Kamrul Hoda, father of the petitioner, filed an application on 2nd December, 2014 in the court of the learned CJM for release of his daughter in his favour on the ground that she is minor and unable to take proper decision and being father he will look after her welfare. In support of his claim, he had produced the Matriculation Certificate of the petitioner wherein the date of birth was recorded as 16.09.1998.

6. The petitioner, however, expressed her unwillingness to go with her parents. She appeared before the court and made statement that she was having affair with Arbind Paswan since long and out of her free will she had solemnized marriage with him in Sarswati Temple at Rati Bigha. She has stated that she is aged about 19 years and she wants to live with her husband. She also stated that she has learnt from others that she along with her husband may be killed by her parents.

7. After holding an enquiry, the learned CJM vide his order dated 13.01.2015 held that the petitioner was two months more than 16 years of age on the date of occurrence and directed her to be released in favour of her father Md. Kamrul Hoda. He also directed Md. Kamrul Hoda and his wife Najma Bano to submit quarterly report regarding the care and protection being given to the petitioner

through the S.H.O., Bodh Gaya Police Station.

8. The aforesaid order dated 13th January, 2015 passed by the learned CJM was challenged by the petitioner by preferring a revision before the Sessions Judge, Gaya vide Cr. Revision No.2/15/7/15 but the revisional court, vide order dated 30th April, 2015, declined to interfere with the operative part of the order passed by the learned CJM whereby the petitioner was released in favour of her father but it reduced the period for submitting report regarding care and protection given to the petitioner. It directed the parents of the petitioner to submit monthly report in this regard instead of quarterly report.

9. Being aggrieved by the aforesaid revisional order dated 30th April, 2015, the petitioner has filed the present application before this court under Section 482 of the CrPC.

10. It has been contended by Mr. Ramakant Sharma, learned Senior Counsel for the petitioner that the marriage of the petitioner with aforesaid Arbind Paswan is out of free will without any pressure, coercion or threat. Since the parents of the petitioner disliked inter-religion marriage due to deep-seated social and cultural prejudices, a false criminal case has been initiated against the petitioner's husband and his family members. He has submitted that the Voter Identity Card would demonstrate that the petitioner is above the age of 18



years. He has further contended that merely on the basis of school leaving certificate and the entries made in the school record, the petitioner has been declared minor ignoring the statement of the petitioner recorded under Section 164 of the CrPC wherein she has stated herself to be aged 19 years. Mr. Sharma, learned Senior Counsel has further contended that the entry regarding the date of birth of the petitioner in the school register is not correct. He has contended that the petitioner is a Muslim girl and one of the important elements of Muslim marriage is puberty. A girl, who has attained puberty, is major under the Muslim law. He has contended that puberty is biological phenomena, which is generally presumed to have attained at the age of fifteen. Even if the petitioner is presumed to be of the age of 16 years and few months, she had attained the age of puberty and thus she is major. He has further contended that the petitioner is mature enough, and, therefore, she cannot and should not be denied her freedom and her wishes should not be neglected. Lastly, he submitted that if the petitioner is sent to her parents' home, she apprehends threat to her life.

11. Per contra, Mr. Nagendra Kumar Singh, learned counsel for the Opposite Party No.2 has submitted that the petitioner, a student of Class XI, studying in the Project Kanya Plus 2 High School, is minor as the date of birth recorded in the school register as per



matriculation certificate is 16th September, 1998. The petitioner would attain majority on completing the age of 18 years on 16th September, 2016. He has contended that in terms of Juvenile Justice (Care & Protection of Children) Act, 2000 and the rules framed thereunder, the entries made regarding date of birth in the school register is conclusive proof of the age of a Juvenile. Therefore, the learned CJM has rightly and legally held that the petitioner is minor and was not capable of giving valid consent for marriage at the relevant time. He has further contended that the stand of the petitioner that she had married Arbind Paswan, a Hindu boy, in a temple situated at Rati Bigha, would make it evident that the alleged marriage was performed in accordance with Hindu Marriage Act, 1955 (for short 'the Act of 1955'). He has submitted that in view of Section 5 of the Act of 1955, a marriage may be solemnized only between two Hindus. Admittedly, the petitioner is a Muslim girl. The marriage of a Muslim girl with a Hindu boy is not is not permissible under the Act of 1955. Furthermore, in view of Section 5(iii) of the Act of 1955, a girl below 18 years of age and a boy below 21 years of age are prohibited from marriage. He has contended that a Muslim girl attaining puberty is free to choose husband of her choice from Muslim community and the Muslim Law does not permit a Muslim girl, who has attained puberty, to marry a bridegroom from any other community. He has contended



that the parents of the petitioner have already furnished monthly report in compliance with the order of the learned CJM but the petitioner has not been released from the Observation Home in view of the interim order dated 4th June, 2015 of this court whereby operation of the impugned orders passed by the courts below so far as it relates to release of the girl in favour of her parents has been stayed.

12. I have heard respective counsel for the parties and perused the materials available on record.

13. Be it noted that the parties admit that the date of birth recorded in the school register of the petitioner is 16th September, 1998. The matriculation certificate would also indicate the date of birth of the petitioner as 16th September, 1998. The date of birth recorded in the matriculation certificate is one of the valid proofs for determination of the age of the girl claiming herself to be major for marriage. The entry of date of birth made in the matriculation certificate would have precedence over the medical certificate or any other kind of evidence. It is true that in her statement recorded under Section 164 of the CrPC, the petitioner has disclosed her age to be 19 years. However, the identity card issued by the Election Commission of India, as contained in Annexure-5 to the present application, does not specify any date or month of birth. It only records the year of birth as 1995. Apparently, the identity card produced by the petitioner does

not inspire confidence regarding its genuineness as the column meant for recording date of birth is incomplete. In that view of the matter, the courts below have rightly not placed any reliance on the identity card produced by the petitioner before the court.

14. Hence, this court finds no illegality in the orders passed by the courts below whereby they have held that the petitioner was less than 18 years of age at the time of so called marriage.

15. Regarding the age of marriage, there are different laws in our country. Section 5 of the Act of 1955 prescribes conditions for a Hindu marriage. It reads as under :

“5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party,-
 - (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity;
- (iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.”



16. From a bare perusal of the aforesaid Section 5, it would be evident that it prescribes the essential requisites for a Hindu marriage. One of the essential ingredients of a Hindu marriage is that both the parties of such marriage must be Hindus. Sub-clause (iii) of Section 5 of the Act prescribes that the bridegroom must be of the age of twenty one years and the bride, the age of eighteen years at the time of the marriage.

17. Section 18 of the Act prescribes punishment for contravention of conditions of Hindu marriage. In case of contravention of condition specified in clause (iii) of Section 5, it prescribes simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or both.

18. Similarly, under the Muslim Laws, one of the important elements of Muslim marriage is puberty. A person, who has attained puberty, is called major. True, a person is presumed to have attained the age of puberty on completion of 15 years. So the boy and girl who have attained puberty can validly contract marriage but for a valid Muslim marriage, the following conditions must be satisfied :

- (a) The parties must have the capacity to marry;
- (b) There must be a clear proposal and acceptance;
- (c) Free consent;
- (d) No legal disability.



19. A marriage under Muslim law is perfectly valid if parties have attained puberty and satisfied all other conditions specified by law. The law with regard to marriage with a non-Muslim is different under Sunni law and Shia law. A Muslim woman cannot marry a non-Muslim man. A marriage of a Muslim female with a non-Muslim male, whether he is a Christian, or a Jew or an Idolater or a Fire-worshipper is not permissible. According to Mulla, such marriage is irregular. But according to Fyzee, such a marriage is totally void. Under Shia law a marriage with a non-Muslim is void. Both the spouses are required to be Muslims.

20. In India, marriage between a Muslim and a non-Muslim can only take place under the Special Marriage Act, 1954.

21. Keeping in mind the peculiarity of law relating to marriages in our country, the Special Marriage Act, 1954 (for short 'the Act of 1954') has been enacted. Section 4 of the Act of 1954 prescribes conditions relating to solemnization of special marriages. It reads as under :

“4. Conditions relating to solemnization of special marriage.-

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled namely:-

- (a) Neither party has a spouse living;
- (b) neither party-

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- (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or
 - (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (iii) has been subject to recurrent attacks of insanity;
- (c) the male has completed the age of twenty-one years and the female the age of eighteen years;
- (d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.”

22. Section 24 of the Act of 1954 prescribes the conditions under which any marriage solemnized under the Special Marriage Act can be held null and void. It reads as under :

“24. Void marriages.- (1) Any marriage solemnized under this Act shall be null and void (and may, on a petition presented by either party thereto against the other party, be so declared) by a decree of nullity if-

- (i) any of the conditions specified in Clauses (a), (b), (c) and (d) of Sec. 4 has not been fulfilled; or
- (ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under the Act within the meaning of Section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in Clauses (a) to (e) of Section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under Sec.17 and the decision of the District Court has become final.”

23. A conjoint reading of Section 4(c) read with Section 24 of the Act of 1954 would make it evident that even under this Act any two persons may solemnize marriage if at the time of marriage the male has completed the age of 21 years and the female the age of 18 years. Underage renders the marriage null and void.

24. Coming back to the facts of the present case, an argument has been advanced by Mr. Ramakant Sharma, learned Senior Counsel for the petitioner that the petitioner, a Muslim girl has married one Arbind Paswan, a Hindu boy in a temple. For the reasons stated above, this Court is of the opinion that such a marriage is neither permissible under the Hindu Law nor under the Muslim Law. It has got no legal sanctity. It is an admitted position that the marriage was not performed under the Act of 1954.

25. In the present case, this court has already held the orders passed by the courts below in so far as they have declared the petitioner to be minor is a correct view. Now the question which arises for consideration is whether the custody of the petitioner should be given to Arbind Paswan with whom she wants to live or to the parents as ordered by the courts below with whom the petitioner

does not want to go or she should be kept in the Observation Home till she attains the age of majority.

26. In this regard, it would be relevant to note that with a view to restraining solemnization of child marriages, the Child Marriage Restraint Act was enacted in 1929 and it was amended in 1949 and in 1978 in order to, inter alia, raise the age limit of male and female persons for the purpose of marriage.

27. Regarding age of marriage, in the light of different marriage laws prevailing in India, i.e. the Act of 1954, the Act of 1955, Muslim Law, the Indian Christian Marriage Act, 1872, the Parsi Marriage and Divorce Act, 1936, the Prohibition of Child Marriage Act, 2006 (for short 'the Act of 2006') has been enacted with effect from 10th January, 2007. According to Section 2(a) of the aforesaid Act, "Child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. According to Section 2(b) "Child Marriage" means a marriage to which either of the contracting parties is a child.

28. Section 9 of the Act of 2006 prescribes that whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees

or with both.

29. Section 10 of the Act of 2006 prescribes that whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

30. Section 15 of the Act of 2006 provides that notwithstanding anything contained in the CrPC, 1973, an offence under the Act shall be cognizable and non-bailable.

31. The object behind enactment of the Prohibition of Child Marriage Act, 2006 is to discourage marriages between underage persons. An attempt has been made through this Act to prevent child marriages as in child marriage not only the rights of the parties are violated but their moral helplessness and inexperience make them vulnerable to exploitation.

32. Since the only question which is to be decided in the present case is the custody of the petitioner, in view of the legislative intent as also in view of different enactments relating to marriage discussed hereinabove, this court is of the view that the release of the petitioner, a minor girl, in favour of a person with whom she eloped or in favour of her parents with whom she is not willing to go would

not be in the interest of the petitioner.

33. By now, it is well settled that while deciding the question of custody of a minor child, it is the interest of the child, which is of paramount consideration.

34. As noted above, the petitioner has expressed her unwillingness to go to her parents' home. She has expressed her apprehension in joining her parental home. The contention of the petitioner is that she would like to stay in Observation Home till attainment of majority instead of going to her parental home.

35. In the circumstances mentioned above, this Court finds no justification to the orders passed by the courts below whereby the petitioner has been directed to be released in favour of her parents with condition that they would submit monthly report regarding care and protection being given to the petitioner. In the opinion of the court, even though the petitioner may not have attained the age of majority, her desire has to be respected.

36. In that view of the matter, the orders passed by the courts below to the extent whereby the petitioner has been directed to be released from the Observation Home in favour of her parents are set aside. The learned CJM is directed to release the petitioner immediately on completing the age of 18 years. After her release, the petitioner shall be set at liberty to live according to her free will and

to go anywhere.

37. With the aforesaid observations and directions, the application is allowed.

(Ashwani Kumar Singh, J)

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