

CWP No.2239 of 2015

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No.2239 of 2015
Date of decision:12.01.2016**

Sumeet Bajwa

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Dr. Surya Parkash, Advocate, for the petitioner(s).

Mr. Yatinder Sharma, Addl. A.G., Punjab.

Mr. Sukhwinder Singh, Advocate,
for respondent No.3.

Mr. Ajayvir Singh, Advocate,
for respondent No.4.

Rakesh Kumar Jain, J.

The petitioner, only child of her parents, born on 08.09.1983, M.Sc. in Zoology, now pursuing her Ph.D. in Physiology from Punjabi University, Patiala, was engaged to Sanbir (respondent No.3), LL.B. From Panjab University, Chandigarh on 09.03.2011. Unfortunately, with the demise of her father on 08.07.2011, their marriage was postponed to be performed after the first Barsi of her father. The date of their marriage was ultimately fixed as 13.09.2013 but before that, respondent No.3 was arrested

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in a case registered vide FIR No.34 dated 27.02.2013 at Police Station Mataur, under Sections 302, 307, 427, 506, 148 and 149 IPC and Sections 25, 27, 54, 59 of the Arms Act and is at present lodged in the New District Jail, Nabha w.e.f. 21.05.2013, having been transferred from Maximum Security Jail, Nabha, as per the orders of the Additional Director General of Police (Jails), Punjab, Chandigarh and is also facing trial in case registered vide FIR No.392 dated 31.08.2013, under Section 52-A of the Prison Act, 1894, at Police Station Tripuri, District Patiala, in which though he is on bail but has never been released on bail in the case registered vide FIR No.34 dated 27.02.2013 and is in custody from the last 2- ½ years. An application bearing CRM-M-25274-2013 was filed by respondent No.3 under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) alleging that since his marriage has been fixed on 13.09.2013, therefore, he may be released to perform his marriage with the petitioner. On the said application, an enquiry was conducted about the factum of the marriage but still, keeping in view the seriousness of the crime, the application for bail was declined. The order passed by this Court in CRM-M-25274-2013 is reproduced as under:-

“The date in the main case is preponed from 19.9.2013 to 9.9.2013 i.e. today.

By filing the present petition under Section 439 of the Code of Criminal Procedure, the petitioners have sought regular bail in case FIR No.34, dated 27.2.2013, registered under Sections 302, 307, 427, 506, 148, 149 of the Indian Penal Code and Sections 25 and 27 of the Arms Act at Police Station Mator, District SAS Nagar.

Learned counsel for the petitioner contends that marriage of petitioner No.1 is scheduled to be held on 13.9.2013. In support of

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his case, he has placed on record the wedding card. He further submits that the petitioners were neither arrested from the spot nor any over act has been attributed to the petitioners. He further submits that the petitioners are in custody since March, 2013.

On the other hand, the learned State counsel opposes the prayer of the petitioners. He submits that after his arrest, petitioner, Sanbir Singh has committed jail offence and in this regard FIR No.392 dated 31.8.2013 has been registered against him.

Heard.

It is a case of murder. The petitioners have been specifically named in the FIR. In pursuance of the order dated 26.8.2013, passed by this Court, an inquiry with regard to the factum of marriage was carried out by ASI Jagir Singh. Report dated 31.8.2013, (Annexure R-1) furnished by the SHO, Police Station Mator, is attached with the reply filed by the State. In the report, it is mentioned that as per the booking register of Khazana Resorts and further as per the statement of Suersh Kumar Rada, General Manager of the Resort, the booking was done about 15 days prior to 29.8.2013, indicating the booking date as 24.1.2013. It is further mentioned in the report that during interrogation after his arrest, petitioner No.1, did not disclose about the scheduled marriage. The charges are yet to be framed. From the facts on record, it appears that the petitioners under the garb of solemnization of the marriage want to flee from the country. The petitioners have also committed jail offence, and in this regard an FIR has been lodged.

Keeping in view the totality of the facts, this court is of the considered view that the documents filed by the petitioners are not sufficient to conclude the factum of the proposed marriage as asserted in the petition. Even if the factum of marriage is proved, still the Court is not inclined to enlarge the petitioners on bail, keeping in view the serious nature of the crime and gravity of allegations, and furthermore, in view of the petitioners conduct in jail.

Dismissed.

However, anything stated hereinabove shall have no bearing on the merits of the case.”

Respondent No.3 also filed an application before the Court of

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Additional Sessions Judge, SAS Nagar Mohali (trial Court), allowing him to solemnize marriage with the petitioner but the said application was also dismissed on 04.12.2014. Thus, the present petition has been filed by the fiancée of respondent No.3 for quashing of the order dated 04.12.2014 passed by the trial Court, dis-allowing the application, moved by respondent No.3 and also for issuance of a writ in the nature of *mandamus* to respondents No.1 and 2 to allow the petitioner to perform marriage with respondent No.3.

At the time of issuance of notice of motion, this Court not only asked for seeking the willingness of respondent No.3 in respect of the marriage but also asked the State counsel to seek instruction after applying Section 3 of the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962 (hereinafter referred to as the “Act”) and to consider her case as to whether the conduct of respondent No.3 had been such as to allow the benefit of application of Section 3 of the Act.

It is pertinent to mention that Sukhwinder Singh, counsel appearing on behalf of respondent No.3 has made a statement that respondent No.3 is ready and willing to marry the petitioner even when he is in judicial custody during the trial of the case but the petition is contested by the counsel appearing on behalf of respondents No.1 & 2 and respondent No.4 (complainant of the FIR).

Insofar as the reply of respondents No.1 and 2 is concerned, it is submitted that since the provisions of the Act applies only to the convicted inmates and not to the under trial prisoners, therefore, respondent

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No.3 cannot be released on bail/parole.

Counsel for respondent No.4 has submitted that he is least concerned with the marriage of the petitioner with respondent No.3 rather his anxiety is that in the garb of this marriage, respondent No.3 may not run away.

Counsel for the petitioner has opened his arguments with reference to the United Nations Universal Declaration of Human Rights, 1948, to which the India is also a signatory, in which Article 16 provides that “(1) *Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution; (2) Marriage shall be entered into only with the free and full consent of the intending spouses; (3) The family is the natural and fundamental group unit of society and is entitled to protection by society*”.

He has further referred to the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19.12.1966, in which Article 23 provides that “1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State; 2. The right of men and women of marriageable age to marry and to found a family shall be recognized; 3. No marriage shall be entered into without the free and full consent of the intending spouses; 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case*

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of dissolution, provision shall be made for the necessary protection of any children”.

It is further argued that the parties are Sikh by religion and are governed by the Hindu Marriage Act, 1955 (hereinafter referred to as the “Act of 1955”) in which Section 5 provides for “conditions for a Hindu marriage”, which reads as under:-

“5. Condition 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;”

It is also submitted that the void marriages are provided in Section 11 of the Act of 1955, which reads as under:-

“11. Void marriages.- Any marriage solemnised after the commencement of 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 it contravenes any one of the

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conditions specified in clauses (i), (iv) and (v) of Section 5.”

The contention of learned counsel for the petitioner is that the petitioner and respondent No.3 are fully eligible for the marriage and are not prohibited by any of the provisions of the law to perform the marriage. It is, thus, sought to be argued that the denial of marriage to the petitioner with respondent No.3 would hit Article 21 of the Constitution of India, which is also reproduced as under:-

“21. No person shall be deprived of his life or personal liberty except according to procedure established by law.”

In order to emphasize his point of view, various judgments have been referred to by counsel for the petitioner, which may be briefly mentioned. Like in the case of **Smt. Usha Singh vs. State of West Bengal and others**, 2003(2) L.L.N. 554, the issue was as to whether the married daughter of the deceased employee can also be eligible for appointment if her father died in harness. The answer in that case was in affirmative but the following observation were made in that judgment by the Calcutta High Court:-

“7. No authority need be cited for the proposition that right to marry is a necessary concomitant of right to life guaranteed under Article 21 of the Constitution. “Right to life includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition”. (See in this regard Sri X v. Hospital Z, reported in (1998) 8 S.C.C. 296).

8. In Re: Michaelham's Will Trusts reported in 1963(2) ALL E.R. 188, sitting in the Chancery Division, Lord Buckley stated the law with regard to restraint of marriage as follows:

“A contract which is in general restraint of marriage is unenforceable on the grounds of public policy, whether it contains an express undertaking that the subject will not

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marry, or whether it is merely a contract of a kind which, on financial or other grounds, will tend to discourage the subject from marrying.”

In the case of **Suchita Srivastava and another v. Chandigarh Administration**, 2009 (9) Supreme Court Cases 1, it was held by the Supreme Court that *“there is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods”*. However, it is subject to the MTP Act, 1971, which can also be viewed as reasonable restrictions on the exercise of reproductive choices.

In the case of **Lata Singh v. State of U.P. and another**, (2006) 5 Supreme Court Cases 475, the issue was of marriage of two adult persons against the consent/sanction of their parents.

In the case of **Municipal Employees Union v. Additional Commissioner (Water) Delhi Water Supply and Sewage Disposal Undertaking and another**, 1996(1) L.L.N. 398, the Division Bench of the Delhi High Court held the condition to be arbitrary wherein the widow was given compassionate appointment only on the condition that she shall not remarry.

In the case of **Smt. Mousumi Das Maity v. State of West Bengal & ors.**, (2009) 1 Cal LJ 615, the application of the petitioner for appointment as an Auxiliary Nurse-cum-Midwife was rejected on the ground that she has been living with her husband just a few days earlier than she filed the application and was not having permanent residence of last 10 years was struck down by the Court on the ground that it would put fetter on a lady citizen's right to marry and it would be clearly against the provisions of the Constitution of India as each and every lady citizen has a right to get married and to reside along with her husband in his residential house.

In the case of **Shrawan Kumar @ Pappu v. Nirmala**, (2013) 3 All LJ 651, the Allahabad High Court held that the right to marry is an integral part of right to life and liberty and is akin to a fundamental right.

In the case of **Mehmood Nayyar Azam v. State of Chhattisgarh and others**, (2012) 8 SCC 1, the Supreme Court has held that when an accused is in custody, his fundamental rights are not abrogated in toto.

Lastly, he has referred to a decision of this Court in the case of **Jasvir Singh and anr. v. State of Punjab & ors.**, 2015(1) R.C.R. (Criminal) 509, in which the petitioners are the husband and wife who were tried for the offence under Sections 302/364-A/201/120-B IPC for kidnapping and brutally murdering a 16 year old minor for ransom. Both of them were awarded death sentence which was confirmed by the High Court but their sentence was converted into life imprisonment by the Apex Court. Both of them were in separate cells but they moved an application for

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seeking enforcement of their perceived right to have conjugal life and procreate within the jail premises. Since their prayer was declined, therefore, the following issues were framed by this Court:-

- “i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?
- ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
- iii. Whether ‘right to life’ and ‘personal liberty’ guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
- iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

After the detailed discussion, while relying upon the local and foreign laws/precedents, the aforesaid questions were answered as under:-

“95 For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

- i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

- ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and

incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State."

The Court also gave certain directions, which reads as under:-

"i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. the Jail Reforms Committee shall also consider making

recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.”

However, it is pertinent to mention that the prayer made by the petitioners in this case was specifically declined after recording the reasons in paras 91, 92 and 94, which read as under:-

“91. Owing to the neglected and limited infrastructure, causing overcrowding, lack of specialized services and above all the prevailing social norms and the societal expectations, it may not be conducive to create space for conjugal visits within the existing prisons. It can nevertheless be introduced on trial basis in Model Jails or Open Air-Free Jails in such a manner that the independent family units of the ‘convicts with good behavior’ may live like in a small hamlet. For that purpose, as of now, a team comprising (i) District & Sessions Judge, (ii) Deputy Commissioner (iii) Superintendent of Jails can identify the places where such like practices can be introduced to begin with.

92. Since multiple inputs from the social scientists, Criminologists, Jail Administration and Judiciary along with budget allocation for the requisite infrastructures, will have a direct bearing on the policy formulation, it is not expedient or desirable for this Court to direct the actual implementation of its directions or observation(s) in a time-bound manner. The State Government shall in consultation with the High Court constitute Jail Reforms Committee to deal with different aspects of jail reforms keeping in view the observations made in this order and on submission of report by such Committee within one year from the date of its constitution, the State shall admit to the High Court the timeframe within which those recommendations shall be given effect.

93. xxx xxx xxx xxx

94. Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in general but the jurisprudential principles expounded therein do not advance the petitioners’ claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners’ incarceration are far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case

where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.”

All said and done, the question to be answered in this case is as to whether a person has a right to marry an under trial prisoner or vice-versa?

Indubitably, there is a difference between a 'convict' and 'under-trial prisoner'. A convict suffers his sentence after conviction when his guilt is proved, whereas an under-trial prisoner remains in jail and is presumed to be innocent till he is found guilty by the Court.

As regards performance of marriage with or by an under-trial prisoner, neither the petitioner has referred to any specific provision which allows the marriage nor the respondents have brought to the notice of the Court any specific provision which prohibits the same except that an under-trial cannot be released on parole.

The parties to the lis are Sikh by religion and are governed by the Act of 1955 in which Section 5 lays down the conditions which are to be fulfilled in order to perform a valid marriage and Section 11 lays down the provisions for declaring the marriage a nullity in case it contravenes Sections 5(i), (iv) and (v) of the Act of 1955. Article 16 of the United Nations Universal Declaration of Human Rights, 1948 specifically provides for the right to marriage between men and women of full age with their free and full consent. Article 23(2) of the International Covenant on Civil and

Political Rights, adopted by the General Assembly of the United Nations on 19.12.1966, also stipulates the right of men and women of marriageable age to marry. Our Courts have also held that the right to marry is a necessary concomitant of right to life guaranteed under Article 21 of the Constitution of India and if not a fundamental right, it is akin to it and so on and so forth. Various judgments have been cited by learned counsel for the petitioner about the right to marry and the last but not the least, the judgment in **Jasvir Singh's case (supra)** in which this Court has answered the question in affirmative that the right to procreation survives incarceration. It is also held that such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights but in the absence of any mechanism to avail the said right for procreation, either by conjugal rights or artificial insemination, various directions have been issued including Constitution of a Jail Reforms Committee to be headed by a former Judge of the High Court, referred to in *extenso*, in the earlier part of this order, but still the prayer made by the petitioners in that case was declined in which one of the grounds was that the circumstance leading to the petitioners' incarceration was far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively.

Thus, in the instant case, this Court is of the view that an under-trial prisoner, being presumed to be innocent, has a right to marry with

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someone who is not an under-trial like him/her and/or a person can marry an under-trial prisoner, if he/she desires.

Thus, the question posed in the earlier part of this judgment is answered in affirmative.

Now the second question would arise as to whether the petitioner can be allowed to marry respondent No.3 in jail premises?

In my view, the marriage can only be performed outside the jail as the jails cannot be converted into marriage palaces and in the instant case, since the application of respondent No.3, especially filed for regular bail, has been specifically declined by this Court on 09.09.2013 in which the respondent No.3 had prayed for his release only for the purpose of his marriage, therefore, the said order, until and unless reversed by higher Court, cannot be reviewed by a Coordinate Bench.

The present petition is thus disposed of accordingly.

January 12, 2016
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(Rakesh Kumar Jain)
Judge