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

+ W.P.(CRL) 1609/2016

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Judgment dated 26th May, 2016

SHER MOHAMMAD

..... Petitioner

Through : Mr.Anurag Ojha and Mr.Arun K. Tewari,
Advs. along with petitioner

versus

GOVERNMENT OF NCT OF DELHI & ORS Respondents

Through : Mr.Rahul Mehra, Standing Counsel (CrI.)
with Mr.Amrit Singh and Shekhar
Budakoti, Advs. for the State.
Insp.R.Ajay Partap and ASI Mukesh, P.S.
F.P. Beri.
Ms.Shahista, daughter of the petitioner in
person.
Shakeel, husband of Shahista in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of habeas corpus thereby directing respondents to produce the corpus of his daughter, Ms.Shahista.
2. In this case, daughter of the petitioner, who as per the writ petition is stated to be fifteen years of age, was missing since 26.4.2016 and the needle of suspicion was upon one, Shakeel.
3. Learned counsel for the petitioner submits that since the respondents failed to perform their statutory duty, the petitioner was left with no option but to knock the doors of this Court for justice.

4. We have heard learned counsel for the parties. In this case, marriage between Shahista and Shakeel was performed against the wishes of the parents of Shahista.
5. It may be noticed that on the last date of hearing i.e. 20.5.2016, Shahista was produced from Prayas Shelter Home. She had submitted that she has married Shakeel out of her own free will and wishes to reside with him. It was also informed to the Court that statement of Ms.Shahista has also been recorded under Section 164 of the Code of Criminal Procedure. The Court directed Shakeel, his parents, and Ms.Shahista and her parents to remain present in Court on the next date of hearing.
6. Today, Shahista and her family members are present in Court. Shakeel, his father and brother are also present in Court. Shahista reiterates the statement made by her in Court on 20.5.2016 to the effect that she has married Shakeel out of her own free will and she wishes to reside with him. Shahista further submits that her date of birth is 01.09.1998 and her age is 17 years and 8 months. Learned counsel for the petitioner disputes the same and submits that as per the petitioner, the age of Shahista is 15 years.
7. The petitioner is also present in Court. He submits that he has no objection if Shahista joins the company of her husband but they would not keep any relationship with Shahista and the her in-laws.
8. Now, the only question which arises for our consideration is whether Shahista has right to reside with her husband or not even if she is below eighteen years of age, as claimed by the petitioner.
9. The law in this regard in Mohammedan Law is well settled that once the girl attains the age of puberty, she has a right to reside with her husband.

10. In the case of *Mrs. Tara Begum v. State of Delhi & Ors.*, reported at (2012) 116 AIC 862, a Division Bench of this Court while taking into consideration the law laid down in the case of *Md. Idris v. State of Bihar*, 1980, Crl.L.J.764 and in the other judgments passed from time to time, held as under:

"4....."Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mahomedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection reference can be made to Article 251 of Mulla's Principles of Mahomedan Law which says that every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, in absence of evidence, on completion of the age of 15 years. Even in Tyabji's Muslim Law under Article 27 is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Article 268 of Mulla's Principles of Mahomedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man of the woman as his wife. Article 90 of Tyabji's Muslim Law also says that a marriage is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian."

This Court, in Vivek Kumar @ Sanju and Anjali @ Afsana vs. The State and another, (Crl.M.C.No. 3073-74 of 2006, decided on 23.02.2007) observed that:

"There is no law which prohibits a girl under 18 years from falling in love with someone else. Neither falling in love with somebody is an offence under IPC or any other penal law. Desiring to marry her love is also not an offence. A young girl, who is in love has two courses available to her one is that she should marry with the consent of her parents after obtaining the consent of her parents. If her parents do not agree to persuade them or to wait for attaining the age of

majority and then exercise her right as a major to marry the person of her own choice. However, this is possible only when the house of her parents where she is living has congenial atmosphere and she is allowed to live in peace in that house and wait for attaining age of majority. This might have been the reason in the mind of petitioner No. 2 when she told her father that she was in love and wanted to marry Sanju, but the response of father when daughter confided in him, created the fear in the mind of petitioner No. 2. Her father slapped her and told that her action would malign the religion and bring danger to the religion. He even threatened to kill her and marry her off to some rich person. When once such a threat is given to a girl around 17 years of age, who is in love, under such circumstances she has a right to protect her person and feelings against such onslaught of her relatives even if the onslaught is from her own parents. Right to life and liberty as guaranteed by the Constitution is equally available to minors. A father has no right to forcibly marry off her daughter, who is below 18 years against her wishes. Neither he has right to kill her, because she intends to marry out of her religion. If a girl around 17 years of age runs away from her parents house to save herself from the onslaught of her father or relatives and joins her lover or runs away with him, it is no offence either on the part of girl or on the part of boy with whom she ran away and married."

5. In *Shamsuddin vs. State*, (WP(Crl.) 13 of 2009, decided on 15.05.2009) where a similar question about the marriage of a minor Muslim girl arose, in the context of the provisions of the Prohibition of Child marriage Act, 2006, this Court observed that:

"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. Gulshan 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 Chhattri, District Bulandsahar, U. P. It is only subsequently that they shifted to Seemapuri, Delhi.”

11. In this case, it is not in dispute that Shahista has attained the age of puberty and her Nikah was performed with Shakeel.
12. Having regard to the fact that Shahista has attained the age of puberty and in view of the statement made by her and the petitioner, we do not find any ground to restrain Shahista to join the company of her husband, Shakeel.

13. Accordingly, Shahista would be free to join the company of her husband, Shakeel, from the Court itself. The I.O. of the case will inform Prayas Shelter Home about the order passed by this Court today.
14. Petition stands disposed of.

G.S.SISTANI, J

MAY 26, 2016
msr

SANGITA DHINGRA SEHGAL, J

