

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

**Criminal Writ Petition No.1568 of 2017
Date of decision: 26.09.2018**

Aamir

..Petitioner

Versus

State of Haryana and others

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. M.D. Khan, Advocate
for the petitioner.

Mr. Chetan Sharma, AAG, Haryana
for respondents No.1 to 3-State.

Mr. Sarfraj Hussain, Advocate
for respondents No,4 to 6.

Daya Chaudhary, J.

Petitioner-Aamir has approached this Court by way of filing the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus for appointment of Warrant Officer with a direction to respondents No.1 to 3 to search for detainee, namely, Sahina, who is wife of petitioner and is in illegal custody of respondents No.4 to 6.

As per case of the petitioner, he and detainee-Sahina have solemnized marriage and filed Criminal Misc. No. M-36403 of 2017 for protection of their lives and liberty with a direction to private respondents not to interfere in their personal life and liberty. Said petition was disposed of vide order dated 27.09.2017 with the direction to Superintendent of

Police, Nuh (Mewat) to look into the matter and to provide protection in case, there is danger to their lives and liberty. Thereafter, detenue-Sahina was forcibly taken away by the private respondents with the help of Local Police and now she is in illegal custody of respondents No.4 to 6. It is also mentioned in the petition that the detenue wanted to go to her matrimonial home with the petitioner but due to action of the Police officials and private respondents, she was not allowed to go there and she is in illegal custody of respondents No.4 to 6.

Learned counsel for the petitioner submits that the petitioner is 22 years of age and has performed 'Nikah' with the detenue on 09.09.2017. The parents of detenue were not happy with the marriage and petitioner and detenue sought protection from this Court, which was granted vide order dated 27.09.2017. Thereafter, the detenue was taken away from her matrimonial home by the private respondents with the help of local Police and she was kept in safe house without telling the petitioner. Learned counsel further submits that it was a case of illegal detention as neither consent of petitioner nor of detenue was sought. Learned counsel also submits that today also, detenue is present in the Court and vide order dated 11.09.2018, the present case was ordered to be heard along with Criminal Writ Petition No.532 of 2018, which has been allowed by this Court today only. Same issue was there in that case also as the detenue was 16 years of age and both the parties are governed by Muslim Law. In the present case also, both the parties are Muslim and they are governed by the Muslim Law.

Learned State counsel submits that the petitioner has allured the detenue and a complaint was got registered by the father of the detenue.

The detenue was recovered by the Police and she was produced before the Illaqa Magistrate where her statement under Section 164 Cr.P.C. was recorded. Learned State counsel further submits that the anticipatory bail application filed by the petitioner was rejected by the Sessions Judge, Nuh as well as by this Court also. The Police is making all efforts to arrest the accused but his whereabouts are not known. Learned State counsel also submits that as per date of birth certificate taken from Sub Registrar Medical Officer, CHC Tauru, the date of birth of detenue-Sahina is 10.05.2002 whereas as per school leaving certificate, her date of birth is 03.04.2001. Learned State counsel also submits that FIR No.105 dated 18.08.2017 was registered under Sections 342, 120-B IPC and Section 4 of the POCSO Act, 2012 at Women Police Station, Tauru and FIR No.352 dated 11.09.2017 was registered under Sections 363, 366-A IPC against the petitioner.

Learned State counsel as well as counsel for respondents No.4 to 6 have opposed the submissions made by learned counsel for the petitioner as detenue is minor and she is not eligible for marriage.

Heard arguments of learned counsel for the parties and have also perused the documents available on the file.

Vide order dated 07.03.2018, the detenue was produced before this Court and she was allowed to go with the petitioner with the liberty to reside till further orders and the case was adjourned for deciding the issue as to whether it was a case of valid marriage in accordance with Muslim Law or the petitioner was liable for prosecution under Sections 363, 366-A, 342 IPC and Section 4 of the POCSO Act, 2012.

Admittedly, the petitioner and detenue have solemnized their marriage and they are governed by the Muslim Personal Law (Shariat) Application Act, 1937, which provides the application of personal law to Muslim in case of marriage and guardianship. Section 2 of the aforesaid Act is reproduced as under: -

"2. Application of Personal Law to Muslim - Notwithstanding any customs usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract of gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, illa, zihar, lian, khula and mubaraa, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

It is apparent from the abovesaid provisions that in case, where the parties are Muslims, they are governed by the Muslim Personal Law (Shariat) and the same would be applicable for the purpose of marriage and dissolution of marriage etc. The Majority Act, 1875 further makes it clear that the said Act will not be applicable in case of marriage. As per provisions of the Act, 2006, marriage of minor is void in certain circumstances and specially as per Section 12(a) of the Act if the "child is taken or enticed out of the keeping of the lawful guardian" and the same is

applicable to all Citizens of India. It nevertheless did not repeal the Muslim Law. Section 21 of the Act, 2006 reads as under :-

*"21. Repeal and savings. - (1) The Child Marriage Restraint Act, 1929 (19 of 1929) is hereby repealed.
(2) Notwithstanding such repeal, all cases and other proceedings pending or continued under the said Act at the commencement of this Act shall be continued and disposed of in accordance with the provisions of the repealed Act, as if this Act had not been passed."*

As per Section 21 of the Act, the only Act, which was repealed was the Child Marriage Restraint Act, 1929 and has no bearing on the Muslim Personal Law (Shariat) Application Act, 1937. The Muslim Personal Law (Shariat) Application Act, 1937 is a special Act, whereas, the Prohibition of Child Marriage Act, 2006, is a general Act. The general provisions would yield to specific provisions. This is a well settled proposition of law. The special Act would have predominance over the general Act. Hon'ble the Supreme Court in the case of ***U.P. State Electricity Board and another v. Hari Shankar Jain and others 1978 (4) Supreme Court Cases 16*** held as under :-

"(d) The rule "generalis specialibus non derogant," which means that the general provision should yield to a specific provision, is based upon the reason that in passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament. Since the Industrial Employment

(Standing Orders) Act is a special Act, dealing with a specific subject, viz. The conditions of service enumerated in the Schedule, of workmen in an industrial establishment, it is impossible to conceive that Parliament sought to abrogate the provisions of that Act, embodying as they do hard-won and the precious rights of the workmen and prescribing as they do an elaborate procedure including a quasijudicial determination, by a general, incidental provision like Section 79(c) of the Electricity (Supply) Act supply. It is obvious that Parliament did not have before it the Standing Orders Act when it passed the Electricity Supply Act and Parliament never meant that the Standing Orders Act should stand pro tanto repealed by Section 79(c) of the Electricity (Supply) Act supply. The provisions of the Standing Orders Act must, therefore, prevail over Section 79(c) of the Electricity (Supply) Act supply in regard to matters to which the Standing Orders Act applies."

In the present case, the question is of the custody of Mohamadden girl of 16 years. The precise question came up before the Patna High Court in the case of ***Md. Idris v. State of Bihar and others 1980 Crl. Law Journal 764***, wherein, it is held as under :-

"In such a situation, even for the purpose of considering the question as to whether the petitioner should be the guardian of respondent No. 5, I am left with no option but to proceed on the assumption that there has been a marriage between respondent Nos. 5 and 4. It is well settled that the Indian Majority Act which fixes the age of 18 years, at which a minor

becomes a major, exempt, marriage and divorce. The result will be that respondent No. 5 on the relevant date may be minor under the Indian Majority Act, or within the meaning of Section 361 of the Indian Penal Code, but certainly she could have married without the consent of her natural guardian. The necessary corollary to this will be that whatever may be the fate of the criminal case, which has been lodged by the petitioner for prosecuting respondent No. 4 for kidnapping, after the marriage, respondent No. 4 will be deemed to be the husband, and, as such, entitled to live with respondent No. 5. In such a situation, in my opinion, learned Sessions Judge has not committed any error in directing the release of respondent No. 5 saying that she was at liberty to live with respondent No. 4 whom she claims to have married."

In the present case, the detinue is 16 years or more than 16 years of age and marriage without consent of father cannot be said to be invalid or otherwise as consent of father is necessary in case, the girl is less than 15 years of age and the marriage without consent of father is void.

The arguments raised by learned State counsel as well as counsel for respondents No.4 to 6 are not applicable to the present case as both the parties belong to Muslim religion/community. The factum of marriage has not been denied by learned counsel for the petitioner as well as counsel for respondents No.4 to 6. The Delhi High Court in the case of ***Rukshana vs. Govt. of NCT of Delhi 2007(3) R.C.R. (Criminal) 542***, while relying on the judgment of **Md. Idris's case (supra)** while reflecting on the Mohammedan Law in somewhere similar situation, as the present one, has

held that the Sessions Judge was right in directing that she was at liberty to live with her husband. The observations made by the Delhi High Court is reproduced as under: -

*"7. Learned counsel for the petitioner submitted that as per Mohammedan Law, a girl who had attained the age of puberty could marry without consent of her parents and had right to reside with her husband even when she was less than 18 years of age and thus otherwise a minor girl. In support of this, he referred to the judgment of Patna High Court in the case of **Md. Idris v. State of Bihar and others 1980 CrL L.J. 764**. That was a case where girl in question was 15 years of age and had married respondent No. 4 without the consent of her parents. Complaint was filed that respondent No. 4 had enticed away the girl in question (respondent No. 5) and minor daughter of the petitioner in that case with a view to marry her forcibly. On this complaint, respondent No. 5/girl was produced before a Magistrate before whom she stated that she had gone with respondent No. 4 with her own accord and without enticement and married him with her own volition. The medical evidence showed that she was above 15 years but below 18 years, the Magistrate ordered the custody of respondent No. 5 to the petitioner as she minor. However, in the revision, the Sessions Judge ordered the custody of the girl to her husband/respondent No. 4 whom she claimed to have married. Challenging this order, father filed writ petition before the Patna High Court. The High Court dismissing the writ petition held that though respondent No. 5 on relevant date may be minor under the Indian*

Majority Act or within the meaning of Section 361 I.P.C., still under Mohammedan Law she could have married without consent of her natural guardian as she had attained the age of puberty. In such a situation, Sessions Judge was right in directing that she was at liberty to live with her husband. The following observations from this judgment would be worth quoting :

"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 Mohammedan 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 or Mulla's Principles of Mohammedan Law which says that every Mohammedan 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 it 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 Mohammedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man or 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 Mohammedan 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."

As per the Text Book of Mohammedan Law by Aqil Ahmad, "Puberty and majority" in the Muslim law are one and the same thing. The presumption is that when a person attains majority at the age of 15 years, it is a age of puberty and the marriage of a minor without the consent of the guardian is invalid unless it is ratified after the attainment of majority. A boy or girl, who has attained puberty, is at liberty to marry any one he or she likes and the guardian has no right to interfere.

Accordingly, by considering the age of the detenue and marriage performed between the petitioner and detenue and the fact that they are happy in their matrimonial life, the present petition is allowed and detenue, namely, Sahina is allowed to remain with the petitioner being wife as she has already been allowed to remain with the petitioner under the orders passed by this Court.

26.09.2018
neetu

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes