

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

**Criminal Writ Petition No.532 of 2018 (O&M)
Date of decision: 26.09.2018**

Mohd. Samim

..Petitioner

Versus

State of Haryana and others

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. Inderjeet Singh, Advocate
for the petitioner.

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

Mr. Sarfraj Hussain, Advocate
for respondent No.4.

Daya Chaudhary, J.

Criminal Misc. No. W-155 of 2018

This application has been moved for placing on record
Annexure P-5.

Application is allowed and Annexure P-5 is taken on record.

Criminal Writ Petition No.532 of 2018

Petitioner-Mohd. Samim has filed the present petition under Article 226 of the Constitution of India for issuance of a writ in the nature of habeas corpus to produce detinue, namely, Tasliman, who is confined in Safe House (Protection Home) at Nuh, District Nuh (Mewat) Haryana against her will and to get her released from illegal custody and to hand over to him being her husband.

As per case of the petitioner, he and detenue-Tasliman performed 'Nikah' on 03.06.2018 with their free will and consent. Thereafter, FIR No.310 dated 26.05.2018 was registered under Sections 363, 366-A IPC at Police Station Nuh by respondent No.4. The marriage is valid as the detenue has attained the age of puberty and she is major as per Muslim Law. The parents of detenue were not happy with the marriage as they wanted to get her marry with other person of their choice but the detenue was not ready. The petitioner and detenue filed Criminal Misc. No. M-25415 of 2018 before this Court for protection of their lives and liberty at the hands of family members and relatives of detenue, which was disposed of with a direction to Superintendent of Police, Mewat to look into the matter and take action in accordance with law to ensure that no harm is caused to the life and liberty to the petitioners at the hands of private respondents. The petitioner and detenue were residing in Safe House (Protection Home) at Nuh. The detenue was produced before the JMIC, Nuh and her statement under Section 164 Cr.P.C. was recorded on 11.06.2018 wherein it was stated by her that she had performed marriage with petitioner and wanted to go with him. The petitioner was arrested on 12.06.2018 and subsequently, he was released on bail by the trial Court. The detenue was kept in Safe House and was not allowed to meet the petitioner, hence, the present petition was filed by the petitioner.

Learned counsel for the petitioner submits that the petitioner and detenue belong to Muslim community and they are governed by Muslim Law. It is a valid marriage under the Muslim Law and provisions of Prohibition of Child Marriage Act, 2006 (hereinafter referred to as 'the Act,

2006') are not applicable. Learned counsel further submits that the petitioner is entitled to take the custody of the detenue being his legally wedded wife. Learned counsel for the petitioner has also relied upon judgment rendered by this Court in ***Kammu vs. State of Haryana and others, 2010(4) RCR (Civil) 716*** wherein the girl was 15 years of age and marriage was held valid under the Muslim Law by holding that the Prohibition of Child Marriage Act, 2006 are not applicable.

Learned State counsel has not disputed the submissions made by learned counsel for the petitioner with regard to age, marriage and also filing of petition for protection but has disputed the submission made regarding applicability of provisions of the Act, 2006.

Similarly, learned counsel for respondent No.4-complainant has also opposed the submissions made by learned counsel for the petitioner and has also relied upon judgment rendered by Hon'ble the Apex Court in ***Independent Thought vs. Union of India and another, 2017(4) RCR (Criminal) 595***, judgment rendered by this Court in ***Amnider Kaur and another vs. State of Punjab and others, 2010(1) RCR (Criminal) 261*** and judgment rendered by the Karnataka High Court in ***Mis. Seema Begaum vs. State of Karnataka by its Secy., Women and Child Development Dept., and others, 2014 (8) RCR (Civil) 2004*** in support of his arguments.

However, learned State counsel as well as counsel for respondent No.4 have not disputed the ratio of judgment rendered by this Court in ***Kammu's case (supra)***.

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

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 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 respondent No.4 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 respondent No.4. 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 of 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.

In the present case, detenue- Tasliman is admittedly 16 years of age as on today and more than 15 years at the time of marriage. She has been asked whether she wants to stay with her parents but she has strongly objected and has stated that she wants to remain with her husband (petitioner).

Keeping in view the facts and law position as discussed above, the marriage of petitioner and detenue cannot be said to be invalid or void. Accordingly, the present petition is allowed and the detenue is entitled to remain with the petitioner being wife. Incharge, Safe House (Protection Home) at Nuh, District Nuh is directed to complete all formalities and release the detenue.

26.09.2018
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned Yes

Whether Reportable Yes