

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

132

CRWP-7056-2020

Date of decision: 21.12.2020

Gagandeep Singh and another

.....Petitioners

Versus

State of Punjab and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Surmeet S. Sandhu, Advocate
for the petitioner.

Mr. Sandeep Kumar, DAG, Punjab
for respondents No.1 to 3.

Mr. Ranvir Singh Arya, Addl. A.G. Haryana
for the State of Haryana

Mr. Rajiv Vij. Addl. Public Prosecutor
for the U.T. Chandigarh.

Ms. Isha Goyal, Advocate
for respondent No.9.

ARUN KUMAR TYAGI, J (ORAL)

(The case has been taken up for hearing through video conferencing.)

1. The petitioners have filed the present petition under Article 226 for issuance of writ in the nature of mandamus for directing the respondents No.2 and 3 to protect life and liberty of the petitioners from harm at the hands of respondents No.4 to 9 and not to harass and humiliate the petitioners and not to implicate them in any false case at their instance.

2. The petition was filed on the averments that petitioner No.1 aged 22 years and petitioner No.2 aged 17 years 7 months have

solemnized marriage on 01.09.2020 against the wishes of respondents No.4 to 9 and apprehend danger to their life and liberty from them and harassment and false implication in criminal case at their instance.

3. Vide order dated 10.09.2020 respondent No.2-Senior Superintendent of Police, Kapurthala was directed to look into the grievances of the petitioners as set out in the petition and also expressed in the representation dated 02.09.2020 (Annexure P-4) and take appropriate action for protection of their life and liberty as may be warranted by the circumstances.

4. Respondent No.9 filed application for modification of order dated 10.09.2020 for taking respondent No.2 out of the custody of petitioner No.1 till she attains the age of 18 years.

5. On representation made by respondent No.9 to respondent No.2, FIR No.111 dated 19.10.2020 in Police Station Begowal, Kapurthala was registered against petitioner No.1 under Section 9 of the Prohibition of Child Marriage Act, 2006 and petitioner No.1 was arrested in the case while petitioner No.2 was sent to Vanita Gandhi Aashram, Jalandhar.

6. Kulwinder Kaur mother of petitioner No.1-Gagandeep Singh filed CRM-M-38750-2020 for handing over custody of petitioner No.2 to her. Vide order of even date i.e. 21.12.2020 passed in CRM-M-38750-2020 custody of petitioner No.2 has been ordered to be given to Kulwinder Kaur-mother of petitioner No.1.

7. Learned counsel for the petitioners has submitted that the petitioners do not want to continue with the present petition and the same may be dismissed as withdrawn.

8. Dismissed as withdrawn.

9. Before parting with the case it may be observed that the Prohibition of Child Marriage Act, 2006 was enacted to provide for the prohibition of solemnization of child marriages and for matters connected therewith or incidental thereto.

10. Sections 9, 10 and 11 of the Prohibition of Child Marriage Act, 2006, which provide for punishment of male adult marrying a child, solemnising a child marriage and promoting or permitting solemnisation of child marriages respectively, read as under:-

“9. Punishment for male adult marrying a child.—
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.

10. Punishment for solemnising a child marriage.—
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.

11. Punishment for promoting or permitting solemnisation of child marriages.—(1) *Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees:*

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised.”

11. In *Hardev Singh Vs. Harpreet Kaur and others : 2020 (1) RCR (Criminal) 238* Hon'ble Supreme Court held that male adults between the age of 18 and 21 years of age marrying female adult above 18 years of age can not be said to have committed the offence punishable under Section 9 of the Prohibition of Child Marriage Act, 2006. In that case Hon'ble Supreme Court observed as under:-

“3. In any case, even assuming that the Appellant was aged eighteen years or above on the date of his marriage, we are of the considered opinion that Section 9 does not apply to the facts and circumstances of this case. It is pertinent to refer to the overall scheme of the 2006 Act in determining whether an offence under Section 9 is made out.

3.1. Section 2(a) of the 2006 Act defines child as 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. Under Section 2(b) of the Act, "child marriage" means a marriage to which either of the contracting parties is a child. Thus, even if the husband is between eighteen and twenty-one years of age, it can be treated as a child marriage.

3.2. It is not in dispute that Respondent No.1 (wife of the Appellant) was a major at the time of marriage. The 2006 Act does not make any provision for punishing a female adult who marries a male child. Hence, a literal interpretation of the above provisions of the 2006 Act would mean that if a male aged between the years of eighteen and twenty-one contracts marriage with a female above eighteen years of age, the female adult would not be punished, but it is the male who would be punished for contracting a child marriage, though he himself is a child.

3.3. We are of the view that such an interpretation goes against the object of the Act as borne out in its legislative history. Undoubtedly, the Act is meant to eradicate the deplorable practice of child marriage which continues to be prevalent in many parts of our society. The Statement of Objects and Reasons declares that prohibition of child marriage is a major step towards enhancing the health of both male and female children, as well as enhancing the status of women in particular. Notably, therefore, a significant motivation behind the introduction of this legislation was to curb the disproportionate adverse impact of this practice on child brides in particular.

3.4. After being passed by the Rajya Sabha, when the Prohibition of Child Marriage Bill, 2006 was introduced

for discussion in the 14th Lok Sabha by Smt. Renuka Chowdhury, the then Minister of State for Women and Child Development, she emphatically highlighted how child marriage reinforces gender discrimination in the country:

"...Unfortunately, here in India today gender is a matter of life and death. Boys live and girls die and that is the tragedy of our times.

These girls are then denied access to schools, they are made to look after their younger siblings, they have no access to food security, much less to immunization, they are anemic, they are subjected to untold exposures of infections and horrors and as soon as they enter their reproductive years, irrespective of the fact that they live in a tropical country like ours where onset of reproductive years is much earlier than in some other countries, these children are then sent off to be married and they become mothers at that age, at that stage of malnutrition, at that stage of denial of food security and at that stage of incubating disease whereby they, in turn, give birth to malnutrition children.

...After that these children are then vulnerable to domestic violence, alcoholic husbands who come home and beat them, abuse of different kinds, trafficking, taken away and exposed to horrors of such type that we cannot even begin to imagine. Although, the Child Marriage Restraint Act 1929 was brought into force nearly 77 years ago, it only brought restraint. It did not talk of prevention or removal."

3.5. Further, the Law Commission of India has also noted that child marriage is far more prevalent amongst girls, whose husbands are often much older than them, therefore compromising their development. (See The 205th Report of the Law Commission of India on the Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws at pages 1523)

3.6. It is also pertinent in this regard to refer to the Prevention of Child Marriage Bill, 2004 ('2004 Bill') which preceded the 2006 Act. Clauses 2(a), 2(b), and 9 of the 2004 Bill are in pari materia with the corresponding Sections of the 2006 Act, except insofar as Clause 9 of the 2004 Bill prescribed simple imprisonment, whereas Section 9 of the 2006 Act prescribes rigorous imprisonment for the offence. The Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, in its Thirteenth Report, on the 2004 Bill, notes that although both men and women are deemed to have attained majority at eighteen years of age under other

laws, a differential metric has been adopted for the purposes of defining child marriage. A higher age is prescribed for men, based on the prevailing societal notions that the age of eighteen years is insufficient for a boy to attain the desired level of education and economic independence, and that an age gap ought to be maintained between the groom and the bride.

3.7. However, the 2004 Bill, as also the 2006 Act, treats men who are above the age of 18 as having sufficient maturity to be held responsible for marrying a female child. The Report also notes that the purpose of Clause 9 of the 2004 Bill is to provide adequate penal consequences for a male adult who marries a child. However, an adult woman is exempt from punishment for marrying a male child as, in a society like ours, decisions regarding marriage are usually taken by the family members of the bride and groom, and women generally have little say in the matter. We hasten to emphasise that we do not wish to comment on the desirability of maintaining the aforesaid distinction in culpability. However, the context in which this distinction was considered appropriate by the legislature must be taken into account.

3.8. Section 9 of the 2006 Act must be viewed in the backdrop of this gender dimension to the practice of child marriage. Thus, it can be inferred that the intention behind punishing only male adults contracting child marriages is to protect minor young girls from the negative consequences thereof by creating a deterrent effect for prospective grooms who, by virtue of being above eighteen years of age are deemed to have the capacity to opt out of such marriages. Nowhere from the discussion above can it be gleaned that the legislators sought to punish a male between the age of eighteen and twenty-one years who contracts into a marriage with a female adult. Instead, the 2006 Act affords such a male, who is a child for the purposes of the Act, the remedy of getting the marriage annulled by proceeding under Section 3 of the 2006 Act. Hence, male adults between the age of eighteen and twenty-one years of age, who marry female adults cannot be brought under the ambit of Section 9, as this is not the mischief that the provision seeks to remedy.

3.9. Our views are supported by the marginal note of Section 9, which reads "Punishment for male adult marrying a child". It is well settled that where any ambiguity exists with regard to the interpretation of a legislative provision, the marginal note can be used in aid of construction, having regard to the object of the legislation and the mischief it seeks to remedy.

In view of the above, the words "male adult above eighteen years of age, contracts a child marriage" in Section 9 of the 2006 Act should be read as "male adult

above eighteen years of age marries a child".

12. A Coordinate Bench of this Court vide order dated 25.09.2020 passed in **CRWP-6912-2020 (O&M) titled 'Sukhwinder Singh and another Vs. State of Punjab and others'** gave the following directions:-

- “i) All the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh, will maintain a proper register of marriages, which maintain a counter-file of performing of a marriage.*
- ii) In the Marriage Certificate, apart from photographs of the boy and girl, the description of the documents like Aadhar Card, Voter I.D. Card, Matriculation Certificate, Birth Certificate, etc., will be strictly mentioned and a photocopy of such document will be pasted on the backside of the counter file, so maintained by the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar.*
- iii) The affidavit of a person, who is deemed to be a minor will not be taken as a valid document of age, for the purpose of performing the marriage, unless either of the parent of such person appears and file his/her affidavit.*
- iv) All the Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh, after every three months/quarters of year will produce their register with counter-file before the SHO having jurisdiction over the area where such Mandir, Masjid, Gurudwara and Girjaghar are situated and will be returned back after an inspection is done by the concerned SHO for verification of age of the parties. Any violation of these directions by the SHO concerned will make him/her liable for disciplinary action.*
- v) The SHO of the concerned area, where Mandir, Masjid, Gurudwara and Girjaghar are situated, on receiving a complaint regarding a child marriage, will immediately take action under the Prohibition of Child Marriage Act, 2006, against the accused.”*

In the above said case a copy of the order was also ordered

to be sent to Director Generals of Police of Punjab and Haryana as well

as Inspector General of Police, U.T. Chandigarh for further issuance of directions to SSPs/SHOs of all districts.

13. This Court observed in its order dated 16.10.2020 as under:-

“The Prohibition of Child Marriage Act, 2006 is a secular Act which applies to all irrespective of religion and is intended to curb the menace/social evil of child marriage and the provisions thereof need to be strictly implemented so that the same does not remain dead letter and the object of enactment thereof is achieved.

In All India Judges' Association Vs. Union of India : 1992 (1) SCC 119 Hon'ble Supreme Court observed that dispensation of justice is an inevitable feature in any civilised society. Maintenance of law and order require the presence of an efficient system of administration of criminal justice.

Efficiency of administration of criminal justice is dependent solely on efficacy of its judicial and executive process and majesty of rule of law is seriously undermined by defiance/non-compliance of statutory provisions and Court orders, deliberate or otherwise.

It is, therefore, of utmost importance that statutory provisions enacted/amended as well as directions issued by the Courts from time to time are complied in letter and spirit by the police which do not have any discretion of not complying with the same.”

14. Accordingly, vide above-said order States of Punjab and Haryana and U.T. Chandigarh were directed to furnish information by way of affidavits as to (i) whether any instructions have been issued regarding registration of cases against such male adult contracting and other persons conducting, directing, abetting, attending or participating in child marriage; (ii) how many complaints were received during this year for registration of such cases and (iii) how many cases have been registered on such complaints in the States of Punjab and Haryana and U.T. Chandigarh.

15. Replies by way of affidavit of Sh. Sarabjit Singh, PPS,

Investigation, Punjab, Chandigarh, Smt. Kala Ramchandran Additional Director General of Police, Crime against Women, Haryana, Panchkula and Ms. Neha Yadav, IPS, Women and Child Support Unit, U.T. Administration, Chandigarh have been filed.

16. In his affidavit Mr. Sarabjit Singh, PPS, Assistant Inspector General of Police, Litigation, Bureau of Investigation, Punjab has mentioned that in compliance with directions given in order dated 16.10.2020 passed by this Court, a circular No.9887/CRLA1 dated 03.11.2020 has been issued to all the field units to take action under the Prohibition of Child Marriage Act, 2006 whenever any case of child marriage is reported to the police and that out of 17 complaints received during the year upto 30.10.2020, FIR was registered in 16 cases.

17. In her report Smt. Kala Ramchandran Additional Director General of Police, Crime against Women, Haryana, Panchkula has mentioned with regard to point No.(i) that no such instructions as mentioned in point (i) had been issued earlier and now directions have been issued to the field units vide memo No.16707-730/CAW-1 dated 11.12.2020 with regard to the role of police on receipt of a complaint under the Prohibition of Child Marriage Act, 2006 and with regard to points No.2 and 3 it has been mentioned that FIR have been registered in 39 out of the 104 complaints received during the year 2020 and that in the rest of the complaints cases were not registered since either the girls were found to be above 18 years of age or the marriage has not been held or the complaint was found to be false.

18. In her affidavit Ms. Neha Yadav, IPS, Women and Child Support Unit, U.T. Administration, Chandigarh has mentioned that the

Prohibition of Child Marriage Rules, 2015 have been promulgated by U.T. Chandigarh Administration which came into force vide notification dated 18.05.2015. In pursuance to order dated 25.09.2020 passed in CRWP No.6912 of 2020 directions have been issued by the Director General of Police, U.T. Chandigarh vide order dated 19.10.2020 to all the SDPOs and SHOs and that one complaint was received till date during the year 2020 and FIR was registered on the basis thereof.

19. It may be observed here that a child marriage may, apart from the penal provisions of the Prohibition of Child Marriage Act, 2006, involved commission of offences punishable under the provisions made in the Indian Penal Code, 1860 (for short 'the IPC') and the Protection of Children from Sexual Offences Act, 2012.

20. Section 361 of the IPC defines kidnapping from lawful guardianship as taking or enticing of any minor under 16 years of age if male and 18 years of age if female or person of unsound mind out of the keeping of lawful guardian without the consent of such guardian. 363 of the IPC provides the punishment for kidnapping of a minor from lawful guardianship. Section 366 of the IPC provides the punishment for kidnapping, abducting or inducing woman to compel her marriage etc. while Section 366A of the IPC provides the punishment for procurement of minor girl to force or seduce her for illicit intercourse. Since Section 12 of the Prohibition of the Child Marriage Act, 2006 declares child marriage to be void if the child being minor was taken or enticed out of the keeping of the lawful guardianship, the question whether the child being minor was taken or enticed out of the keeping

of the lawful guardian assumes significance.

21. Section 375 of the IPC defines 'rape'. Section 375 of the IPC, before expansive amendment in 2013, provided that a man is said to commit rape if he has sexual intercourse with a woman under circumstances falling under any of the six (seven after amendment in 2013) descriptions mentioned in the section. A woman is defined under Section 10 of the IPC as a female human being of any age. Among the six (now seven after amendment in 2013) descriptions is clause sixthly defining sexual intercourse against the will or without the consent of the woman under the specified age to be rape. Clause 'Sixthly' of Section 375 of the IPC, as amended in 2013, makes it clear that if the woman is under 18 years of age, then sexual intercourse with her – with or without her consent - is rape. Exception 2 to Section 375 of the IPC provided that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. The effect of exception 2 to Section 375 of the IPC even after amendment in 2013 was that a girl child not being under 15 years of age, who was married before attaining the minimum age of 18 years for marriage, could be subjected to sexual intercourse with or without her consent by her husband and the husband could not be charged with offence of rape.

22. In *Independent Thought Vs. Union of India and another : (2017) 10 SCC 800* Hon'ble Supreme Court held that exception 2 to Section 375 of the Indian Penal Code, 1860, which provides that **"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."**, is arbitrary and violative of the principles enshrined in Articles 14, 15 and 21 of the

Constitution of India and read down the same as providing that **"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."**

23. Keeping in view the mounting crimes against children, the Parliament enacted the Protection of Children from Sexual Offences Act, 2012 to prevent the sexual abuse and exploitation of children. The Protection of Children from Sexual Offences Act, 2012 deals with sexual offences committed against a child defined under Section 2(1)(d) thereof to be a person below the age of 18 years. The Protection of Children from Sexual Offences Act, 2012 does not define rape, but it defines penetrative sexual assault under Section 3 and aggravated penetrative sexual assault under Section 5 and the punishments are provided for them under Section 4 and 6 respectively. Section 7 of the Protection of Children from Sexual Offences Act, 2012 defines sexual assault, Section 9 defines aggravated sexual assault and punishments for those offences are provided under Section 8 and 10 respectively. Section 11 defines sexual harassment and Section 12 provides the punishment for sexual harassment.

24. In view of these statutory provisions taking away/enticing of the minor girl out of lawful custody of her guardian amounts to kidnapping from lawful guardianship under Section 361 of the IPC punishable under Section 363 of the IPC and may also fall under aggravated forms. Sexual intercourse by the husband with his wife under eighteen years of age amounts to rape under Section 375 punishable under Section 376 of the Indian Penal Code, 1860 and penetrated sexual assault/aggravated penetrative sexual assault under

Section 3/Section 5 punishable under Section 4/Section 6 of the Protection of Children against Sexual Offences Act, 2012.

25. In view of the above referred statutory provisions Director General of Punjab, Haryana and U.T. Chandigarh respectively are also directed to issue appropriate instructions to all concerned CPs/SSPs/SPs and SHOs of the Police Stations in all the districts in the States of Punjab and Haryana and U.T. Chandigarh respectively for ensuring :-

- (i) that appropriate action is taken for registration of FIR under Section 9 of the Prohibition of Child Marriage Act, 2006 in cases where male adult person aged more than 18 years solemnises marriage with a minor girl less than 18 years of age falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006;
- (ii) that appropriate action is taken for registration of FIR under Section 4/Section 6 of the Protection of Children from Sexual Offences Act 2012 where such male adult person having solemnised marriage with a minor girl less than 18 years falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006 had with such minor girl sexual intercourse falling within the definition of penetrative sexual assault/aggravated penetrative sexual assault under Section 3/Section 5 of the Protection of Children from Sexual Offences

Act, 2012 as the case may be;

- (ii) that appropriate action is taken for registration of FIR under Section 10 of the Prohibition of Child Marriage Act, 2006 where any Pujari/Pandit of Mandir, Molwi/Qazi of Masjid, Granthi of Gurudwara and Paadari of Girjaghar in the States of Punjab, Haryana and U.T. Chandigarh conducts marriage of a male adult person of the age of 18 years or more with a minor girl less than 18 years of age falling within the definition of 'Child' under Section 2(a) of the Prohibition of Child Marriage Act, 2006; and
- (iv) that appropriate action is taken for registration of FIR against other persons as provided under Sections 10 and 11 of the Prohibition of Child Marriage Act, 2006, as may be warranted by the facts and circumstances of the case.

26. A copy of this order be supplied to learned State Counsel for the States of Punjab and Haryana and Additional Public Prosecutor for U.T. Chandigarh respectively and be also sent to the Director General of Police, Punjab, Haryana and U.T. Chandigarh respectively for requisite compliance.

21.12.2020
vishal/kothiyal

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No