

Sr. No. 108 (2 cases)

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

CRWP-7911 of 2020 (O&M)

Date of Decision: 09.10.2020

Divya

...Petitioner

Versus

State of Punjab and others

...Respondents

CRWP-8066-2020 (O&M)

Gulistan@ Mahak and another

...Petitioners

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr.Vikrampreet Arora, Advocate,
for the petitioner in CRWP No.7911 of 2020.

Mr. Vishal Satija, Advocate,
for the petitioners in CRWP No.8066 of 2020.

Mr. LuvinderSofat, AAG, Punjab.
(Presence marked through video conference).

ARUN MONGA, J. (ORAL)

Almost every day, this Court is approached by runaway couples seeking protection of their life and liberty, fearing danger to and/or elimination of their life at the hands of their relatives/family members, who have not accepted their marriage and/or consensual relationship and/or live-in relationship.

Reasons may vary. Inter caste or inter religion marriage, being the most prominent cause.

2. There is no conflict with law in the cases where both the partners have attained the legal age of marriage (18 years for female and 21 years for male) or attained the legal age to have a consensual relationship or a live-in relationship, as the case may be. It is irrelevant, whether or not they perform marriage, since law permits them to marry or choose their partners according to their wishes, regardless of their choice being accepted by the family and/or relatives. However, difficulty arises where they or either of them have/has not attained the legal age of marriage or for consensual relationship and yet, they marry or choose their partner or have a live-in relationship and approach courts for orders to protect their life and liberty.

3. Often, one hears of honour killing in the name of protecting the family pride, not giving two hoots to the rights of the runaway couples. Problem seems to be pan India, North to South. Illustration in hand is recent case from Telangana, South of India, where a “Vyasa” caste man was murdered apparently for marrying a “Reddy” caste woman. Almost daily, petitions are being filed before this court from Punjab, Haryana and/or Union territory of Chandigarh. Newly weds first seek protection from State and on failure to get relief, they rush to courts. It is a fight of ‘love versus honour’ ! One wonders, what kind of mindless pride/honour is this, which so much blinds the family members/parents as to even kill their own, the ones they gave birth to and/or to eliminate her/his chosen partner ?

4. Some of the enactments by Parliament of India not only prescribe the minimum age of marriage but also criminalise any violation thereof and make it a punishable offence. Consequently, any such marriage and sexual relationship per se is an offence, regardless of consent. In such event, custody

of a minor girl is also a debatable issue. Should the custody of the minor girl continue with her chosen partner and/or husband ? Or should she be sent to an institution like Nari Niketan ? If so, in doing so, should one give weightage to her wishes or ignore the same all together just because she is a minor ? Would it not violate her fundamental right to life and liberty guaranteed under Article 21 of the Constitution of India, if, against her wishes, she is sent to an institution like Nari Niketan ? Or should her custody be given against her wishes to her legal guardians/parents, who have instituted criminal proceedings against her husband and/or partner whom she loves and with whom she wants to live ?

5. In this conspectus, matter in hand (CRWP 7911 of 2020) was heard yesterday also. Following order was passed by me:-

“Yet again this Court is faced with a conflict qua a run-away couple herein. Per law, one of them is though not legally eligible to get married but in conceded violation, they have performed their marriage with each other. Basis thereof, they seek protection qua their life and liberty, feeling threatened from the family members/relatives of petitioner No.1-wife, who are allegedly against their marriage, same being inter-religion, apart from other reasons as stated in the petition.

In the instant case, the girl though is of marriageable age, born on 16.07.2002 (18 years old 04 months old) and she thus has all the right to choose her life partner but her husband/petitioner no.2 born on 01.01.2002, admittedly being below 21 years (18 years and 09 months old) is legally not entitled to get married. No doubt, right to protection of life, as envisaged under Article 21 of Constitution of India stands on a higher footing viz-a-viz violation, if any, of statutory provisions viz The Prohibition of Child Marriage Act 2016, where the age of marriage is envisaged as 18 years for bride and 21 years for the bridegroom; and/or Indian Majority Act 1875; and/or Protection of Child from Sexual Offences Act 2012; and/or Indian Penal Code 1860.

It was only yesterday, a case bearing CRWP No. 7911 of 2020 titled as “Divya v. State of Punjab and others” came up before me where in a 17 years old minor girl had run away from her legal guardians (parents), to exercise her right to get married with her chosen partner, on turning 18 years old. She filed a petition through her next friend and sought protection qua her life and liberty, fearing threat from her parents/relatives.

After hearing arguments for some time in the morning session, this court issued notice of motion in CRWP No. 7911 of 2020, with a request to learned state counsel to assist. When instant

case was also being adjourned to be heard with CRWP No. 7911 of 2020, it transpired that in the afternoon session, when the Court was rising and morning order dictated in open court was yet to be signed, learned counsel for the petitioner made a discreet mention to withdraw the said petition. Being under an erroneous impression that it was perhaps a pass over case and no arguments were heard, this Court allowed the same to be withdrawn.

Today in the course of hearing of this petition, learned State counsel points out that CRWP No. 7911 of 2020 has been withdrawn surreptitiously, behind his back. I am in agreement that the aforesaid case was indeed withdrawn surreptitiously without notice to the learned state counsel and this Court was misled into granting permission to withdraw it, under the bonafide impression that notice was yet to be issued.

In the premise, Registry is directed to list CRWP No. 7911 of 2020 for re-hearing along with the present petition on 09.10.2020. Learned counsel for the petitioner in CRWP No. 7911 of 2020 be informed accordingly.”

6. Learned counsel for the petitioner appearing in CRWP No.7911 of 2020 submits that he is under instructions to not pursue the petition filed by next friend of the minor girl. Says, he could not earlier bring to the notice of this Court, that the minor girl is not staying with her next friend anymore. She has eloped with her partner, who is 21 years old man. The parents of the girl have already instituted an FIR against the boy under appropriate provisions of law for kidnapping and other offences. The merits of the criminal writ petition, therefore, need not be discussed since it is not being pursued. The same was anyway permitted to be withdrawn yesterday, on request of the learned counsel for petitioner.

7. Though the aforesaid criminal writ petition stands withdrawn, but it leaves this Court pondering, whether it is worthwhile to criminalize such activities of the children ? Wouldn't making them criminals leave a lifelong scar on their minds, from which they may not be able to ever recover ?

8. Regarding custody of a minor wife, it would be worthwhile to cite two judgments of Delhi High Court, one by a Division Bench and other by a Full

Bench. First one is titled **Jitender Kumar Sharma Vs. State & Another**¹, wherein relying on an earlier division bench of Delhi High Court in **Neetu Singh v State**², HMJ Badar Durrez Ahmed (as he then was) speaking for the Division Bench, inter alia, held as under :-

“23. *In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her husband. A husband who is minor can be the guardian of her minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reason other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam’s welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention against her will and would be violative of her rights guaranteed under Article 21 of the Constitution. Neetu Singh’s case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.*”

Second judgment titled **Court on its own motion (Lajja Devi) Vs. State**³ is by a Full Bench of three judges, again by Delhi High Court. Speaking for Full Bench of Delhi High Court, HMJ A.K.Sikri, Acting Chief Justice (as he then was) observed as under :-

“46. *In such circumstances, allowing the husband to consummate a marriage may not be appropriate more so when the purpose and rationale behind the PCM Act, 2006 is that there should be a marriage of a child at a tender age as he or she is not psychologically or medically fit to get marriage. There is another important aspect which is to be borne in mind. Such a marriage, after all, is voidable and the girl child still has right to approach the Court seeking to exercise her option to get the marriage declared as void till she attains the age of 20 years. How she would be able to exercise her right if in the meantime because the marriage is consummated when she is not even in a position to give consent which also could lead to pregnancy and child bearing. Such marriages, if they are made legally enforceable will have*

¹2010 (171) DLT 543

² 1999 (77) DLT 601 : 1999 (121) PLR 47

³2012(193) DLT 619

deleterious effect and shall not prevent anyone from entering into such marriages. Consent of a girl or boy below the age of 16 years in most cases a figment of imagination is an anomaly and a marriage and, will act as a cover up by those who are economically and/or socially powerful to pulverize the muted meek into submission. These are the considerations which are to be kept in mind while deciding as to whether custody is to be given to the husband or not. There would be many other factors which the Court will have to keep in mind, particularly in those cases where the girl, though minor, eloped with the boy (whether below or above 21 years of age) and she does not want to go back to her parents. Question may arise as to whether in such circumstances, the custody can be given to the parents of the husband with certain conditions, including the condition that husband would not be allowed to consummate the marriage. Thus, we are of the opinion that there cannot be a straight forward answer to the second part of this question and depending upon the circumstances the Court will have to decide in an appropriate manner as to whom the custody of the said girl child is to be given.”

9. Judgments *ibid* thus lay down the guiding principles and throw light on the course to be adopted qua guardian ship of an under aged minor girl in case of runaway couples.

10. On earlier occasions, I have had to deal with many a cases, where two partners solemnized marriage and one of them was not of marriageable age /minor. Yet, orders were passed for granting them protection *inter alia* on the ground, that right to life envisaged under Article 21 of the Constitution of India stands on a higher pedestal qua the alleged violation of statutory requirements of matrimonial law, which are to be adjudicated by the trial Court at appropriate stage. It is certain, that even if there is violation of statutory requirements of matrimonial law, as alleged, the person/party violating the same, cannot be hounded to be killed in the name of protecting honour of the family. Human life, therefore, has to be protected. It is the very basic ethos and the scheme of our Constitution particularly Article 21.

11. It would be apposite to reproduce relevant extract/observations from an earlier judgment, rendered by me in ***Sonia and another v State of Punjab and others***⁴, as under :-

“8. I am conscious of the fact that the girl is not of marriageable age. Marriage, assuming that it took place according to Hindu Rites is, therefore, in violation of Section 5 (iii) of the Hindu Marriage Act. Section 5, ibid envisages statutory pre-requisites for the consenting parties to solemnize marriage between them. Sub Section (iii) thereof stipulates the minimum ages of a bridegroom and a bride. However, at the same time, Section 11 of the Hindu Marriage Act which declares certain marriages, which are in contravention of Section 5 (supra), to be void, but precludes a marriage solemnized in contravention of Sub Section (iii) of Section 5, ibid from the purview of being regarded as void or invalid.

9. *I find support to my above sentiments from a Division Bench judgment rendered by Delhi High Court in case titled as **Jitender Kumar Sharma Vs. State and Another** reported as 2001 (7) AD (Delhi) 785.*

10. *Reverting to the present case, it appears that the petitioners have not solemnized a valid marriage as per Sub Section (iii) of Section 5 of the Hindu Marriage Act and may be required to satisfy the validity of their marriage before an appropriate Forum in the event of same being put to challenge.*

11. *The issue in hand, however, is not marriage of the petitioners, but the deprivation of fundamental right of seeking protection of life and liberty. Fundamental Right under Article 21 of Constitution of India stands on a much higher pedestal. Being sacrosanct under the Constitutional Scheme it must be protected, regardless of the solemnization of an invalid or void marriage or even the absence of any marriage between the parties.*

12. *It is the bounden duty of the State as per the Constitutional obligations casted upon it to protect the life and liberty of every citizen. Right to human life is to be treated on much higher pedestal, regardless of a citizen being minor or a major. The mere fact that the petitioners are not of marriageable age in the present case would not deprive them of their fundamental right as envisaged in Constitution of India, being citizens of India.”*

12. Before proceeding further on the case in hand, I am tempted to quote the following excerpts from a thought provoking Article in respect of age

of consent vis a vis criminalisation of sexual activity, captioned as **Need to revisit the concept of “age of consent”**⁵ which recently, while doing some off

Court reading, I had an occasion to go through :-

“Studies have established that children are attaining puberty earlier than before. There are reports confirming early initiation of children into sexual activities. Early sexual activity is directly attributable to the greater exposure that children nowadays have. All sorts of adult content and pornographic material is easily accessible online.

Hormones are in overdrive during their teenage years. We need to guide them but putting an absolute bar will lead to undesirable consequences. The forbidden fruit is always more lucrative and severe restrictions serve to fuel curiosity.

It is convenient for adults to put curbs on teenage sexuality rather than deal with related issues. By criminalizing even consensual sexual activity we are denying them access to protective measures as well as safe medical procedures. Teenage girls turn to quacks for abortions and treatment of STD’s. A law prescribing age of consent cannot be discarded, but it needs to be understood in a manner that protects our children against abuse as well as unmindful prosecution. These laws should serve an educative purpose and provide reformatory punishments.

Criminalizing consensual sexual activities among children will have a negative impact. Can we treat them as juveniles in conflict with the law? Some states in the US have Romeo and Juliet laws that penalize sexual activity only where the age gap between consenting minors is more than 3 or 4 years. We also need to distinguish between cases where predators prey upon young children or those where people in authority exercise their influence upon those who are incapable of saying no to them; and those where children give in to their exploratory or experimental urges. Cases falling in the latter category cannot be equated with those falling in the former. It is our responsibility to protect our children not only from activities that could be unhealthy at their age but also from unnecessary prosecutions and punishments.”

13. Mistakes of tender age ought to be handled with certain tenderness. Not to suggest or mean that tender age is a licence to commit crimes of passion or crime arising out of sheer lust which may be masqueraded as purported “love”. What course should be adopted in such a case with regard to the custody of a minor girl who has not attained the legal age for marriage or in a given case,

where she is less than 16 years and is certainly not capable of legal consent for sexual activity or the choice of partner ? Should her legal guardians/parents be deprived of her custody or prevented from taking appropriate steps in accordance with law, to secure her custody, when the law envisages that regardless of her consent, a consensual relationship with her is a criminal offence ? I am of the view that it is not in the interest of a child generally to criminalize his/her activity as a straitjacket formula. Each case needs to be analysed on its own facts and circumstances.

14. Under Hindu Marriage Act, 1955, marriage before attaining the prescribed age is not void ab initio but only voidable. It is anomalous that while under this Act, marriage with a girl between 16 and 18 years of age subsists, unless declared by a court as void.

15. Even section 3 of the Prohibition of Child Marriage Act 2006 Act says that child marriages are voidable only at the option of contracting party being a child. It provides thus :-

“3. —(1) Every child marriage, whether solemnised 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.”

16. But, at the same time, under section 9 of 2006 Act (Prohibition of Child Marriage Act), only the male adult (18 and above), who contracts such child marriage, is made criminally liable. What if a marriageable aged woman, marries a boy who is a child and has not attained the age of marriage ? Act seems to be silent about any criminal liability of such woman. Perhaps, the omission is deliberate and is pursuant to Article 15(3) of the Constitution of India, which permits special provisions in favour of women.

17. Be that as it may, questions posed above are left open to be decided in the appropriate proceedings since the petition (CRWP No.7911 of 2020) where the girl is minor has been withdrawn by the learned counsel for the petitioner.

18. As regards protection to be given to the minors/children or even a major, I have already observed that in appropriate cases, depending upon factual position, the same ought to be provided to them to protect their life. Albeit, one has to sometimes tread cautiously in the case of minor to provide protection, as invariably, protection granted by this Court may be used as a shield by the accused to project it as an immunity from the statutory offences, as noted above. Therefore, each case will have to be examined on its own facts and circumstances.

19. Adverting to the case in hand i.e. criminal writ petition bearing CRWP No.8066 of 2020, the partners are both major, though one of them is not of marriageable age, but their action does not constitute any offence under The Prohibition of Child Marriage Act 2016 and/or Indian Penal Code 1860. Respondent No.2 i.e. Superintendent of Police, SAS Nagar, Mohali, before whom representation of the petitioners is pending (Annexure P-5) is, therefore, directed to look into the representation and ascertain the threat perception of the petitioners. If warranted and deemed fit, further appropriate steps be taken to provide necessary protection qua their life and liberty, in accordance with law.

20. With these observations, criminal writ petition is disposed of.

21. After the above order was dictated, Mr. Luvinder Sofat, learned State counsel submits that he be accorded another opportunity to assist, as he feels that the matter needs to be dealt with on the judicial side, since there are indeed certain legal contradictions, which arise out of different ages being prescribed for different choices/rights in different statutes. In view of his request, liberty is

given to Mr. Sofat, to file an appropriate application, more as an amicus curie,
rather than as a State counsel.

OCTOBER 09, 2020
vandana

(ARUN MONGA)
JUDGE

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