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

Date of decision: 17.08.2022

+ **W.P.(CRL) 763/2022**

FIJA & ANR.

..... Petitioner

Through: Mr. Arvind Singh, Mr. AK Mishra,
Advocates

versus

STATE GOVT OF NCT OF DELHI & ORS.

..... Respondent

Through: Ms. Rupali Bandhopadhyay, Ld. ASC
with Mr. Akshay Kumar, Mr. Abhijeet Kumar,
Advs.

ASI Harvinder Kaur, PS Dwarka North

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

CRL.M.A. 6443/2022-EX.

Allowed subject to all just exceptions.

The application is disposed of.

W.P.(CRL) 763/2022

1. This is a petition filed seeking writ in the nature of mandamus or any other writ directing respondent Nos. 1 to 3 to grant protection to the petitioners and further direct them to ensure that nobody separates the petitioners from each other.
2. The factual matrix of the petition is that the petitioners are law-abiding and peace-loving citizens and are Mohammedans (Muslim) by religion.
3. The petitioner No.1 is the wedded wife of the petitioner No.2. The respondent No.1 is the State i.e., NCT of Delhi. The respondent No.2 is



the Commissioner of Police and the respondent No.3 is the SHO of the Police Station, Tughlakabad, Delhi. The respondent No.4 is the father of the petitioner No.1 and respondent No.5 is the mother of the petitioner No.1.

4. The petitioners were in love with each other and married on 11.03.2022 in accordance with Muslim rites and rituals by Maulana Imtiyaz of Jokihat Masjid, District Aauriya, Bihar.
5. The petitioners took decision to get married out of their own free will and consent. A copy of the *Nikahnama* and affidavit of the petitioners showing their marriage with each other are annexed with the petition.
6. The respondent Nos. 4 and 5 being parents of the petitioner No.1 are opposing the marriage of the petitioners and have registered an FIR No. 163/2022 dated 05.03.2022 registered at PS Dwarka (North) under Section 363 IPC against the petitioner No.2. Though, initially the FIR was under Section 363 IPC, subsequently Section 376 IPC and Section 6 POCSO have been added.
7. According to the petitioner no.1 (child-victim), she was regularly beaten by her parents at home. The parent tried to forcibly marry her to someone else even though she was in love with the petitioner No.2.
8. The respondent-State has filed a status report, as per which, the date of birth of the petitioner No.1 is 02.08.2006 i.e. the petitioner was only 15 years and 5 months on the date of the marriage.
9. On 27.04.2022, the petitioner No.1 was recovered in the custody of the petitioner No.2, and medical examination of the petitioner No.1 was conducted at Deen Dayal Upadhyay Hospital (DDU), Delhi.
10. It also states that the petitioner No.1 and 2 have had sexual intercourse.



After medical examination, the petitioner No.1 was produced before the CWC on 27.04.2022, and as per the directions of CWC, the child victim has been kept at Nirmal Chhaya Complex, Hari Nagar from the said date.

11. Mr. Singh, learned counsel for the petitioner states that the petitioner No.1 is pregnant and the petitioner Nos. 1 and 2 are expecting a child together. He further draws my attention to the statement under Section 164 Cr.PC of the petitioner No.1, wherein the petitioner No.1/prosecutrix has alleged that her mother used to beat her at home and she used to lock the prosecutrix inside the house.
12. Petitioner No.1 eloped with the petitioner No.2 out of her own free will and consent and got married on 11.03.2022.
13. I have heard learned counsel for the parties.
14. The High Court of Punjab and Haryana at Chandigarh in CRWP 5744/2022 titled '*Gulam Deen and another vs. State of Punjab and others*' has held:-

*"In the case of **Yunus Khan** (supra) it has been noted that the marriage of a Muslim girl is governed by the personal law of the Muslims. Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla' has also been reproduced in the said decision which Article reads as under:*

'195. Capacity for marriage – (1) Every Mohomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.

(3) A marriage of a Mahomedan who is sound mind and has attained puberty, is void, if it is brought about without, his consent.



Explanation – Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.’’

15. It is thus clear that as per Mohammedan Law 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 minor girl.
16. My attention has also been drawn to an order dated 06.07.2022 in W.P. (CRL.) 1449/2022 titled “*Imran vs. State of Delhi through Commissioner of Delhi Police & Ors.*” wherein it has been held that the POCSO is an Act for protection of children below 18 years from sexual abuse and exploitation and will apply to Muslim law.
17. However, I must differentiate the facts of “*Imran vs. State of Delhi through Commissioner of Delhi Police & Ors.*” Imran (supra) was for quashing of the FIR No. 196/2022 under Section 376/506 IPC and Section 6 POCSO Act and the charge sheet.
18. In the case of “*Imran vs. State of Delhi through Commissioner of Delhi Police & Ors.*”, there was no marriage between the prosecutrix and the accused. In fact, in that case the sexual relationship was established prior to marriage. Post establishing the physical relationship, the accused had refused to marry the prosecutrix. It was on this basis that POCSO had been applied to the facts of that case. The object of the POCSO Act states that the Act is aimed to secure the tender age of the children and ensure they are not abused and their childhood and youth are protected against exploitation. It is not customary law specific but the aim is to protect the children below the children below the age of 18 years from sexual abuse.



19. The physical relationship in the case of *“Imran vs. State of Delhi through Commissioner of Delhi Police & Ors.”* was on the pretext of marriage, and hence, it was a case of sexual exploitation of a child below 18 years.
20. On the other hand, in the present case, it is not a case of exploitation but a case where the petitioners were in love, got married according to the Muslim laws, and thereafter, had physical relationships.
21. It is also clear from the status report that the parties were living with each other husband and wife. There is no averment that they had sexual intercourse prior to their marriage. In fact, the status report is suggestive of the fact that they were married on 11.03.2022, and thereafter, established physical relationship.
22. In fact in paragraph 3 of the status report dated 19.07.2022, it is stated that:-

“3. After the marriage, both the child victim and the accused had sexual intercourse multiple times. Further, section 366/376 IPC & 6 POCSO Act was added in the present case.”
23. Hence, the petitioners being lawfully wedded to each other cannot be denied the company of the each other which is the essence of the marriage. If the petitioners are separated, it will only cause more trauma to the petitioner no.1 and her unborn child. The aim of the state here is to protect the best interest of Petitioner no.1. If the petitioner has wilfully consented to the marriage and is happy, the state is no one to enter private space of the petitioner and separate the couple. The doing of the same will tantamount to encroachment of personal space by the state.



24. In ‘*Rukshana and Another vs Govt. of Nct of Delhi and Others*’ “2007 SCC OnLine Del 2059, the coordinate bench of this court dealt with similar facts. In that case admitted facts were that both the petitioners were living together after marrying each other. The marriage was solemnized on 6.5.2005. Since then, they were living together as husband and wife and leading blissful married life. They had been blessed with male child who was still an infant. The only hurdle sought to be created by the respondents was that she was 16 years and six months of age and, thus, minor at the time of commission of the alleged offence.

25. The Court in *Rukshana (supra)* observed that

“However, only because of this reason, am of the view that in the facts and circumstances of this case, the petitioners cannot be denied the relief prayed for and it would be fit case to quash the proceedings. This course of action is in the interest of not only the petitioner No. but the petitioner No. and her child as well. The prosecution is launched on the allegations that the petitioner No. is the victim of the crime. However, if the petitioner No. is now prosecuted and convicted, again it would be the petitioner No. who shall become the victim in that eventuality. Additional victim would be small child. Both of them would be rendered without any financial support and the consequences can be disastrous. We should not compound her sufferings and miseries more so when she willingly went with the petitioner No. and married him.

(emphasis supplied)

26. It must also be kept in mind that in the present case, the environment in the house of petitioner no.1 is hostile towards her and her husband. There are allegations of physical abuse against the petitioner no.1. In



Vivek Kumar @ Sanju v. The State, (2007) 1 DLT (Cri) 902 decided on 23.02.2007 took similar view:

“There is no law which prohibits 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. 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 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. 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 feat 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 threat is given to girl around 17 years of age, who is in love, under such circumstances she has 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. 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 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 the girl or on the part of boy with whom she ran away and married.”



27. In this view of the matter, the petition is allowed and it is directed that the respondent Nos. 1 to 3 shall ensure safety and protection of the petitioners. Similar cases are exception to the precedent laid down in *Imran (supra)* case.
28. It is also directed that if the petitioner No.1 so desires, she will be at liberty to join the company of the petitioner No.2.
29. The petitioners are entitled to stay together and the respondent Nos. 1 to 3 are directed to ensure the personal safety and protection of the petitioners.
30. The petition is allowed in view of the aforesaid terms.

AUGUST 17, 2022 / (MS)

JASMEET SINGH, J

[Click here to check corrigendum, if any](#)