

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRWP-8693-2022 (O&M): &
CRM-W N: 1656 of 2023 in CRWP-8693-2022

Reserved On: 28.11.2023

Pronounced On: 13.12.2023

Zakir Hussain and Another

.....Petitioners

Vs.

State of Haryana and Others

.....Respondents

CORAM: - HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: - Mr. Munfaid Khan, Advocate for the petitioners.

Mr. Chetan Sharma, DAG, Haryana.

Mr. B.S. Tewatia, Advocate for respondent No.4.

DEEPAK GUPTA, J.

The two petitioners Zakir Hussain & Tosifa belong to Muslim religion. They performed *Nikaah* (marriage) on 25.08.2022 as per Muslim Rites and Customs, against the wishes of their family members and then approached this Court by filing **CRWP-8693-2022** under Article 226 of Constitution of India for issuance of direction to official respondents to protect their life and liberty at the hands of private respondents. It was claimed that petitioner No. 1 was more than 29 years of age; whereas, petitioner No.2 was about 18 years of age, her date of birth being 01.01.2004 and after performing the marriage, they are living happily but are being threatened by private respondents.

2. Respondent No.4, who is the father of petitioner No.2 raised objection to the effect that respondent No.2 was a minor, her date of birth being 21.05.2007 and that the marriage inter-se the petitioners was not legal. Prayer was made on behalf of respondent No.4 not only to dismiss the petition but

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further to hand over the custody for petitioner No.2 to him (respondent No.4).

3. Vide order dated 09.09.2022, this court directed that petitioner No.2 be sent to *Ashiyana*, Sector-15, Chandigarh, whereas the official respondent N: 2 was directed to ensure that life and liberty of petitioner No.1 is protected.

4. Since dispute was raised regarding the age of petitioner No.2, so State of Haryana was directed to get the certificates placed on record, verified. Efforts for mediation were also made, but the same failed.

5. Attention of this Court has been drawn by Ld. Counsel for the petitioners towards four contradictory reports filed by the respondents. First such report dated 23.09.2022 is filed by way of an affidavit of Ms. Mamta Kharb, HPS, Deputy Superintendent of Police, CAW Nuh and Tauru, as per which the date of birth of petitioner No.2 was verified to be 01.01.2004 on the basis of entry in the Aadhar Card and '*Parivar Pehchan Patar*', although it was also disclosed that in the School Leaving Certificate, the father of petitioner No.2 had mentioned the age of petitioner No.2 in the admission form as 21.05.2007. In the two subsequent reports dated 11.10.2022 and 23.01.2023 both filed by Shri Ashok Kumar, DSP Headquarter Nuh, Tauru, date of birth of petitioner No.2 was stated to be 21.05.2007 on the basis of necessary enquiry pertaining to the identity documents. Faced with this situation, this Court vide order dated 08.12.2022 had directed the Superintendent of Police to conduct an enquiry in the matter and in case any of the parties is found to have forged any of the documents, then to initiate appropriate action. As per the report dated 09.09.2023 filed by way of an affidavit of Shri Narendra Bijarniya, IPS,

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Superintendent of Police, Nuh, he found that the Aadhar Card team had visited the village of petitioner No.2 and it was found that date of birth of the two daughters Tosifa and Suhana of respondent No.4 was mentioned as 01.01.2004, though they are not twins and that later on respondent No.4 got corrected the date of birth of petitioner No.2- Tosifa in the *Parivar Pehchan Patar* from 01.01.2004 to 21.05.2007 and that it was not got done with any mala fide intention.

6. Be that as it may, the date of birth of petitioner No.2 is a disputed question of fact and this Court does not intend to record any finding thereon, as it is not the appropriate forum to do so. The sole question, in the facts and circumstances of the case, is that whether petitioners deserve to be given necessary protection qua their life and liberty; and further, whether the custody of petitioner No.2 should be handed over to her father- respondent No.4 as requested by his counsel; or to her husband- petitioner No.1, as has been prayed by counsel for the petitioners by moving application bearing No. **CRM-W-1656-2023**.

7. Let it be assumed that date of birth of petitioner No.2 was 21.05.2007 as is contended on behalf of respondent No.4. Since *Nikaah* (marriage) was performed by the petitioners on 25.08.2022, it means that on that date, petitioner No.2 was above 15 years of age. As already observed that both the petitioners belong to Muslim religion and have performed marriage as per Muslim Rites and Customs.

8. ***Prohibition of Child Marriage Act, 2006*** was enacted to provide for the prohibition of solemnisation of child marriages. Section 2 of this Act

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provides definitions of some of the relevant and important terms, as under:

- “(a) **"child"** means 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;*
- (b) **"child marriage"** means a marriage to which either of the contracting parties is a child;*
- (c) **"contracting party"**, in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnised;*
- (f) **"minor"** means a person who, under the provisions of the Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority.”*

9. Apart from Section 2(f) defining ‘minor’, this term ‘minor’ is used in the Act in Section 3 & 12, in the context as to when a child marriage is to be voidable; or when marriage of a minor is to be void. Sections 3 & 12 read as under:

3. Child marriages to be voidable at the option of contracting party being a child. — *(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:*

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

*(2) If at the time of filing a petition, the petitioner is a **minor**, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.*

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned

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parties have been given notices to appear before the district court and show cause why such order should not be passed.

Section 12: Marriage of a minor child to be void in certain circumstances.

*Where a child, being a **minor**—*

- (a) is taken or enticed out of the keeping of the lawful guardian; or*
- (b) by force compelled, or by any deceitful means induced to go from any place; or*
- (c) is sold for the purpose of marriage; and made to go through a form of marriage or if the **minor** is married after which the **minor** is sold or trafficked or used for immoral purposes, such marriage shall be null and void.”*

10. The terms ‘child’ and ‘minor’ appear to have been used in the Act interchangeably. The term ‘minor’ is used in the Act, only when marriage of a child/minor is to be void or voidable in certain circumstances. Otherwise, the various definitions given in Section 2 of the Act would make it clear that for the purpose of marriage, child means a person who has not completed the age of 21 years in case of male; and has not completed the age of 18 years in case of female. At the same time, minor is stated to be person who is deemed to have not attained his majority under the Majority Act, 1875. Thus, the term ‘minor’ as adopted in Prohibition of Child Marriage Act, 2006 is controlled by the Majority Act.

11. As per Section 3 of the Majority Act, 1875, age of majority of the persons domiciled in India, is as under: -

“3. Age of majority of persons domiciled in India. — (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before. (2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.”

However, Section 2 of the Act reads as under:

“2. Saving. —Nothing herein contained shall affect: —

- (a) the capacity of any persons to act in the following matters (namely), —*

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*marriage, dower, divorce and adoption;
(b) the religion or religious rites and usages of any class of citizens of India; or
(c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.”*

12. Thus, as per the provisions of Majority Act, though a person is stated to have attained the age of majority on completing the age of 18 years but this provision is not to affect the capacity of any person to act in the marriage or his capacity, who before Act came into force had attained majority under the law applicable to him.

13. In **“Yunus Khan v. State of Haryana 2014 (3) RCR (Criminal) 518”** a minor Muslim girl, who had attained the age of puberty, voluntarily married a Muslim boy according to Muslim Rites against the wishes of her father. Her father filed writ petition alleging that minor girl to be detenue. This Court considered the provisions of Prohibition of Child Marriage Act, 2006 in the light of Muslim Personal Law (Shariat) Application, Act 1937 besides the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla. It was observed that as per Article 195 of the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla (10th Edition) of 1933, every Mohammedan of sound mind, having attained the age of puberty could enter into a contract of marriage. The Court then referred to Article 27 of Muslim Law by Faiz Badruddin Tyabji, as per which with reference to the age of competence to marry, it is presumed in the absence of attainment of puberty that males attain puberty at the age of 15 years and females at the age of 09 years. This Court then held as under:

“Keeping in view the above, it is obvious that even taking 15 years to be the age of puberty and not prior to that, the present applicant, i.e., Sanjeeda is well above the said age by appearance and even by admission of all parties

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concerned. As such, unless her marriage can be shown to have been not validly performed for any other reason, she has, even ex-facie, without any evidence to the contrary having been shown, performed a valid marriage with her consent. The wishes of her father would be, therefore, inconsequential, in law.”

14. A similar question also arose before this Court in **“Gulam Deen & Anr. v. State of Punjab and Ors. 2022(3) Law Herald 1848”**. In that case, a run away Muslim couple sought protection of life and liberty under Article 21 of Constitution of India. Girl was above 16 years of age but less than 18 years, whereas boy was 21 years. Holding that marriage of Muslim girl is governed by Muslim Personal Law and that girl being competent to enter into a contract of marriage the person of her choice, the petitioners were held to be of marriageable age as envisaged by the personal law. This Court further referred to **“Kammu v. State of Haryana 2010(4) RCR (Civil) 716”**; **“Yunus Khan v. State of Haryana 2014 (3) RCR (Criminal) 518”** & **“Mohd. Samim v. State of Haryana 2019 (1) RCR (Criminal) 685”** and by relying on which, contention was raised that in the Muslim Law, puberty and majority are one and the same and there is a presumption that a person attains majority at the age of 15 years. Contention was also raised that a Muslim boy & Muslim girl, who attain puberty, are at liberty to marry anyone, he or she likes and the guardian has no right to interfere.

15. This Court in **“Gulam Deen (supra)**, after referring to the aforesaid authorities and Article 195 from the book of Principles of Mohammaden Law by Sir Dinshah Fardunji Mulla held as under:

“The law, as laid down in various judgments cited above, is clear that the marriage of a Muslim girl is governed by the Muslim Personal Law. As per

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Article 195 from the book 'Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla', the petitioner No.2 being over 16 years of age was competent to enter into a contract of marriage with a person of her choice. Petitioner No.1 is stated to be more than 21 years of age. Thus, both the petitioners are of marriageable age as envisaged by Muslim Personal Law. In any event, the issue in hand is not with regard to the validity of the marriage but to address the apprehension raised by the petitioners of danger to their life and liberty at the hands of the private respondents and to provide them protection as envisaged under Article 21 of the Constitution of India. Article 21 of the Constitution of India provides for protection of life and personal liberty and further lays down that no person shall be deprived of his or her life and personal liberty except as per the procedure established by law. The Court cannot shut its eyes to the fact that the apprehension of the petitioners needs to be addressed. Merely because the petitioners have got married against the wishes of their family members, they cannot possibly be deprived of the fundamental rights as envisaged in the Constitution of India."

16. Same view has been taken by this Court in **"CRWP-2673-2019 (O&M)** titled as ***Mohd. Israil v. State of Haryana and Others***" decided on 07.01.2020; **"CRWP-1568-2017** titled as ***Aamir v. State of Haryana and Others***" decided on 26.09.2018 and **"CRWP-7426-2022 (O&M)** titled as ***Javed v. State of Haryana and Others***" decided on 30.09.2022.

17. In view of the legal position as discussed above, the petition bearing No. CRM-W-1656-2023 deserves to be allowed. Since the marriage of the petitioners was valid as per the Mohammedan Personal Law, petitioner No.2 being above the age of 15 years i.e., age of puberty and petitioner No.1 also being of marriageable age, and they having performed *Nikaah* as per their wish, so the custody of petitioner No.2 is directed to be handed over to petitioner No.1. Respondent No.4- father of petitioner No.2 cannot claim the custody of petitioner No.2 and his wishes in this regard would be inconsequential.

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18. Consequently, the application bearing No. CRM-W-1656-2023 is hereby allowed. Respondent No.2 is ordered to be released from Ashiyana, Sector-15, Chandigarh. Her custody is directed to be handed over to her husband- petitioner No.1. Official respondents are also directed to keep on providing necessary protection to the petitioners, as and when required, after assessing threat perception to their life and liberty.

Pending application(s), if any, stands disposed of.

December 13, 2023
Neetika Tuteja

(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No