

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRWP-11123-2023

I. Iqbal and Another

.....Petitioners

Vs.

State of Haryana and Others

.....Respondents

CRWP-11190-2023

II. Shameem and Another

.....Petitioners

Vs.

State of Haryana and Others

.....Respondents

Reserved On: 29.11.2023
Pronounced On: 13.12.2023

CORAM: - HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: - Mr. Anshul Mangla, Advocate for the
petitioners in CRWP-11123-2023 and
for respondent No.4 in CRWP-11190-2023.

Mr. Praveen Bhadu, AAG, Haryana.

Mr. Sutikshan Sharma, Advocate for respondent
No.4 in CRWP-11190-2023 and for
petitioners in CRWP-11190-2023.

DEEPAK GUPTA, J.

Shameem and Salma, the petitioners in **CRWP-11190-2023** are Muslims by religion. Petitioner- Shameem is 23 years of age, whereas petitioner- Salma, with her date of birth being 03.05.2007, is more than 16 years 06 months of age. They wanted to perform marriage, to which their family members did not agree. They then entered into a matrimonial bondage in a Masjid at Zirakpur as per Muslim Rites and Ceremonies on 08.11.2023. Since marriage was performed against the wishes of the family members, they felt

threat to their life and liberty and so, approached this Court by filing this petition i.e., CRWP-11190-2023 under Article 226 of Constitution of India for issuing the writ in the nature of mandamus to direct the official respondents to protect their life and liberty at the hands of private respondent Nos.4 to 6, who are the father, brother and uncle of the girl Salma.

2. On the other hand, the parents of the girl Iqbal and Rashida filed separate petition bearing No. **CRWP-11123-2023** praying this Court to issue a writ in the nature of habeas corpus and to direct the official respondent Nos.1 to 3 to produce their minor daughter Salma from the illegal custody of respondent No.4 Shameem (petitioner No.1 of CRWP-11123-2023). It was contended by them that their daughter was a minor, who had been abducted by respondent No.4- Shameem, regarding which FIR No.227 dated 07.11.2023 had been registered at Police Station Partap Nagar (Khizrabad), District Yamuna Nagar, for commission of offences under Sections 363 & 366-A of the IPC. It was further contended that despite lapse of more than a week from the date of registration of the FIR, the investigating agency had failed to trace the whereabouts of the detainee nor had taken any action against respondent No.4. Prayer was accordingly made to issue the writ of habeas corpus to produce Salma from the illegal custody of respondent No.4 and to hand over her custody to the petitioners.

3. Respondent No.4 in CRWP-11123-2023 i.e. Shameem opposed the petition and filed reply, wherein he referred to Section 2 of the Majority Act besides Section 2 of The Prohibition of Child Marriage Act, 2006 and contended that a Muslim girl after attaining the age of puberty, cannot be treated as minor under The Prohibition of Child Marriage Act, 2006 and as respondent

No.4- Shameem had contracted *Nikaah* with the daughter of the petitioners Salma i.e., alleged detenue, so he (respondent N:4 Shameem) was the natural guardian of his wife and therefore, petitioner deserves to be dismissed. He also referred about CRWP-11190-2023 filed by him along with his wife Salma for seeking protection to their life and liberty.

4. Counsels for all the sides have been heard and their contentions considered. Paper book also perused.

5. The sole question, in the facts and circumstances of the case, is that whether Shameem and Salma, the petitioners in **CRWP-11190-2023** deserve to be given necessary protection qua their life and liberty; and further, whether the custody of petitioner Salma should be handed over to her parents Iqbal and Rashida i.e., petitioners of **CRWP-11123-2023**.

6. It is an undisputed fact that the Petitioner- Shameem is 23 years of age, whereas petitioner- Salma, with her date of birth being 03.05.2007, is more than 16 years 06 months of age. Since *Nikaah* (marriage) was performed by them on 08.11.2023, it means that on that date, Salma 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.

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

8 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 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."*

9. 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.

10. 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), — 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.”

11. 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.

12. 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 detinue. 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 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.”

13. 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.

14. This Court in *“Gulam Deen (supra)”*, after referring to the aforesaid authorities and Article 195 from the book of Principles of Mohammedan 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 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.”

15. 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.

16. Learned counsel appearing for the petitioners in CRWP-11123-2023 have referred to ***Thakorlal D. Vadgama v. State of Gujarat, 1973 AIR (SC) 2313*** to contend that kidnapping a minor girl with an intention to seduce her to illicit intercourse, will be an offence of kidnapping and that on the date of occurrence, the girl voluntarily going with the accused would be no defence. Reliance is further placed upon ***State of Haryana v. Raja Ram, 1973 AIR (SC) 819***, wherein it was held by Hon’ble Supreme Court that persuasion by an accused person, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, is sufficient to attract Section 361 of the IPC and that consent of minor is immaterial and that Section 361 of the IPC is designed to protect the sacred rights of the guardians with respect to their minor wards.

17. With regard to the above contention, it is noticed that FIR No.227 dated 07.11.2023 has already been registered at Police Station Partap Nagar (Khizrabad) for commission of offences under Sections 363 & 366-A of the IPC lodged by the parents of the girl. The police will be at liberty to investigate the

same in accordance with law and this order is not a bar to conduct any investigation as per law.

18. In view of the legal position as discussed above, the petition bearing No. **CRWP-11190-2023** deserves to be allowed. Since the marriage of the petitioners is *prima facie* valid as per the Mohammedan Personal Law, petitioner Salma being above the age of 15 years i.e., age of puberty and petitioner Shameem also being of marriageable age, and they having performed *Nikaah* as per their wish, so the custody of petitioner Salma is directed to be handed over to petitioner Shameem. Parents of petitioner Salma i.e., petitioners of **CRWP-11123-2023** cannot claim the custody of their daughter Salma and their wishes in this regard would be inconsequential. Official respondents are also directed to keep on providing necessary protection to the petitioners in CRWP-11190-2023, as and when required, after assessing threat perception to their life and liberty.

CRWP-11123-2023 filed by parents of Salma, is hereby dismissed.

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

December 13, 2023

Neetika Tuteja

**(DEEPAK GUPTA)
JUDGE**

Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No