

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRWP No.493 of 2024 (O&M)

Date of Decision:16.01.2024

Sube Khan and another ... Petitioners

Versus

State of Haryana and others ... Respondents

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Sanyam Khetarpal, Advocate
for the petitioners.

HARPREET SINGH BRAR, J. (ORAL)

1. The present petition has been filed under Article 226 of the Constitution of the India for issuance of a writ in the nature of habeas corpus for directing the official respondents No.1 to 3 for producing the detenue Kaifa daughter of petitioner No.2 before this Court, who has been illegally detained by respondent No.4 at his residence.
2. Learned counsel for the petitioners *inter alia* contends that the detenue is aged 15 years and belongs to Muslim community. Respondent No.4 induced

the detainee and took her along with him. He filed a petition before this Court in CRM-M No.12025 of 2023 seeking protection of life and liberty at the hands of petitioner No.2, who is father of the detainee, on the ground that he has solemnized marriage with detainee against the wishes of family members of detainee and therefore, they apprehend danger to their life and liberty at their hands. The said petition was allowed by this Court vide order dated 14.12.2023. It is further contended that while filing the aforesaid petition, respondent No.4 prepared a forged and fabricated aadhaar card of detainee and obtained order dated 14.12.2023 in his favour while misleading this Court, claiming the detainee to be major. The detainee is a minor being 15 years old and she has been illegally detained by respondent No.4. Therefore, the petitioners have approached this Court for issuance of direction to official respondents to produce the detainee before this Court.

3. Having heard learned counsel for the petitioners and after perusing the record, it transpires that the alleged detainee belongs to Muslim community and therefore, even if, for the sake of argument, it is presumed that the detainee is minor aged 15 years, even then the marriage solemnized cannot be said to be void, as marriage of a Muslim girl is governed by the personal law of Muslims. As per Article 195 of the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla, the age of puberty of a Muslim female is 15 years and if she marries the person of her choice with her own willingness and consent, after attaining 15 years of age (puberty), such a marriage would not be void in terms of Section 12 of the Prohibition of Child Marriage Act, 2006. A Coordinate

Bench of this Court in *Yunus Khan vs. State of Haryana & Ors. 2014(3) RCR (Criminal) 518* has held as under:-

“33. As such, the marriage of a Muslim girl continues to be governed by the personal law of Muslims. In this regard, it would be useful to reproduce what is stated in the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla, in Article 195 thereof. (10th Edition of 1933):

195. Capacity for marriage (1) Every Mahomedan 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.

(This Article is shown as Article 251 in Mulla's Principles of Mahomedan Law, 19th Edition, by M.Hidayatullah),

The same principle is also reproduced in Article 27 of Muslim Law by Faiz Badruddin Tyabji, which is also reproduced hereinunder:

27. Age of competence to marry - With reference to the age of competence to marry, it is presumed in the absence of evidence of attainment of puberty, that males attain puberty at the age of 15 years, and females at the age of 9 years.

34. 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. Le. 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.

35. The wishes of her father would be, therefore, inconsequential, in law.

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As such, this Court cannot direct further detention of the applicant in the Protection Home and, on the principal issue, it is held that upon a nikah having been performed by a Muslim female, on her own willingness and consent, after attaining puberty, such a marriage would not be void in terms of Section 12 of the Prohibition of Child Marriage Act 2006, though it may be voidable at the instance of the minor ("child") in terms of Section 3 thereof. Therefore, though the present order would amount to modifying the earlier order to that extent however, as already stated earlier, the liberty of an individual cannot be curtailed by this Court against the provisions of law.

38. The issue of the present application not being maintainable, having been filed by a minor would also lose significance in view of the fact that such minor has been held to have performed a nikah) as per her consent, permissible by the personal law which governs the community to which she belongs. As such, since the application only seeks that the minor be restored to the custody of the person she has married by her own consent, she cannot be refused such permission on the technicality of the application not having been moved by respondent No.4, in view of the fact that he is denied access to her in the protection home.

Otherwise also, this order also arises out of a petition seeking a writ of habeas corpus, and the alleged "detenue" not actually

having been found to be illegally detained by respondent No.4, her custody would naturally be returned to him, in case the so called "detenue expresses her wish to go back with him.

39. Still, in view of the fact that the present application (CRM No.930 of 2014) is not accompanied by an affidavit, the presence of the applicant, as also of Respondent No.4, would be necessary. The matter be listed for that limited purpose, on 17.02.2014.

In case the applicant states in Court that she wishes to accompany respondent No.4 to his home and respondent No.4 also states to the effect that he wishes to take her to his home, she would be ordered to be released to his custody immediately thereafter."

4. Similarly, a Coordinate Bench of this Court in the judgment passed in CRWP No.8693 of 2022 titled as ***Zikar Hussain and another Vs. State of Haryana and others*** on 13.12.2023 while dealing with a similar controversy declined the custody of minor married Muslim girl, who attained the age of puberty being above the age of 15 years to the father. Following was observed:

*"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 Mohammeden 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. 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."

5. The argument raised by the learned counsel for the petitioners that respondent No.4 had obtained a favourable order by misleading this Court by forging and fabricating the aadhaar card of the detenue is also not sustainable. This Court passed order dated 14.12.2023 in CRM-M No.12025 of 2023 without going into the validity of the marriage and evidentiary value of the documents placed on the file, as this Court needed to address the apprehension of threat to their life and liberty at the hands of private respondents therein raised by the petitioners and provide them protection as envisaged under Article 21 of the Constitution of India. This Court while passing the said order has also observed that this order shall not be taken to protect the petitioners therein from legal action for violation of law, if any, committed by them. Therefore, this Court is not the correct forum to go into the validity of the aadhaar card as challenged by the petitioners and for the said purpose, petitioners are at liberty to take recourse to any alternative remedy available to them, in accordance with law.

6. In view of the aforesaid facts and circumstances, this Court does not find merit in the present petition and the same is dismissed accordingly.

(HARPREET SINGH BRAR)
JUDGE

January 16 2024
Pankaj*

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