

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-8594-2024 (O&M)
Reserved on: 13.03.2024
Date of Decision:- 02.04.2024

MASUM ALI

...PETITIONER

Vs.

STATE OF PUNJAB

...RESPONDENT

CORAM: HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

(As on the reserved date)

Present: Mr. Mohd Salim, Advocate,
for the petitioner.

Ms. Himani Arora, A.A.G., Punjab.

Mr. Bikramjeet Singh Baath, Advocate,
for the complainant.

HARPREET KAUR JEEWAN, J.

1. The present petition has been filed under Section 438 Cr.P.C. for grant of anticipatory bail to the petitioner in case FIR No.237, dated 20.11.2023, registered at Police Station Mukerian, District Hoshiarpur, under Sections 363 and 366-A of the IPC (Sections 366 and 362 thereof were added later on).
2. Learned counsel for the petitioner submits that the daughter of the complainant is major as per the ossification test which was conducted on 19.01.2024 by a private diagnostic center (Annexure P-2). The petitioner has already solemnized '*Nikah*' with the daughter of the complainant on 15.06.2023 as per the certificate (Annexure P-3) and the

photographs (Annexure P-4). The petitioner and the daughter of the complainant had jointly filed a Civil Writ Petition in this Court seeking protection of life and liberty and the order dated 15.01.2024 (Annexure P-5) was passed by this Court in the said petition. The petitioner has been falsely implicated in this case at the instance of the complainant. The marriage between the petitioner and the daughter of the complainant is legally valid marriage since the daughter of the complainant is having the age of puberty and the '*Nikah*' has been performed as per the personal law applicable to the petitioner. In support of his arguments, he has relied upon the following judgments passed by this Court:-

1. **Zakir Hussain and another** vs. **State of Haryana and others** 2023 (4) Law Herald 3240;
 2. **Mohd. Israil** vs. **State of Haryana and others** 2020 (3) RCR (Criminal) 394;
 3. **Javed** vs. **State of Haryana and others** (CRWP-7426-2022), decided on 30.09.2022;
 4. **Aamir** vs. **State of Haryana and others** (CRWP-1568-2017), decided on 26.09.2018;
 5. **Mohd. Samim** vs. **State of Haryana** 2019 (1) RCR (Criminal) 685; and
 6. **Yunus Khan** vs. **State of Haryana and others** 2014 (3) RCR (Criminal) 518
3. Notice of motion.
 4. Having received advance copy of the petition, Ms. Himani Arora, A.A.G., Punjab, accepts notice on behalf of the respondent-State.

5. A short reply, dated 13.03.2024, by way of an affidavit of Sh. Vipin Kumar PPS, Deputy Superintendent of Police, Sub-Division Mukerian, District Hoshiarpur, has been filed in Court today by learned State counsel. The same is taken on record.

6. Learned State counsel has opposed the bail petition by submitting that the prosecutrix is a minor. Referring the order dated 03.02.2024 passed by the Child Welfare Committee, Hoshiarpur, it was contended that presently the prosecutrix is staying in Childrens' Home '*Gandhi Vanita Aashram*', Jalandhar, as per the order dated 03.02.2024 by the Child Welfare Committee, Hoshiarpur.

7. Mr. Bikramjeet Singh Batth, Advocate, appears and accepts notice on behalf of the complainant and filed his power of attorney in Court today. The same is taken on record.

8. Counsel for the State, as well as counsel for the complainant contends that as per the school certificate, the age of the victim is less than 16 years and therefore, the petitioner is not entitled to the concession of anticipatory bail.

9. In support of his contentions, counsel for the complainant has also relied upon a judgment passed by Hon'ble the Supreme Court in XYZ vs. Abhisheik and another 2022 (4) RCR (Criminal) 711.

10. I have considered the aforesaid contentions and perused the paper-book.

The following are the material facts:-

- (i) On 15.06.2023, the petitioner is alleged to have performed '*Nikah*' with the daughter of the complainant (victim).

(ii) On 18.11.2023 at about 04:00 p.m., the petitioner is alleged to have taken away the victim in 'Bolero' vehicle from her home, as per the FIR (Annexure P-1) in the presence of her siblings when her parents had gone for grazing the buffaloes. On 20.11.2023, father of the victim reported the matter to the police and FIR was initially lodged under Sections 363 and 366-A IPC. The victim was alleged to be less than 16 year of age in the FIR.

(iii) On 10.01.2024, Criminal Writ Petition No. 343 of 2024 was filed by the petitioner and by the daughter of the complainant for issuance of a direction to the official respondents to protect their life and liberty.

(iv) As per order dated 15.01.2024 (Annexure P-5), the State counsel informed the Court in the said petition that petitioner No. 1 (the victim) has disclosed her incorrect age and as a matter of fact her date of birth is 04.03.2008 and the father of the victim has already lodged present FIR No. 237. While issuing a direction to the Senior Superintendent of Police, Hoshiarpur, to look into the representation filed by the petitioner and the daughter of the complainant, it was specifically clarified that this order shall not be taken to be an expression as regards the alleged relationship or age of the petitioners. Apart from this, the State was directed to conduct verification regarding the age of petitioner

No. 1 and to file a report. It was also clarified that the said order is not to be construed as any kind of protection to petitioner No. 2 (petitioner Masum Ali) in respect of the FIR already registered against him.

(v) On 19.01.2024, ossification test (Annexure P-2) is alleged to have been conducted by a private medical practitioner without intervention of the investigating agency.

(vi) On 03.02.2024, the statement of the victim (Annexure P-6) was recorded under Section 164 Cr.P.C. wherein she alleged that she does not want to go with her parents and also levelled allegations against her parents. As per the order of the same date (Annexure P-7), the victim was ordered to be produced before the Child Welfare Committee, Hoshiarpur, for further orders regarding her custody as she was not willing to go with her parents. She also stated before the SDJM that she does not want to get herself medico-legally examined. As per the order dated 03.02.2024 by the Child Welfare Committee the victim was sent to Children's Home, Gandhi Vanita Aashram, Jalandhar.

11. The counsel for the petitioner has alleged that prosecutrix (victim) is major and she has performed '*Nikah*' with her consent, as such, the petitioner is entitled for anticipatory bail.

12. This Court is not to conduct an inquiry regarding the age of the victim. As per sub-section (2) of Section 34 of the Protection of Children

from the Sexual Offence Act, 2012, (for short ‘*the POCSO Act, 2012*’) the question as to whether a person is a child or not? shall be determined by the Special Court designated to deal with the offences under the Act. The said sub-rule reads as under:-

34. *“Procedure in case of Commission of offence by child and determination of age by Special Court.*

XXXX XXXX XXXX XXXX

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.”

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13. However, the State was ordered to conduct the verification regarding the age of the victim as per the order passed by the co-ordinate Bench on 15.01.2024 (Annexure P-5). The State has conducted the verification in compliance of the said directions and on the basis of the school records, the date of birth of the prosecutrix is found to be 04.03.2008. As such, her age is calculated as 15 years, 08 months and 14 days at the time of alleged occurrence. Relevant portion of the status report reads as under:-

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9. *“That it is submitted that the prosecutrix was studying at Government Elementary School Village DholaKhera, Police Station Mukerian, District Hoshiarpur and as such the police of Police Station Mukerian, verified the fact of age of prosecutrix from*

Centre Head Teacher of the above said school on 23.01.2024. and she gave in writing that as per record of School the date of birth of Karshum is 04.03.2008. As per record of above said school, the prosecutrix was 158 years, 08 months and 14 days old at the time of occurrence.

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14. So far as the ossification test report (Annexure P-2) is concerned which is contradictory to the school records, the same cannot be relied upon for two reasons. Firstly, the said examination has been done by a private practitioner without association of the investigating agency, as such, its authenticity is yet to be seen. Secondly, it would be debatable as to whether the report of the ossification test would prevail over the school records.

15. The documents on which the reliance can be placed and the process which can be followed for determination of the age of a child allegedly in conflict of law are specified in **Section 94 (2)** of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short '*the Act of 2015*'), which reads as under:-

“94. Presumption and determination of age,---(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining --

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

(Emphasis applied by this Court)

16. The ossification test report has a role in the absence of birth certificate from school; or the matriculation certificate or equivalent certificate or birth certificate issued by corporation or a municipal authority or a Panchayat.

17. Age has relevance with legal or valid consent. The age for consent referred in Section 375 of the Indian Penal Code is 18 years. To be

valid, the consent has to be free and spontaneous. Though the petitioner has alleged that a '*Nikah*' has been performed with the prosecutrix with her consent, but the validity of the consent is yet to be ascertained which would be subject to the decision of the inquiry to be conducted by the Special Court regarding the age of the victim under sub-Section (2) of Section 34 of the Act of 2012.

18. The decision relied upon by the learned counsel for the petitioner in **Javed's** (*supra*) case pertains to an order passed by the co-ordinate Bench in a petition under Article 226/227 of the Constitution of India seeking issuance of a writ in the nature of Habeas Corpus whereby the custody of the detinue was handed over to the petitioner who alleged that the age of the detinue is more than 16 years and she has performed a '*Nikah*' with the petitioner. While relying upon the decision of the co-ordinate Bench in **Yunus Khan's** and **Mohd. Samim's** cases (*supra*), as well as in **Kammu vs. State of Haryana and others** 2010 (4) RCR (Civil) 716, it was observed that the marriage of a Muslim girl continues to be governed by the personal law of Muslims and it was also observed that 15 years is the age of puberty of a Muslim and on her own willingness and consent, after attaining the age of puberty (15 years of age) can marry a person of her choice and such a marriage would not be void in terms of Section 12 of the Prohibition of the Child Marriage Act, 2006.

19. I am of the considered opinion that Protection of Children from the Sexual Offence Act, 2012, has been enacted which is a self contained comprehensive legislation *inter alia* to provide for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being

of the child at every stage of the judicial process. A child has been defined any person below the age of 18 years, as per sub-section (d) of Section 2 of the Act of 2012. Apart from this, Section 42-A of the Act of 2012 provides that the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of inconsistency. The said Section reads as under:-

“42-A Act not in derogation of any other law—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to be extent of this inconsistency.”

20. Hon’ble the Apex Court has already entertained a Special Leave Petition which has been instituted by the National Commission for protection of Child Rights (NCPCR) and it has been directed vide order dated 13.01.2023 that pending further order, the impugned judgment of the High Court dated 30.09.2022 in CRWP-7426-2022 passed by this Court shall not be relied upon as a precedent in any other case. Hon’ble the Apex Court has passed the said order dated 13.01.2023 in a Special Leave Petition (Criminal) Diary No. 35376/2022. In view of this order by the Hon’ble Court, the ratio in the **Javed’s** case cannot be applied in the present case.

21. Learned counsel for the petitioner while relying upon the decision in **Javed’s** case (supra) did not bring this fact into the notice of this Court that the said decision has been challenged by the National Commission for protection of Child Rights (NCPCR) and Hon’ble the

Apex Court has already passed the order dated 13.01.2023 that the decision in Javed's case shall not be relied upon as a precedent in any other case during the pendency of the matter before hon'ble the Apex Court.

22. Similarly in the ratio of other decisions relied upon by learned counsel for the petitioner as that in Javed's case (supra).

23. In view of the subsequent order dated 13.01.2023 passed by Hon'ble the Apex Court in National Commission for Protection of Child Rights (NCPCR) case (supra), the ratio in the decisions relied upon by learned counsel for the petitioner are not applicable in this case.

24. In view of the aforesaid reasons, I am of the considered opinion that *prima facie* the victim is minor and the contentions of the petitioner that she is major is a matter of inquiry by the Special Court. No special ground is made out to grant the petitioner a discretionary relief under Section 438 Cr.P.C.

25. Consequently, the present petition stands dismissed.

26. Pending miscellaneous applications, if any, also stand disposed of.

(HARPREET KAUR JEEWAN)
JUDGE

April 02, 2024
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Whether Speaking	Yes
Whether Reportable	Yes