

CRM-M-30384-2023 (O&M) - 1 - 2024 : PHHC : 049589

206 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-30384-2023 (O&M)

Date of reserve: 15.03.2024

Date of Judgement: 09.04.2024

FAROOKHDEEN

... PETITIONER

V/S

STATE OF HARYANA

... RESPONDENT

CORAM: HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

Present: Mr. Parminder Singh, Advocate for the petitioner.

Mr. Kirpal Singh Thakur, AAG, Haryana.

Ms. Sweta, Advocate for

Mr. Inderjeet Singh, Advocate for the complainant.

* * *

HARPREET KAUR JEEWAN, J.

[1] The present petition has been filed under Section 439 Cr.P.C. for grant of regular bail to the petitioner in case bearing FIR No. 157 dated 28.04.2023 registered under Sections 365, 34 IPC (later on added 363, 366 IPC and Section 9 of Prohibition of Child Marriage Act, 2006 and deleted Section 365 IPC) at Police Station Bilaspur, District Yamuna Nagar.

[2] Learned counsel for the petitioner *inter alia* contends that the date of birth of the prosecutrix is 12.08.2006. Both the petitioner and prosecutrix belong to muslim community as per the marriage certificate (Annexure P-2). On 03.05.2023, the daughter of the complainant solemnized marriage with the petitioner with her choice and free will,

however, against the wishes of her parents. As per the muslim law, the

marriage is permissible beyond the age of 15 years. The FIR was registered at the instance of father of the prosecutrix. A representation for protection of life and liberty was also given by the petitioner and the daughter of the complainant and thereafter, they jointly filed a petition bearing CRWP-4429-2023, seeking protection to their life and liberty (Annexure P-3). However, as per the order dated 08.05.2023 (Annexure P-4) passed by this Court, the daughter of the complainant was sent in Aashiana (Children Home). It is further contended that even in her statement under Section 164 Cr.P.C., the daughter of the complainant has shown her willingness and desire to accompany the petitioner and refused for her medico-legal examination. The petitioner is in custody since 09.05.2023. In view of the aforesaid facts and circumstances, no case is made out against him since it is debatable issue as to whether a case punishable under Sections 363, 366 IPC and Section 9 of Prohibition of Child Marriage Act is made out or not. In support of his arguments, he has relied upon the following judgment passed by this Court in **Javed vs. State of Haryana and others** (CRWP-7426-2022), decided on 30.09.2022.

[3] Learned State counsel has filed the status report by way of affidavit of Anil Kumar, Deputy Superintendent of Police, Bilaspur, Yamuna Nagar. Learned State counsel contends that during the investigation, it was found that on 28.04.2023, the petitioner with a view to solemnize marriage with prosecutrix kidnapped her from her house and thereafter, she was taken to Chandigarh where they stayed at Mullanpur in a Hotel xxxx in Sector 45-B Chandigarh. While referring the status

report, learned State counsel contends that during the investigation, copy of the School Leaving Certificate of the prosecutrix was taken into possession and as per the said certificate, the prosecutrix was found to be 16 years and 8 months of age on the day of registration of the FIR. It is further contended that after recording the statement under Section 164 Cr.PC, the medico-legal examination of the prosecutrix was conducted on 2.2.2024 Annexure R-1. The counselling of the victim was done through CWC. The offence under Sections 363, 366 IPC was added and Section 365 IPC was deleted. It is confirmed that the petitioner is in custody since 11.05.2023. Learned State counsel has further confirmed that the challan/final report has been presented in trial Court on 06.07.2023 under Sections 363, 366 IPC.

[4] I have considered the aforesaid contentions.

[5] Admittedly, the prosecutrix is aged less than 18 years. No doubt, the petitioner is in custody and final report under Section 173 Cr.P.C. has already been presented. However, the statement of the prosecutrix is yet to be recorded during the trial.

[6] As per her medical examination (Annexure R-1), in the column of **“History/Brief description of the incident (as narrated by the victim/acquaintance)”**, it is mentioned that *‘she was forcibly picked up from her home on 28.04.2023 by a person named Fahrukdeen and was forced to go for court marriage on 08.05.2023. During this period, she was made to stay at different places and was sexually assaulted multiple times by Fahrukdeen’*. As per the said report, the medical opinion has been given that *possibility of sexual assault cannot be ruled out*.

[7] Though, the petitioner and the prosecutrix has filed Criminal Writ Petition No. 4429 of 2023, as per order dated 08.05.2023, Annexure P-4, however, when it was pointed out to the Court by the counsel for respondent No.4 in the said petition that petitioner no.1 is about 16 years of age and an FIR was registered against petitioner No.2 in the said petition, keeping in view the tender age of prosecutrix, a specific order was passed by the Court that the prosecutrix be lodged in Aashiana (Children Home), Sector 15 Chandigarh.

[8] Thereafter, as per order dated 22.05.2023, the parents of the prosecutrix were permitted to meet the prosecutrix in the Children Home. As per order dated 29.05.2023 (Annexure P-6), the Secretary, District Legal Services Authority, Panchkula was directed to briefly interact with the prosecutrix and record her statement with regard to her wishes to reside with her parents. As per order dated 01.06.2023, the Court observed that as per the statement recorded by the District Legal Services Authority, Panchkula, the prosecutrix does not wish to reside with her parents and she alleged that she has solemnized marriage. The prosecutrix was ordered to be continue lodged at Children Home till further orders.

[9] The counsel for the petitioner has alleged that prosecutrix has performed '*Nikah*' with her consent, as such, the petitioner is entitled for anticipatory bail, while placing reliance upon **Javed's** (*supra*)'s matter.

[10] 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 of the trial.

[11] 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 detenue was handed over to the petitioner who alleged that the age of the detenue 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.

[12] 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.”

[13] 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.

[14] 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 decision relied upon by

learned counsel for the petitioner in Javed's case (*supra*) is not applicable in this case.

[15] Keeping in view the aforesaid facts and circumstances and specifically the fact that prosecutrix is minor, she is yet to be examined by the trial Court, at this stage, it is not a fit case to release the petitioner on regular bail. Consequently, the present petition stands dismissed.

[16] However, it is made clear that nothing expressed hereinabove would be construed to be an expression of opinion on merits of the case.

[17] Pending miscellaneous application(s), if any, shall also stand disposed of.

09.04.2024
Janki

(HARPREET KAUR JEEWAN)
JUDGE

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