

(2015) 03 MAD CK 0266

In the Madras High Court

Case No : Criminal R.C. No. 1441 of 2012 and M.P. No. 1 of 2012

Abdul Khader and Others

APPELLANT

Vs

K. Pechiammal Child Marriage Prohibition Officer

RESPONDENT

Date of Decision : 03-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 21, 25
Criminal Procedure Code, 1973 (CrPC) — Section 125
Dowry Prohibition Act, 1961 — Section 2
Penal Code, 1860 (IPC) — Section 375
Prohibition of Child Marriage Act, 2006 — Section 1, 1(2), 10, 13, 13(1)

Citation : (2015) 1 LW(Cri) 525

Hon'ble Judges : C.T. Selvam, J

Bench : Single Bench

Advocate : V. Lakshmi Narayanan for V. Raghavachari, for the Appellant; Abudu Kumar Rajarathinam, Amicus Curiae, Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.T. Selvam, J.—This Criminal Revision arises against the order of learned Judicial Magistrate, Perambalur, passed in CrI. M.P. No. 11762 of 2012 on 23.11.2012. Respondent, a Child Marriage Prohibition Officer cum District Welfare Officer, Perambalur, moved CrI. M.P. No. 11762 of 2012 before learned Judicial Magistrate, Perambalur, informing that petitioners and another had arranged a child marriage on 17.11.2012, that the intended bride had been born on 18.05.1995 and therefore, the proposed marriage was in violation of The Prohibition of Child Marriage Act, 2006. She sought an injunction there against. It was contended on behalf of petitioners that respondent was acting towards gaining publicity and as the intended bride was a Muslim girl, personal law of Muslims was applicable. The Shariat Act, 1937, had made applicable such personal law. The intended bride was above 15 years and below 18 years. Muslim law informed that a girl could be given in marriage upon her attaining puberty and there was a presumption of her having done so at age 15. It therefore was

contended that the intended marriage could not be prevented. In making absolute the interim order of injunction passed by it on 16.11.2012, the Court below took note of the judgment of Full Bench of this Court in T. Sivakumar vs. Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District [2011-5-L.W. 1 : 2011 (4) MLJ (Cri.) 315] to the following effect:

"15.....As envisaged in Section 1 of the said Act, it extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India; provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry. It is manifestly clear that this Act is secular in nature which has crossed all barriers of personal laws. Thus, irrespective of the personal laws, under this Act, child marriages are prohibited.

16. The term "child" has been defined in Section 2(a) of the said Act which states that "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."

2. It also took note of the decision of the Division Bench of Delhi High Court in Mohammed Nihal vs. State [2008 (4) Crimes (HC) 650 (Del)], wherein it had been held that The Prohibition of Child Marriage Act, 2006 was applicable to Muslims.

3. In circumstances where the intent of petitioners to conduct the marriage of the girl aged below 18 years was clear, the Court below under orders dated 23.11.2012 restrained petitioners from proceeding or solemnizing the marriage of the girl until she completes the age of 18. Aggrieved by such order, the present revision has been filed.

4. Heard learned counsel for petitioners. None appear for respondent. However, as the matter is of some social importance and welfare of children is a matter of concern irrespective of caste, creed or religion, this Court requested Mr. Abudu Kumar Rajarathinam, to act as Amicus Curiae and graciously he had obliged.

5. Learned counsel for petitioner submitted that the Shariat Act, 1937, was a progressive enactment which had been passed towards uplifting the lot of Muslim women. The same made applicable to Muslims their personal law. Such personal law permitted marriage of a Muslim girl upon her attaining puberty. It further provided that upon a Muslim girl attaining the age of 15, her having attained puberty would be presumed. The Shariat Act, 1937, is a special enactment which would prevail over a general enactment, such as The Prohibition of Child Marriage Act, 2006. Informing that the test to determine whether an Act is special or general would be to consider its effect, learned counsel submitted that the Shariat Act, 1937, and the Muslim Personal Law (Shariat) Application [Tamil Nadu Amendment Act], 1949, made applicable the personal law to Muslim marriages and thereby excluded the application of general law contained in The Prohibition of Child Marriage Act, 2006. Submitting that Parliament had not passed legislation towards an uniform civil law, learned counsel contended that the right conferred upon a Muslim girl to enter upon marriage upon attaining

puberty or attaining the age of 15 could be taken away only by a specific enactment and not by implication. The fact that Shariat Act, 1937, had not been amended while passing the Prohibition of Child Marriage Act in the year 2006, reflected the legislative intent not to meddle with the personal law of Muslims. A pointer to such effect is that in amending the Indian Penal Code under the Criminal Law (Amendment) Act 13 of 2013, and substituting new Section 375 I.P.C. informing that rape would stand committed when the woman was under 18 years of age whether with or without her consent, the prior position that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape, had not been interfered with. Learned counsel for petitioners also contended that Section 20 of The Prohibition of the Child Marriage Act, 2006, referred only to Hindu Marriage Act and not to the Shariat Act, 1937. Similarly, Section 21 of such Act repealed only the Child Marriage Restraint Act, 1929.

6. Shri Abudu Kumar Rajarathinam, learned Amicus Curiae, submitted that The Prohibition of Child Marriage Act, 2006, was a special enactment intended to serve a special purpose. The objects and reasons behind such Act are as follows:

"Statement of Objects and Reasons. The Child Marriage Restraint Act, 1929, was enacted with a view to restraining solemnisation of child marriages. The Act was subsequently amended in 1949 and 1978 in order, inter alia, to raise the age limit of the male and female persons for the purpose of marriage. The Act, though restrains solemnisation of child marriages yet it does not declare them to be void or invalid. The solemnisation of child marriages is punishable under the Act.

2. There has been a growing demand for making the provisions of Act more effective and the punishment thereunder more stringent so as to eradicate or effectively prevent the evil practice of solemnisation of child marriages in the country. This will enhance the health of children and the status of women. The National Commission for Women in its Annual Report for the year 1995-96 recommended that the Government should appoint Child Marriage Prevention Officers immediately. It further recommended that (i) the punishment provided under the Act should be made more stringent; (ii) marriages performed in contravention of the Act should be made void; and (iii) the offences under the Act should be made cognizable.

3. The National Human Rights Commission undertook a comprehensive review of the existing Act and made recommendations for comprehensive amendments therein vide its Annual Report 2001-2002. The Central Government, after consulting the State Governments and Union territory Administrations on the recommendations of the National Commission for Women and the National Human Rights Commission, has decided to accept almost all the recommendations and give effect to them by repealing and re-enacting the Child Marriage Restraint Act, 1929.

4. The salient features of the Bill are as follows:?

(i) To make a provision to declare child marriage as voidable at the option of the contracting party to the marriage, who was a child.

(ii) To provide a provision requiring the husband or, if he is a minor at the material time, his guardian to pay maintenance to the minor girl until her remarriage.

(iii) To make a provision for the custody and maintenance of children born of child marriages.

(iv) To provide that notwithstanding a child marriage has been annulled by a decree of nullity under the proposed section 3, every child born of such marriage, whether before or after the commencement of the proposed legislation, shall be legitimate for all purposes.

(v) To empower the district Court to add to, modify or revoke any order relating to maintenance of the female petitioner and her residence and custody or maintenance of children, etc.

(vi) To make a provision for declaring the child marriage as void in certain circumstances.

(vii) To empower the Courts to issue injunctions prohibiting solemnisation of marriages in contravention of the provisions of the proposed legislation.

(viii) To make the offences under the proposed legislation to be cognizable for the purposes of investigation and for other purposes.

(ix) To provide for appointment of Child Marriage Prevention Officers by the State Governments.

(x) To empower the State Governments to make rules for effectively administration of the legislation.

5. The Bill seeks to achieve the above objects"

7. Learned Amicus Curiae submitted that it would be wrong to contend that a Muslim girl would be deprived of protection intended by Parliament. Both The Prohibition of the Child Marriage Act, 2006, as also the Shariat Act, 1937, were special enactments. When there was conflict, the later enactment would prevail. It is to be noted that Section 2 of the Dowry Prohibition Act specifically excluded dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies. There was no such exclusion in The Prohibition of the Child Marriage Act, 2006. The manner in which Section 375 I.P.C., as amended, is to be read is that while a man could not be prosecuted for sexual intercourse with his wife aged not below 15 years, he could be prosecuted for offence under The Prohibition of Child Marriage Act, 2006. The offences were distinct. Article 15 of the Constitution of India required the State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and

clause 3 of such Article permitted the State to make special provision for women and children. Article 39 of the Constitution of India required the State to direct its policy towards avoiding abuse of the tender age of children. The Prohibition of Child Marriage Act, 2006 intended to protect the interest of children and served the larger constitutional purpose. A reading of Section 1(2) was plain on terms, i.e.

"It extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India without and beyond India:

Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry".

It is not open to Court to supply a different interpretation. Any interpretation of the sort sought by petitioners would destroy the object. Though there were several laws based on religion, the Act has been made applicable to all citizens. The Court is required to presume that Legislature knew of the Shariat Act while passing the enactment. Presidential assent there for had been obtained on 10.01.2007 and it would have to be presumed that the Shariat Act had been considered in granting the same. To the extent the Shariat Act, 1937 was repugnant to Constitutional provisions, the same would have to be read down. The Prohibition of Child Marriage Act, 2006 was not in question. It was only the interpretation thereof that was. Petitioners were seeking an interpretation which would allow them to commit an offence under Section 10 of The Prohibition of the Child Marriage Act, 2006.

8. Much case law had been relied upon by learned counsel for petitioners and learned Amicus Curiae. We think it appropriate to endorse and extract the following from the decision of the High Court of Karnataka in W.P. No. 75889 of 2013 placed before us by learned Amicus Curiae:

"21. An operative Act is the expression of the will of sovereign legislature; it overrides the consistent provisions of the existing personal law. The personal law has to submit to the statute law. The personal law cannot be repugnant, contrariant or derogatory to the statute.

22. When a later statute makes a contrary provision to the earlier statute, it has to be taken that the Parliament has intended the earlier statute to be repealed, though it may not have said so expressly. The same is in accordance with the maxim *leges posteriores priores contrarias abrogant*. (later laws abrogate earlier contrary laws).

23. The statement of objects and reasons can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. Reference to the statement of objects and reasons is permissible to understand the surrounding circumstances which render the remedying of the evil a paramount requirement.

24. The prime reason for bringing in the P.C.M. Act is the prohibition of the

solemnization of the child marriage. When the prescribed marriageable age of the girl is 18 years, this Court cannot be called upon to issue the sought declaration that the provisions of the P.C.M. Act are not applicable for the petitioner, as she belongs to Muslim community. The courts have the power coupled with the duty to prevent and not to promote the child marriages. This Court cannot and would not pass an order by virtue of which little girls become child brides.

25. It is also profitable to refer to Section 13 of the P.C.M. Act, which empower the courts to issue injunctions prohibiting the solemnization of marriages in contravention of the said Act. Section 13(1) reads as follows:

"13. Power of court to issue injunction prohibiting child marriages.--(1) Notwithstanding anything to the contrary contained in this Act, if, on an application of the Child Marriage Prohibition Officer or on receipt of information through a complaint or otherwise from any person, a Judicial Magistrate of the first class or a Metropolitan Magistrate is satisfied that a child marriage in contravention of this Act has been arranged or is about to be solemnized, such Magistrate shall issue an injunction against any person including a member of an organization or an association of persons prohibiting such marriage."

26. When there is legislative ban on the child marriages, the courts cannot go out of their way to help the promoters of child marriages.

27. The courts will prefer the construction, which advances the object rather than the one which attempts to find some way of circumventing it. It is the duty of the courts not to facilitate the circumvention of the parliamentary intent.

28. As held by the Apex Court in the case of Radhakishan (supra,) when the statutory law has commenced to govern a particular field, the personal law becomes inapplicable. Reiterating this view in the subsequent case of Kumar Gonsusab (supra), the Hon"ble Supreme Court has held that the personal law dealing with the transfer of property cannot override the provisions of the Transfer of Property Act.

29. In the case of Shabana Bano (supra), it was contended that under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, the divorced wife is not entitled to maintenance after the expiry of the iddat period. Not accepting this contention, the Hon"ble Supreme Court has laudably held as follows:

"The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only."

30. In the case of Molly Joseph (supra), the Apex Court has categorically held that when the legislature enacts the law in respect of the personal law of a group of persons following a particular religion, then such statutory provisions would

prevail over and override any personal law, usage or custom prevailing before the coming into force of such Act.

31. In the case of Smt. Parayankandiyal (*supra*), the Apex Court has negated the submissions that a person can be permitted to acquire a second wife during the life-time of the first wife and during the subsistence of the first marriage, just because the second marriage was customarily permitted under certain circumstances and for some purposes in the era of pre Hindu Marriage Act, 1955.

32. On the conspectus reading of paras 441, 442 and 443 of the Halsbury's Laws of England, the contents of which are extracted hereinabove, it becomes clear that the custom stands abrogated or destroyed, if it is running contrary to the statutory provisions, unless the custom is saved or preserved by a statute. The previously existing rights do not re-emerge, as they are superseded by the statute.

33. As the codified law prevails over all other laws, be they are ecclesiastical, personal or customary, the rights which the Muslim girls had under Muslim Personal Law (Shariat) Application Act, 1937 do not remain alive on the commencement of the P.C.M. Act.

34. There can be no dispute with what Patna and Delhi High Courts have said. But then, in both the cases, the Courts were confronted with a situation where the child marriage had already taken place. But the said decisions cannot be used to demand that a Mohammedan girl be permitted to marry before she attained the age of 18 years.

35. The issue can be examined with reference to the territorial dimension of the P.C.M. Act. That the P.C.M. Act has the application for the people of all States and Union Territories of India except the State of Jammu and Kashmir is spelt out in the P.C.M. Act itself Section 1(2) of the P.C.M. Act, the provisions of which are extracted *supra*, makes it sternly clear that it applies to all the citizens of India, whether they are in India or outside India. The only exceptions made are in respect of State of Jammu and Kashmir and remnants of the Union Territory of Pondicherry. Therefore, no Indian citizen on the ground of his belonging to a particular religion, can claim immunity from the application of the P.C.M. Act. The Legislature has not left anything to implication or interpretation as far as the application of P.C.M. Act is concerned.

36. The childhood of a person is precious. On the child attaining the age of majority, anything may be given to it like the job, house, husband/wife; but what cannot be got back is its precious childhood. What is therefore of paramount importance is that the child should fully enjoy his/her childhood before entering the wedlock. More often than not, it is the girl's happy childhood that would ensure a happy wifehood and happy motherhood. In whatever form it is, the child marriage is a gross violation of human rights of a girl or boy."

9. The Hon''ble Supreme Court in Khursheed Ahmad Khan v. State of U.P. and

Others (Civil Appeal No. 1662 of 2015) has thought it appropriate to quote with approval the judgment in Javed and Others Vs. State of Haryana and Others, AIR 2003 SC 3057 : (2003) 3 CTC 620 : (2003) 6 JT 283 : (2003) 135 PLR 531 : (2003) 5 SCALE 602 : (2003) 8 SCC 369 : (2004) SCC(L&S) 561 : (2003) 1 SCR 947 Supp : (2003) AIRSCW 3892 : (2003) 5 Supreme 371 stating thus:

"14. In Javed and Others Vs. State of Haryana and Others, AIR 2003 SC 3057 : (2003) 3 CTC 620 : (2003) 6 JT 283 : (2003) 135 PLR 531 : (2003) 5 SCALE 602 : (2003) 8 SCC 369 : (2004) SCC(L&S) 561 : (2003) 1 SCR 947 Supp : (2003) AIRSCW 3892 : (2003) 5 Supreme 371 , this Court dealt with the issue in question and held that what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality. Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25. This Court upheld the views of the Bombay, Gujarat and Allahabad High Courts to this effect. This Court also upheld the view of the Allahabad High Court upholding such a conduct rule. It was observed that a practice did not acquire sanction of religion simply because it was permitted. Such a practice could be regulated by law without violating Article 25. This Court observed:

49. In State of Bombay v. Narasu Appa Mali (AIR (1952) Bom. 84) the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held: (AIR p. 86, para 5)

"[A] sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

50. Their Lordships quoted from American decisions that the laws are made for the governance of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is a recognized institution according to Hindu religious practice, Their Lordships stated in no uncertain terms: (AIR p. 86, para 7)

"The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of

social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

51. What constitutes social reform? Is it for the legislature to decide the same? Their Lordships held in *Narasu Appa Mali* case that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy, who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the courts of law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.

52. We find ourselves in entire agreement with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized without any demur. Divorce, unknown to ancient Hindu law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim personal law.

53. The Division Bench of the Bombay High Court in *Narasu Appa Mali* also had an occasion to examine the validity of the legislation when it was sought to be implemented not in one go, but gradually. Their Lordships held: (AIR p. 87, para 10)

"... Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise."

54. Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this Court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.

55. In *Badruddin v. Aisha Begum* ((1957) All LJ 300) the Allahabad High Court ruled that though the personal law of Muslims permitted having as many as four

wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

56. In *R.A. Pathan v. Director of Technical Education* ((1981) 22 Guj. LR 289) having analysed in depth the tenets of Muslim personal law and their base in religion, a Division Bench of the Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

57. In *Ram Prasad Seth v. State of U.P.* (AIR (1957) All 411) a learned Single Judge held that the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, Rule 27 of the U.P. Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

58. The law has been correctly stated by the High Courts of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India.

59. In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

60..... It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform

which the impugned legislation clearly does."

10. In the instant case what is claimed is a right to practice that which the personal law allows i.e., marriage of Muslim girl upon attaining puberty, on the premise that it has obtained legislative sanction under the Shariat Act, 1937. Rightly, such right is not claimed as a matter of religious faith. The practice would run counter to the social objective of the provisions of the Prohibition of Child Marriage Act, 2006 aimed to prevent the evil practice of solemnization of child marriages in the country towards enhancing the health of child and the status of women. This Criminal Revision shall stand dismissed. Consequently, connected miscellaneous petition is also dismissed. This Court records its deep appreciation for the meticulous effort and submissions of Mr. Abudu Kumar Rajarathinam, Amicus Curiae.