
(2016) 05 DEL CK 0165
In the Delhi High Court
Case No : W.P.(Crl). 835 of 2016

Mohd. Anis & Another

APPELLANT

Vs

State of NCT of Delhi & Others

RESPONDENT

Date of Decision : 16-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 2 DMC 8 : (2016) 4 RCRCivil 535

Hon'ble Judges : G.S. Sistani and Sangita Dhingra Sehgal, JJ.

Bench : Division Bench

Advocate : Mr. Mohammad Yusuf, Advocate, for the Appellant; Mr.Rahul Mehra, Standing Counsel (Crl.) and Mr.Amrit Pal Singh, Advocate and SI Ramesh, P.S. Swaroop Nagar, for the Respondent

Final Decision : Disposed Off

Judgement

G.S. Sistani, J.—(Oral) - Present petition has been filed by the petitioners under Article 226 of the Constitution of India seeking a writ of habeas corpus thereby directing respondents to produce their minor daughter, Fareen, who has been missing since 27.12.2015.

2. As per the petition, the age of Fareen is 17 years and three months (date of birth is 10.12.1998). It has been alleged in the petition that one, Asif, who has been arrayed as respondent no.6 in this petition, had kidnapped Fareen.

3. Notice in this petition was issued on 15.3.2016, when Fareen, daughter of the petitioners, and Asif, respondent no.6, were produced in Court. We had interacted with the petitioners; their daughter, Fareen; and also with Asif, respondent no.6 in kthe Chamber. Asif and Fareen had submitted that their Nikah has been performed and they are living as husband and wife. Fareen had refused to join the company of her parents.

4. On 15.3.2016 it was also informed to the Court that this is the second occasion when Fareen had left her parental home. On the second date of hearing

i.e. 30.3.2016, Fareen had reiterated her statement made on 15.3.2016.

5. Petitioner no.1, who is present in Court, submits that in view of the fact that Fareen has not attained the age of majority, she should be sent to Nari Niketan. Today, Fareen has again reiterated the statement made by her on 15.3.2016 and 30.3.2016 that she wishes to stay with her husband and does not wish to join the company of her parents.

6. We have heard learned counsel for the parties, petitioner no.1, Fareen and Asif. Marriage between Asif and Fareen was solemnised against the wishes of their parents, however, subsequently the parents of Asif have accepted the marriage. According to the petitioners, the age of Fareen is 17 years and three months (date of birth is 10.12.1998) whereas according to Fareen, her age is 19 years.

7. The short question which arises for our consideration is whether or not Fareen has the right to reside with her husband even if she is below eighteen years of age, as claimed by the petitioners. The law in this regard is well settled in Mohammedan Law that once the girl attains the age of puberty, she has a right to reside with her husband.

8. An almost similar issue had come up for consideration before a Division Bench of this Court in *Mrs. Tara Begum v. State of Delhi & Ors.*, reported at (2012) 116 AIC 862. The Division Bench took into consideration the law laid down in the case of *Md. Idris v. State of Bihar*, 1980, Crl.L.J.764 and other judgments passed from time to time and held as under:

"4?.."Whether respondent No. 5, who was below 18 years of age, could have married without the consent of her parents is another question which was seriously contended before us. But, as I shall immediately indicate, under the Mahomedan Law a girl, who has attained the age of puberty, can marry without the consent of her parents. In this connection reference can be made to Article 251 of Mulla's Principles of Mahomedan Law which says that every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage. The explanation to the said Article says that puberty is presumed, In absence of evidence, on completion of the age of 15 years. Even in Tyabji's Muslim Law under Article 27 is mentioned that a girl reaching the age of puberty can marry without the consent of her guardian. Article 268 of Mulla's Principles of Mahomedan Law says that the marriage will be presumed, in the absence of direct proof, by mere fact of acknowledgment by the man of the woman as his wife. Article 90 of Tyabji's Muslim Law also says that a marriage is to be presumed on the acknowledgment of either party to the marriage. As such, it has to be held that under Mahomedan Law a girl, who has reached the age of puberty, i.e., in normal course at the age of 15 years, can marry without the consent of her guardian."

This Court, in *Vivek Kumar @ Sanju and Anjali @Afsana v. The State and another*, (Crl.M.C.No. 3073-74 of 2006, decided on 23.02.2007) observed that,

"There is no law which prohibits a girl under 18 years from falling in love with someone else. Neither falling in love with somebody is an offence under IPC or any other penal law. Desiring to marry her love is also not an offence. A young girl, who is in love has two courses available to her one is that she should marry with the consent of her parents after obtaining the consent of her parents. If her parents do not agree to persuade them or to wait for attaining the age of majority and then exercise her right as a major to marry the person of her own choice. However, this is possible only when the house of her parents where she is living has congenial atmosphere and she is allowed to live in peace in that house and wait for attaining age of majority. This might have been the reason in the mind of petitioner No. 2 when she told her father that she was in love and wanted to marry Sanju, but the response of father when daughter confided in him, created the fear in the mind of petitioner No. 2. Her father slapped her and told that her action would malign the religion and bring danger to the religion. He even threatened to kill her and marry her off to some rich person. When once such a threat is given to a girl around 17 years of age, who is in love, under such circumstances she has a right to protect her person and feelings against such onslaught of her relatives even if the onslaught is from her own parents. Right to life and liberty as guaranteed by the Constitution is equally available to minors. A father has no right to forcibly marry off her daughter, who is below 18 years against her wishes. Neither he has right to kill her, because she intends to marry out of her religion. If a girl around 17 years of age runs away from her parents house to save herself from the onslaught of her father or relatives and joins her lover or runs away with him, it is no offence either on the part of girl or on the part of boy with whom she ran away and married."

5. In *Shamsuddin v. State*, (WP(Crl.) 13 of 2009, decided on 15.05.2009) where a similar question about the marriage of a minor Muslim girl arose, in the context of the provisions of the Prohibition of Child marriage Act, 2006 , this Court observed that:

"7. In the present case, the facts are slightly different. Here, we have Mst. Gulshan, who has attained the age of puberty. She has entered into matrimony with Bhura @ Furqan. Though there is no documentary evidence thereof, there is evidence of the fact that they resided as a husband and wife and the presumption of marriage has to be drawn. Nothing has been presented by the petitioner to rebut any such presumption. In fact, Mst. Gushan is in the family way. Therefore, we can safely come to the conclusion that her marriage with Bhura @ Furqan was not a void marriage.

8. We may also notice certain provisions of the Prohibition of Child Marriage Act, 2006 as also the Guardians and Wards Act, 1890. Under the former Act, a child, if a female, has been defined under Section 2 (a) as being a person who has not attained the age of 18 years. Section 3 (1) of the Prohibition of Child Marriage Act, 2006 stipulates that every child marriage, whether solemnized 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. This clearly indicates that a child marriage even under the secular laws is not void ab initio but voidable at the option of the contracting party who was a child at the time of marriage. Interestingly, this is also in consonance with the principle under Muslim law where a minor has the option of annulment of marriage on her attaining the age of majority / puberty. The principle is well-known and is commonly referred to as the option of puberty or *khiyar-ulbulugh*. This clearly indicates that the marriage of a "child" is not void but voidable.

9. Section 12 may also be noticed where certain marriages are treated as void. However, none of those circumstances mentioned in Section 12 arise in the present case.

10. Section 17 (1) of the Guardians and Wards Act, 1890 specifically stipulates that in appointing or declaring a guardian of a minor, the Court shall, subject to the other provisions of the said Section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. This makes it clear that while appointing a guardian of a minor, the Court has to consider the personal laws of the minor and more importantly the welfare of the minor. What is more important is Section 17 (5) which says that the Court shall not appoint or declare any person to be guardian against his will. Section 19 is also of great significance insofar as the present case is concerned. It prescribes that nothing in Chapter -II of the said Act authorizes the Court to appoint or declare a guardian of the person of a minor, who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of a person. We may also note that in the case of a minor not being a married female, no guardian can be appointed for such a minor, whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of a minor.

11. In the present case, nothing has been pointed out or brought to our notice for us to declare that the Mst. Gulshan's husband, namely, Bhura @ Furqan is unfit to be her guardian of her person. As such the applicability of Section 19 (b) of the said Act which pertains to minors in general whose fathers are living, would not come into play.

12. There is, however, one complication in this case, as pointed out above and that is that Mst. Gulshan's husband Bhura @ Furqan is presently in custody. Mst. Gulshan is present in Court and so are her mother-in-law and father-in-law. She was residing with Bhura @ Furqan at Seema Puri. But, since he is in custody, till such time, he is released from custody, she has expressed her clear desire to reside with her parents-in-law. Her mother-in-law Momina is present in Court and so is her father-in-law Mausam Ali. Both have acknowledged the fact that their son Bhura @ Furqan is legitimately married to Mst. Gulshan. Both of them

have expressed their desire and willingness for the return of their daughter-in-law Mst. Gulshan. It may be reiterated that immediately after their marriage Mst. Gulshan and her husband Bhura @ Furqan first resided with Mausam Ali and Momina at their village Choudhera, Police Station Chhatri, District Bulandsahar, U.P. It is only subsequently that they shifted to Seemapuri, Delhi."

9. In the present case, it has not been disputed before us that Fareen has attained the age of puberty. Nikah was performed between Fareen and Asif. The family members of Asif have accepted the marriage. Accordingly, Fareen would be free to join the company of her husband and is being entitled to exercise her option.

10. The petition stands disposed of accordingly.