

(2012) 05 DEL CK 0645

In the Delhi High Court

Case No : Writ Petition (Criminal) 446 of 2012 and Criminal M.A. 3701 of 2012

Mrs. Tahra Begum

APPELLANT

Vs

State of Delhi and Others

RESPONDENT

Date of Decision : 09-05-2012

Acts Referred:

Constitution of India, 1950 — Article 268, 90
Guardians and Wards Act, 1890 — Section 17(1), 17(5), 19
Prohibition of Child Marriage Act, 2006 — Section 12, 2, 3(1)

Citation : (2013) 1 RCR(Civil) 798

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : M.A. Rahman, for the Appellant; Pawan Sharma, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

Crl. M.A. 3701/2012

For the reasons mentioned in the application, the application is allowed. Crl. M.A. 3701/2012 is disposed of in the above terms.

W.P. (CRL) 446/2012

1. The petitioner seeks a writ of habeas corpus for the production of her daughter (Shumaila). It was alleged that Shumaila was a minor (aged 15) when she was kidnapped by Mehtab on 12.04.2011 along with Rs. 1,50,000. The petitioner's husband reported the kidnapping to the Gokalpuri police and on 14.04.2011 got FIR No. 123 of 2011 registered. It is alleged that after the abduction of Shumaila, on 13.03.2012 the petitioner received telephonic threats from Mehtab stating that if the petitioner took any legal action against him, he would kidnap her other daughter; the police were informed of this incident. It is also alleged that on 19.03.2012 the petitioner approached the Deputy Commissioner of Police and requested him to rescue her minor daughter from

the illegal detention of the accused. However the police did not take any action and hence the petitioner approached this Court through this petition. The petitioner relies on the birth certificate on record of Shumaila issued by the Delhi Government which shows that her date of birth was 10.06.1996. It is submitted by the petitioner that the age of her daughter at the time of kidnapping was 15 years.

2. After notice was issued, the police traced Shumaila, who appeared before this Court and stated that she voluntarily went away with Mehtab and has married to him; they have been living as husband and wife since then. Shumaila also told the Court on 18th April, 2012 that she did not wish to go back to her parents and that she wanted to continue to stay with her husband. In the meanwhile, Shumaila was kept in Nirmal Chaya; after her production before the Child Welfare Committee, that body, through its order dated 24-4-2012, stated that according to available records, Shumaila's age was 15 years, 10 months and 23 days. The issue to be decided by this Court, in view of these developments is, whether Shumaila should be directed to return to her parental home.

3. This Court notes that according to Mohammedan Law a girl can marry without the consent of her parents once she attains the age of puberty and she has the right to reside with her husband even if she is below the age of 18. The Patna High Court in the case of Md. Idris vs. State of Bihar & Ors, 1980 CrL. L.J. 764 observed that,

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 vs. 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.

4. In *Shamsuddin vs. 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. WP (CRL) 13/2009 Page 6 of 10 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 u/s 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-ul-bulugh. 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.

13. In view of the discussion above, we dismiss the writ petition and we direct that Mst. Gulshan is at liberty to reside with her parents-in-law till the release of her husband and thereafter it is up to her as to where she wants to reside with him.

In view of the above judgments, it is clear that a Muslim girl who has attained puberty i.e. 15 years can marry and such a marriage would not be a void marriage. However, she has the option of treating the marriage as voidable, at the time of her attaining the age of majority, i.e 18 years.

5. In view of the above discussion, and also in view of the fact that the girl in this case, Shumaila, clearly expressed her choice of residing with her husband, this Court is of opinion that she ought to be allowed to exercise her option. This Court has today recorded her statement in that regard. We direct the presence of Mehtab, Shumaila and either of her in-laws once in six months, in order to ascertain her well being, till she attains the age of majority before the Child Welfare Committee. The Committee shall take necessary steps including obtaining the necessary undertaking from Mehtab in that regard. Subject to completion of these steps, (which shall be within a week) Shumaila shall be allowed to live with Mehtab, in the matrimonial home. The writ petition is disposed of in terms of the above directions.