
(2012) 07 RAJ CK 0033

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 1154 of 2012

Pratapa Ram

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 2(d)

Penal Code, 1860 (IPC) — Section 34, 36, 363, 366

Prohibition of Child Marriage Act, 2006 — Section 12, 2(a), 2(b), 9

Citation : (2013) 1 RLW 1

Hon'ble Judges : Sandeep Mehta, J

Bench : Single Bench

Advocate : Vineet Jain, for the Appellant; Chandralekha, Public Prosecutor, Rameshwar Dave for Ashok, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble Mehta, J.—Heard learned counsel for the parties. The instant misc. petition has been preferred by the petitioner Pratapa Ram, father of Mst. Amri, being aggrieved of the order dated 21.4.2012 passed by the learned Judicial Magistrate, Raniwara directing detention of his daughter Mst. Amri at the Nari Niketan in connection with FIR No. 27/2012 of Police Station, Karda.

2. Succinctly stated the facts of the case are that the petitioner is the father of Mst. Amri aged 14 years (Date of Birth is 2.1.1998). Mst. Amri was kidnapped by Ashok, Ganesh, Raimal and Methi upon which the petitioner filed an FIR No. 27/12 at P.S. Karda against these accused persons for the offences under Sections 363, 366 and 36/34 IPC. The police recovered Mst. Amri during investigation of the FIR aforesaid and she was produced before the Court of Judicial Magistrate, Raniwara. The petitioner being the natural guardian of the girl filed an application before the learned Magistrate praying that the custody of his daughter be given to him as she was a minor and the petitioner being the natural guardian was entitled to have the guardianship of the minor child.

3. It may be mentioned here that the girl upon being examined, refused to go with the petitioner and claimed that she should be permitted to go with the person who had allegedly kidnapped her namely, Ashok as she claimed that she had contracted marriage with him.

4. The learned Magistrate by the impugned order dated 21.4.2012 directed that since the petitioner's daughter was a minor aged about fourteen years and was not desirous of going with the petitioner, she be kept at the Nari Niketan until further orders. The aforesaid order dated 21.4.2012 has been assailed by the petitioner by way of the instant misc. petition.

5. Mr. Vineet Jain, learned counsel for the petitioner contended that the petitioner being the father of the kidnapped minor girl, is her natural guardian and as such, is entitled to claim and receive her custody. It is submitted that Amri is neither a juvenile in conflict with law nor is she a child in need of care and protection so as to direct her detention at Nari Niketan. It is submitted that the petitioner has all the means and facilities to provide proper care to his daughter and as such, the minor's desire cannot be considered to be a paramount or a bar for depriving the petitioner from the custody of his minor child. It is submitted that the learned Magistrate has given no such finding that Amri was a child in need of care and protection in terms of Section 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act of 2000") and, therefore, the order of the learned Executive Magistrate whereby Mst. Amri has been directed to be detained at Nari Niketan cannot be justified.

6. Learned Public Prosecutor and the counsel for Ashok have opposed the arguments advanced on behalf of the petitioner and submits that the learned Magistrate has rightly directed the minor to be detained at Nari Niketan and justified the order passed by the learned Magistrate.

7. This Court had directed the detained child to be produced before this Court and she was brought from the Nari Niketan on 30.5.2012. On an enquiry being made from her, she expressed her unwillingness to go with her father and desired to go with her alleged husband Ashok. However, she did not express any threat to her life from her father nor did she state that her father was not having any means to maintain her. She stated that her father had never neglected to maintain her nor had abused her nor was he unfit or incapacitated to exercise control over her.

8. Upon a consideration of the arguments advanced at the bar and on going through the order impugned and the material available on the record, it is evident that the petitioner's daughter is minor aged 14 1/2 years. She at present is neither mentally nor morally in a position to assess the consequences of the act of elopement which she did by going away with accused Ashok. Though she has claimed that she has married to Ashok but such marriage has no credence in the eye of law. The Prohibition of Child Marriage Act, 2006 (for short "the Act of 2006") lays down that marriage of a minor girl i.e. a female below 18 years of

age is an offence.

9. Sections 2(a), 2(b), 9 and 12 of the Prohibition of Child Marriage Act, 2006 read as under :-

2. In this Act, unless the context otherwise requires,-

(a) "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;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

9. Punishment for male adult marrying a child - Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

12. Marriage of a minor child to be void in certain circumstances.-Where a child, being a minor-

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

10. The decisions in the cases of (1) Sayar & Ors. vs. State of Raj. reported in 2012 (1) Cr. L.R. (Raj.) 168; (2) Bhaga Ram Vs. State of Rajasthan ; and (3) Chiranji Lal vs. State of Raj. reported in 2011 (1) Cr. L.R. (Raj.) 106 have not taken into consideration the effect and import of the Act of 2006. Since a marriage between the persons below 18 years of age is now declared to be an offence under the Act of 2006, giving custody of a child to a person who has contracted marriage with such child in violation of the Act of 2006, would virtually amount to perpetrating an offence under the orders of the Court.

11. Now coming to the question as to whether the custody of the child should be continued at the Nari Niketan or should be given to her natural guardian. The relevant provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 need to be considered for this purpose and are reproduced herein below :-

2(d). "child in need of care and protection" means a child -

(i) who is found without any home or settled place or abode and without any ostensible means of subsistence,

(ia) who is found begging, or who is either a street child or a working child,

(ii) who resides with a person (whether a guardian of the child or not) and such

person-

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable injury,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natural calamity;

2(k). "juvenile" or "child" means a person who has not completed eighteenth year of age;

2(1). "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;

12. The petitioner undisputedly is a natural guardian of the girl and is under an obligation to maintain her. There is no allegation in the case that Mst. Amri is a child in need of care and protection or a juvenile in conflict with law. Resultantly, there cannot be any justification for keeping the girl in confinement of Nari Niketan because yet more than 31/2 years remain before she gains majority.

13. The Hon"ble Apex Court in the case of Nil Ratan Kundu and Another Vs. Abhijit Kundu, held as below:-

In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human

touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and Indispensable considerations.

If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

14. Keeping in view the observations made by the Hon'ble Apex Court and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and Prohibition of Child Marriage Act, 2006, it is apparent that since the marriage of Ashok with the petitioner's daughter is an offence under the Act of 2006, directing the custody of the petitioner's daughter to be given to aforesaid Ashok cannot be justified or lawful. That apart, this Court cannot loose sight of the fact that the girl cannot be permitted to be detained without any justification at the Nari Niketan for a period of nearly 3 1/2 years before she attains majority.

15. Thus, this Court has no hesitation in arriving at a conclusion that the order of the learned Magistrate whereby the petitioner's minor daughter has been directed to be detained at Nari Niketan cannot be sustained. Accordingly, the order impugned dated 21.4.2012 is hereby quashed. The custody of the minor Mst. Amri shall be handed over to the petitioner. However, the petitioner shall submit an undertaking to the learned Magistrate that he shall take proper steps for the welfare and well being of the minor. The learned Magistrate shall call for a quarterly report regarding child's well being in accordance with the Act of 2000 and such report shall be called through the S.H.O., Police Station Karda. If the petitioner is found infringing any of the conditions of the Act of 2000, the learned Magistrate shall be entitled to take action against the petitioner in accordance with law for the violation of the said Act. With the aforesaid directions and observations, the present misc. petition is allowed.