
(2015) 06 CAL CK 0079
In the Calcutta High Court
Case No : W.P. No. 8619 (W) of 2015

Rahul Amin Sekh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 16-06-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 21, 25
Dissolution of Muslim Marriages Act, 1939 — Section 2(a), 2(b), 2(vii), 4(1)
Guardians and Wards Act, 1890 — Section 17, 19, 21, 4(1)
Majority Act, 1875 — Section 2(a), 2(b), 3(1)
Muslim Personal Law (Shariat) Application Act, 1937 — Section 2
Penal Code, 1860 (IPC) — Section 34, 363, 366, 497
Prohibition of Child Marriage Act, 2006 — Section 10, 11, 12, 2(a), 2(b)

Citation : (2015) 4 CALLT 168

Hon'ble Judges : Nadira Patherya and Indrajit Chatterjee, JJ.

Bench : Division Bench

Advocate : Gopal Chandra Ray, for the Appellant; Prasun Dutta, for the Respondent

Final Decision : Disposed Off

Judgement

Nadira Patherya, J.—By this writ petition the petitioner seeks issuance of a writ of habeas corpus for the production of the missing girl, Manisha Khatoon (Manisha) who according to the petitioner, had gone missing. Pursuant to orders passed, the missing girl Manisha appeared in Court along with her husband Arman Sekh (Arman). Manisha is 16 years of age and Arman is 17 years of age. Therefore, both Manisha and Arman would under the statutory laws of the land be classified as juveniles. But, Counsel for Arman has taken a plea that Arman and Manisha are both Mohammedans and entitled to contract a marriage on attaining puberty. To resolve the said issue Mr. Bikash Ranjan Bhattacharya, Senior Advocate was appointed as amicus curiae and it is submitted by him that Muslim Personal Law (Shariat) Application Act, 1937 makes applicable Muslim Personal Law to Muslims in the matter of marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs. Section 2 of the 1937

Act specifically provides that when the parties are Muslims, the Muslim Personal Law (Shariat) will be applicable.

2. According to Mulla a Mohammedan of sound mind who has attained puberty may enter into a contract of marriage and "Puberty" as per the explanation given "is presumed in the absence of evidence, on completion of the age of 15 years". Puberty has not been fixed. No age has been specified for puberty. No biological or physical importance has also been attached but according to the commentaries on Mohammedan Law by Ameer Ali, puberty will mean the age of understanding and such age of understanding cannot be 15 years. In fact, Ameer Ali has further gone on to say that the ingredients necessary for a Muslim to contract a marriage is him/her being a major or sane. The Child Marriage Restraint Act, 1929 was promulgated prior to the 1937 Act. On a reading of the Shariat Act of 1937, one does not find the age at which two Muslims can contract a marriage. Under the 1929 Act a minor is a person of either sex below 18 years of age. By virtue of the Special Marriage Act, 1954 an individual attains majority at 18 years. Mulla in Chapter XVIII has specifically stated that a Mohammedan who is a minor can contract a marriage under the Personal Laws. In view of the Acts of Parliament and the subsequent Central Acts, Shariat Law cannot be considered as a Personal Law and the subsequent enactments will prevail. The Guardians and Wards Act 1890 also recognizes an individual attaining majority at 18 years. The West Bengal Children Act 30 of 1959 was given assent on 3rd January, 1961 and a major thereunder was an individual above 18 years of age. The Prohibition of Child Marriage Act, 2006 is an Act which applies to all the Indian citizens without and beyond India. Section 2(a) defines child to mean a "male" who has not completed 21 years of age and a "female" who has not completed 18 years of age. Section 3(1) has specifically stated that every child marriage solemnized before or after the said Act of 2006 shall be voidable at the option of the contracting party who was a child at the time of marriage. With amendments a statute changes and the Personal Law which prevailed in 1937 by virtue of the 2006 amendment will undergo a change as held in *Bajaya Vs. Gopikabai and Another*, . Therefore the Personal Law will no longer prevail. Reliance is also placed on *Shri Krishna Singh Vs. Mathura Ahir and Others*, . In the *Mohd. Ahmed Khan Vs. Shah Bano Begum and Others*, the General Law of the land prevailed over the Personal Law and this is what was stated as will appear from hereunder:--

".....The statutory right available to her under that section is unaffected by the provisions of the Personal Law applicable to her".

3. Therefore, in case of a conflict between the Statutory Law and Personal Law it will be the Statutory Law which will prevail as held in *Noor Saba Khatoon Vs. Mohd. Quasim*, , *Smt. Sarla Mudgal, President, Kalyani and others Vs. Union of India and others*, and *Molly Joseph alias Nish Vs. George Sebastian alias Joy*, . A Full Bench of the Kerala High Court also sought to remove discrimination between religions and decided the issue on the anvil of the Constitution and is

and to a query put by Court it was submitted that the missing girl, Manisha was 16 years of age and Arman was 17 years of age. Under the statutory law admittedly both are minors. But according to Counsel for Arman, a Mohammedan girl or boy can contract a marriage on attaining puberty and according to Mulla puberty would mean 15 years of age. It is only to ascertain whether Personal Law would prevail over the Statutory Law that Mr. Bikash Ranjan Bhattacharya, Senior Advocate was appointed as amicus curiae and it has been submitted by him that with the enactment of the Prohibition of Child Marriage Act 2006 Statutory Law would prevail over Personal Law in view of the enactments and decisions. The Muslim Personal Law (Shariat) Application Act, 1937 in section 2 has specifically stated that where both parties are Muslims in case of marriage the Muslim Personal Law shall prevail. It is true that various enactments, namely, the Child Marriage Restraint Act 1929, the Special Marriage Act and the Prohibition of Child Marriage Act 2006 has fixed the age of a male attaining majority at 21 years and a female at 18 years. A minor is a person of either sex under 18 years of age. The Guardian and Wards Act in section 4(1) defined a minor to mean a person who under the Indian Majority Act 1875 has not attained majority. The Indian Majority Act 1875 in Section 3(1) has categorically stated that a person of India shall attain the age of majority on completing 18 years. Therefore, under the statute 18 years can be accepted as the minimum age for a person to attain majority. In 2006 the Prohibition of Child Marriage Act was introduced and in section 2(a) a child in case of "male" attained majority at 21 years of age and "female" at 18 years of age. Section 2(b) defined a "child marriage" to mean a marriage to which either of the contracting parties is a child and section 2(f) defined the "minor" to be a person under the Majority Act of 1875. The said enactment was applicable to all citizens of India without and beyond India. Therefore, what has to be considered is that when the statutory law is contra to the Personal Law or vice versa which law shall prevail.

9. Ameer Ali in his commentaries on Mohammedan Law while dealing with the age of a Mohammedan to enter into a valid contract of marriage has stated that the person must be possessed of understanding this is because the Mohammedan Law does not fix any particular age. Puberty and discretion constitute according to Ameer Ali the essential conditions for a Mohammedan to enter into a valid contract of marriage. A person who is an infant in the eye of law is disqualified from entering into any legal transaction so also contract of marriage. Under the Hanafi and Shia School of Muslim Law 15 years is the age of majority for both male and female. But for Muslims or Mohammedans other than those belonging to the Hanafi School of law Or Shia School of law discretion and puberty are the guiding factors. Therefore, a person though a minor under the General Law of the land but who possesses understanding and has reached the age of discretion and can comprehend the consequences of the act will be entitled to contract a marriage and in the event they are not able to do so, the marriage will be nothing but a mere nullity. In the instant case Arman is 17 years old and Manisha is 16 years of age. Both of them have admittedly reached

puberty and the age of discretion. It cannot be said that they do not understand or comprehend the consequences of their act.

10. Mulla in his Principles of Mohammedan Law while dealing with the issue of marriage has categorically stated that a Mohammedan boy or girl who has attained puberty is at liberty to marry anyone he/she likes and has explained that the marriage of two Mohammedans of sound mind and who have attained puberty is a valid marriage. Mulla has further fixed puberty to completion of 15 years in the absence of evidence. While dealing with the issue of guardians, Mulla in the same book in Chapter XVIII has stated that the minority for male or female under Mohammedan Law terminates when he/she attains puberty according to Islamic Law and while under the Majority Act of 1875 the age of a minor is fixed at 18 or 21 years, the said statutory age will guide a Mohammedan except in matters of marriage, dower and divorce. This also finds support in the Majority Act of 1875 as amended. Section 2(a) and 2(b) whereof reads as follows:

"2. Saving. - Nothing herein contained shall affect-

(a) the capacity of any persons to act in the following matters (namely), - marriage, dower, divorce and adoption;

(b) the religion or religious rites and usages of any class of [citizens of India];

(c) xx"

11. Therefore in cases of marriage, dower and divorce an exception has been culled out.

12. But in 2006 the Prohibition of Child Marriage Act was promulgated. Section 2(f) defines a "minor" to mean a person who is deemed not to have attained majority under the Majority Act, 1875. Section 12 deals with instances of a void marriage but none of these instances is applicable to the instant case. On the contrary it is section 3 which will be applicable and such a child marriage is voidable at the option of the contracting party. Therefore, the marriage of Arman and Manisha is not a nullity in the eye of law but is voidable at the option of the contracting party, and till one of such contracting party initiates a proceeding for annulment of the marriage, the marriage of a Mohammedan cannot be nullified.

13. The said petitioner also sought for Manisha being handed over to them. This was another reason for considering the issue. From a consideration of the Mohammedan Law so also the enactments of Parliament, the 1929 Act has been repealed by the 2006 Act. The 2006 Act does not prohibit a child marriage but has recognized a child marriage and in case it does take place, the same may be void under section 12 of the 2006 Act or voidable under section 3 of the 2006 Act. In the instant case Arman and Manisha as per the Mohammedan Law applicable to them are married. All that the petitioner sought is issuance of a writ of Habeas Corpus and that Manisha be produced. Manisha was produced. It is when custody was sought that the question arose whether the marriage of

Arman and Manisha was any marriage in the eye of law and from the above discussion the marriage as per Mohammedan Law, prima facie, cannot be brushed aside. Therefore, the custody of Manisha cannot be given to the petitioner till such time that proceedings are filed under section 3 of the 2006 Act by either of the contracting parties.

14. In view of the aforesaid this application merits no further order and is disposed off.

15. By order dated 13th May, 2015 Manisha was directed to be sent to a Home after being produced before the concerned CWC. Let steps be taken by the I.O. to produce Manisha before the CWC for issuance of her release order. Before we part we must express our gratitude to Mr. Bikash Ranjan Bhattacharya, Senior Advocate for very ably assisting the Court as amicus curiae, and his able assistance has helped us in reaching a decision.

Let a certified copy of the order, if applied for, be given to the parties on priority basis.

Indrajit Chatterjee, J.

I agree.