
(2020) 10 P&H CK 0035

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 12578 Of 2020 (O&M)

Raji And Another

APPELLANT

Vs

State Of Punjab

RESPONDENT

Date of Decision : 01-10-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 363, 366, 375
Prohibition Of Child Marriage Act, 2006 — Section 9, 10, 11
Code Of Criminal Procedure, 1973 — Section 164, 438, 438(2), 482
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 2(14)(xi)
Constitution Of India, 1950 — Article 14, 15, 15(3), 21

Citation : (2020) 10 P&H CK 0035

Hon'ble Judges : Arvind Singh Sangwan, J

Bench : Single Bench

Advocate : Rahul Bhargava, Joginder Pal Ratra, Veneet Sharma

Final Decision : Disposed Of

Judgement

Arvind Singh Sangwan, J

The zeal and zest to decide the so-called marriage protection petition(s) on very first date of hearing, without calling a report from the concerned Police Station, sometimes adversely effect the right of a girl child between the age group of 15 to 18 years in view of the direction given by the Hon'ble Supreme Court in "Independent Thought vs Union of India and another", 2017(4) RCR (Criminal) 595, wherein the Hon'ble Supreme Court dealt with various issues regarding the "rights of a girl child between 15 to 18 years."

Before referring to the facts of this case, the operative part of the judgment Independent Thought (supra) is reproduced as under:-

"The issue before us is limited but one of considerable public importance - whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual

intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

2 to 17. XXXX XXXX XXXX XXXX

National Policy and National Plan

18. What has been the response of the Government of India to studies carried out from time to time and views expressed? The National Charter for Children, 2003 was notified on 9th February, 2004. While it failed to define a child, we assume that it was framed keeping in mind the generally accepted definition of a child as being someone below 18 years of age. Proceeding on this basis, for the present purposes, Clause 11 of the National Charter is of relevance in the context of child marriages. It recognized that child marriage is a crime and an atrocity committed against the girl child. It also provided for taking "serious measures" to speedily abolish the practice of child marriage. Clause 11 reads:

"11. a. The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated.

b. The State shall in partnership with the community undertake measures, including social, educational and legal, to ensure that there is greater respect for the girl child in the family and society.

c. The State shall take serious measures to ensure that the practice of child marriage is speedily abolished."

19. As a first step in this direction, child marriages were criminalized by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the IPC, as it existed in 2006, to decriminalize marital rape of a girl child.

20 to 87. XXXX XXXX XXXX XXXX

88. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl

child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the IPC. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the IPC inter-se.

89 to 104. XXXX XXXX XXXX

Conclusion

105. On a complete assessment of the law and the documentary material, it appears that there are really five options before us:

(i) to (iv) XXXX XXXX XXXX

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(v) To read Exception 2 to Section 375 of the IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected and perhaps given impetus."

The Hon'ble Supreme Court, additionally observed as under:-

"120. The Restraint Act was repealed and replaced by the PCMA. The provisions of the PCMA are slightly more stringent. Under Section 9 of the PCMA, if a male adult above 18 years of age contracts a child marriage, he can be sentenced to rigorous imprisonment up to 2 years or fine which may extend up to one lakh rupees or both. However, no minimum sentence is provided even under this Act. Section 10 of the PCMA provides punishment for those persons who perform, conduct, direct or abet a child marriage and the same sentence is provided. As far as the guardians and parents are concerned, the punishment for them is provided under Section 11 and it is the same. Again, the proviso lays down that no woman shall be punishable with imprisonment. Though this Court is not dealing with this question directly in the present petition, it is obvious that a woman would be placed in the forefront by any person who gets a child marriage

conducted. Such a woman cannot be sentenced to undergo imprisonment and at the most, a fine can be levied. The punishments provided are neither sufficiently punitive nor deterrent. Therefore, the PCMA has been breached with impunity. I think the time has come when this Act needs serious reconsideration, especially in view of the harsh reality that a lot of child trafficking is taking place under the garb of marriage including child marriage. More stringent punishments should be provided and some minimum punishment should definitely be provided especially to those mature adults who promote such marriages and who perform, conduct, direct or abet any such marriage. Otherwise, this legislation will never act as a sufficient deterrent to prevent or even reduce child marriages.

121 to 192. XXXX XXXX XXXX

RELIEF

193. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

194. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:-

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and

21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;

(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape".

It is, however, made clear that this judgment will have prospective effect."

A perusal of the judgment of the Hon'ble Supreme Court, while dealing with the harmonious interpretation of Indian Penal Code, The POCSO Act, The Juvenile Justice Act and Prevention of Child Marriage Act, has held that Proviso 2 to Section 375 of IPC would mean that sexual intercourse or sexual act by a man with his own wife, the wife being not under 18 years of age is not rape. In other words, if the wife is less than 18 years of age, the Exception 2 to Section 375 of IPC giving a protection to the husband is not applicable.

The Hon'ble Supreme Court has also observed that the provisions of Prevention of Child Marriage Act, are being breached with impunity and needs serious reconsideration.

The Hon'ble Supreme Court has also held that under Articles 14, 15 and 21 of the Constitution of India read with National Policy and National Plan, provides that a girl between the age of 15 and 18 years need protection from early marriages and to provide a girl child a life of dignity.

Prayer in this petition is for grant of anticipatory bail to the petitioners, who are parents of the co-accused Varinder Singh (who has been granted the concession of anticipatory bail by the Court of Additional Sessions Judge, Amritsar) under Section 438 of the Code of Criminal Procedure (in short 'Cr.P.C.') in FIR No.23 dated 06.03.2020, for offence punishable under Sections 363/366/34 of the Indian Penal Code, 1860 (in short 'IPC') registered at Police Station Majitha, District Amritsar.

Brief facts of the case are that the son of the petitioners/co-accused namely Varinder Singh aged 20 years along with the girl, namely 'S' (name not disclosed), who is daughter of the complainant, aged about 15 years (Date of Birth 18.03.2005) filed a criminal writ petition i.e. CRWP No.2780 of 2020 on 17.03.2020, in which the complainant and other family members were arrayed as respondents No.4 to 8. (This Court has summoned the record of the said criminal writ petition). A perusal of Para 2 of the said criminal writ petition, shows that it is stated that the date of birth of co-accused Varinder Singh is 05.06.2000 i.e. 20 years as per the Aadhar Card. It is further stated in the petition that on 13.03.2020 both of them performed marriage in a Gurudwara (the name of the Gurudwara was not disclosed) and further, it is stated that the Marriage Certificate was not issued by the said Gurudwara as Varinder Singh is less than 21 years of age, however, the photographs performing the marriage along with the Granthi in the Gurudwara and one person were attached as a proof of marriage.

A perusal of the representation attached with the said petition also shows that it is nowhere mentioned that as to where Varinder Singh and 'S' had allegedly performed the marriage.

The said criminal writ petition was disposed of by this Court on 17.03.2020 by issuing a direction to the Police Authorities to look into their grievance, however, it was observed that nothing observed in the order will be taken as to validate the alleged marriage or entitle them for any protection against their arrest or continuance of any criminal proceedings, if they are found involved in the commission of any cognizable offence as in such eventuality, the law will take its own course.

The aforesaid FIR No.23 dated 06.03.2020, was already registered, at the instance of the father of 'S' namely William, who was arrayed as respondent No.4 in CRWP No.2780 of 2020, which was filed on 16.03.2020 i.e. after registration of the FIR.

After passing of the order dated 17.03.2020, by this Court, Varinder Singh applied for anticipatory bail, which was listed before the Sessions Judge, Amritsar

on 30.05.2020 and noticing the fact that on 17.03.2020, this Court has granted protection to Varinder Singh and 'S', the arrest of Varinder Singh was stayed subject to the provisions of Section 438(2) Cr.P.C.

Later on, the said case was transferred to the Court of Additional Sessions Judge, Amritsar on 24.06.2020, observing that the bail application of the co-accused (petitioner/parents) has already been decided by the said Court (Additional Sessions Judge, Amritsar) on 12.05.2020, therefore, the bail application of Varinder Singh, was also assigned to the same Court.

On 29.06.2020, the Additional Sessions Judge, Amritsar observed in the order that Varinder Singh has joined the investigation but as per the certificate produced by the father of 'S', her date of birth is 18.03.2005 and she is aged about 15 years and 02 months and the case was adjourned for medical examination of the prosecutrix.

Later, on 02.07.2020, the interim bail granted to Varinder Singh was made absolute by the said Court on the premise that 'S' has refused to undergo medical examination and therefore, it could not be ascertained whether she was sexually abused or not.

It is worth noticing that the anticipatory bail application of the present petitioners namely Raji and Buta Singh, i.e. mother and father of Varinder Singh, was dismissed by the same Court/Additional Sessions Judge, Amritsar on 12.05.2020, a fact noticed by the Sessions Judge, Amritsar in his order dated 24.06.2020, while transferring the bail application of Varinder Singh to the same Court.

While dismissing the bail application of the present petitioners, the Additional Sessions Judge, Amritsar, in the order dated 12.05.2020 has observed that as per the statement of the Investigating Officer, during the investigation, the Birth Certificate of 'S' was taken in possession and her date of birth is 18.03.2005 and on the date of deciding the application, she was 15 years and 02 months and therefore, she was minor. In this order, there is a reference to the order passed by this Court in CRWP No.2780 of 2020, wherein 'S' was shown as 19 years of age, however, the Additional Sessions Judge, Amritsar, formed an opinion that the girl is of 15 years of age as per her Date of Birth Certificate and therefore, the anticipatory bail application of the petitioners/parents of Varinder Singh, was dismissed.

Surprisingly, subsequent to passing of this order, the same Additional Sessions Judge, Amritsar has granted anticipatory bail to the main accused namely Varinder Singh despite the fact that even in the order dated 29.06.2020, it was observed by him that the date of birth of 'S' is 18.03.2005 and vide subsequent order dated 02.07.2020, the anticipatory bail to Varinder Singh was confirmed despite noticing the fact that the girl is aged about 15 years. Therefore, it requires an explanation from the Additional Sessions Judge, Amritsar as to how despite noticing the fact that the prosecutrix is 15 years of age, he has granted bail to the main accused Varinder Singh, while declining the bail to his parents

i.e. the present petitioners.

Vide order dated 20.05.2020, the arrest of the petitioners was stayed by the Co-ordinate Bench of this Court noticing the fact that on 17.03.2020, the son of the petitioners had performed marriage with the daughter of the complainant on 13.03.2020.

The counsel for the complainant has strongly opposed the prayer for bail to the petitioners. Therefore, vide order dated 01.09.2020, the petitioners were directed to produce the girl before the Illaqa Magistrate with a further direction that the Illaqa Magistrate will re-record the statement of the girl under Section 164 Cr.P.C. and the complainant will produce all the relevant documents like Birth Certificate, Aadhar Card and any other document, to show the correct date of birth of the prosecutrix. It was also directed that if the Illaqa Magistrate is satisfied that the age of the prosecutrix is below 16 years of age, she will be lodged in the Children Home i.e. Gandhi Vanita Aashram, Jalandhar till further orders.

As the petitioners fail to produce the girl before the Illaqa Magistrate on the given date/time, again time was extended till 15.09.2020 to comply with the aforesaid directions.

A report from the Judicial Magistrate Ist Class, Amritsar has been received that after recording the statement of the girl 'S', who stated that she performed marriage with Varinder Singh on 17.03.2020 as her date of birth is 18.03.2001. In the statement of William i.e. the father of the prosecutrix, it is stated that the correct date of birth of his daughter is 18.03.2005, which is recorded in the Birth Certificate issued from the office of Registrar, Birth and Death as 18.03.2005 and the attested copy of certificates of the school where she is studying again showing her date of birth as 18.03.2005 and the correct Aadhar Card No.794786050330, wherein the date of birth of the prosecutrix is mentioned as 18.03.2005.

The report of the Judicial Magistrate Ist Class, Amritsar is supported by all the documents showing the date of birth of the prosecutrix 'S'.

The statement of Neetu, wife of the complainant - William and a Teacher of the school was also recorded to this effect.

On the basis of the enquiry conducted by the Judicial Magistrate Ist Class, Amritsar, it is reported as under:-

"In kind reference to the subject cited above, it is respectfully submitted that the Hon'ble High Court vide CRM-M-12578-2020, order dated 01.09.2020 was please to direct this court to submit a report as per terms of the aforementioned order. Upon notice, girl 'S' and her parents have come present before this court. The statement of 'S' d/o William was recorded, wherein she claims to have been married to Varinder Singh on 17.03.2020. She further stated that her Date of Birth is 18.03.2001. Conversely, upon recording the statement of her parents i.e.

father William and mother Neetu, it has been claimed that her actual Date of Birth is 18.03.2005. In support of her claim, 'S' produced on record her Aadhar Card No.794786050330 wherein her Date of Birth is depicted as 18.03.2001. Similarly, her parents, William and Neetu, also produced an Aadhar Card No.794786050330 wherein her Date of Birth is depicted as 18.03.2005. It is pertinent to note that both the Aadhar Cards aforementioned bear the same number i.e. 794786050330. Since the originals of both the Aadhar Cards were produced before the undersigned, I myself scanned the Bar Code on the Aadhar Cards. Such scan however in both the cases returned the same result wherein, apart from detailing other relevant facts, the Date of Birth was mentioned as 18.03.2005. Consequently, the Aadhar Card produced by the parents of 'S', depicting her Date of Birth as 18.03.2005 is accurate. Further, the parents of 'S' also produced on record her Birth Certificate No.712578 dated 17.07.2017, copies of certificates for 3rd, 4th, 5th, 6th and 7th standard, issued by Secret Heart Convent School, VPO Rohri, Majitha, where 'S' was studying in all of which her Date of Birth has been enumerated as 18.03.2005. I have compared the attested copy of these documents with the originals, which have been produced before me. The girl 'S' was confronted with the aforementioned documents, whereby, whereas she admitted the authenticity of the documents (other than Birth Certificates), she volunteered to claim that Date of Birth mentioned therein is incorrect. Further, since it has been brought on record and is not disputed that 'S' was a student of Secret Heart Convent School, VPO Rohri, Majitha, Sahil Arora, who works as a teacher in the aforementioned School had come present alongwith record from the aforementioned School, pertaining to 'S'. In his statement, the witness produced and proved transfer certificate of 'S' bearing Sr. No.945 dated 12.08.2019, application for admission bearing No.1564 dated 21.03.2012, as also the Birth Certificate of 'S'. As per the witness, the aforementioned documents from the record of the School reveal the Date of Birth of 'S' d/o William to be 18.03.2005. Therefore, going by the statements of her parents, the statement of the official from Secret Heart Convent School, VPO Rohri, Majitha and a number of relevant documents aforementioned, also taking into account the fact that the Bar Code of her self-produced Aadhar Card returned information contradictory to the Date of Birth mentioned on the same, I conclude that the apparent Date of Birth of 'S' is 18.03.2005, as stated by her parents and not 18.03.2001, as claimed by her. A copy of the relevant documents and statements is appended herewith for kind perusal of your goodself. Further, since the age of 'S' at the relevant time was much lower than 16 years, therefore, in compliance with the orders of Hon'ble High Court, 'S' has been lodged in Gandhi Vanita Ashram, Jalandhar."

In the facts and circumstances of the present case, it is apparent that the complainant has been able to prove that the date of birth of his daughter 'S' was 15 years and therefore, by no stretch of imagination, she was not capable to perform the marriage and for all intents and purposes as per the provisions of Juvenile Justice Act, her parents are entitle to seek her custody as a girl child

before attaining the age of 18 years is a child in need of care and protection as per Section 2(14)(xi) of the Juvenile Justice Act.

Therefore, considering the allegations in the FIR and the age of the victim/prosecutrix 'S', I find no ground to grant the concession of anticipatory bail to the petitioners and accordingly, the present petition is dismissed with the following directions/observations:-

(a) As it was directed by this Court that 'S' will be kept in Children Home i.e. Gandhi Vanita Aashram, Jalandhar, liberty is granted to the complainant and his wife namely Neetu, to move an appropriate application before the Illaqa Magistrate/Duty Magistrate/Juvenile Justice Board, to seek her custody and the same will be decided, in accordance with law.

(b) It will be open for the mother of the prosecutrix 'S' to get her daughter medical examination conducted by moving an appropriate application through the Investigating Officer.

(c) Since on the face of it, there is a violation of Section 10 of the Prevention of Child Marriage Act and the POCSO Act, the Investigating Officer will further conduct the investigation regarding the offence committed by the Granthi of the Gurudwara, who has performed the marriage by taking information from the accused persons or 'S'.

(d) It will also be open for the Investigating Officer to take photographs (Annexure P-3) from the record of CRWP No.2780 of 2020, showing the place of marriage as well as the identification of Granthi, who has performed the marriage, by moving an appropriate application before the Registrar General or the Registry of this Court.

(f) In exercise of suo moto power under Section 482 Cr.P.C., the District & Sessions Judge, Amritsar is directed to revive the petition granting anticipatory bail to Varinder Singh and after affording an opportunity of hearing to the accused - Varinder Singh as well as the Public Prosecutor, to pass an order afresh, as to whether Varinder Singh is entitled to anticipatory bail or not.

However, as observed above, the Additional Sessions Judge, Amritsar, who has passed the order granting anticipatory bail to Varinder Singh despite an objection raised by the complainant as well as the Investigating Officer that 'S' is aged about 15 years, though while dismissing the anticipatory bail application of the present petitioners i.e. parents of Varinder Singh, on the same premise that the girl is 15 years of age, needs an explanation as to how the anticipatory bail was granted to Varinder Singh as the same do not meet the criteria of granting the anticipatory bail. The explanation be sent through the Registrar General of this Court within a period of 01 month from the date of receipt of certified copy of this order.

Disposed of accordingly.

The Registry is directed to supply a copy of this order to the District & Sessions Judge, Amritsar, for compliance, at the earliest.