

CRWP-7426-2022(O&M)

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IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CRWP-7426-2022(O&M)
Date of decision : 30.09.2022

Javed

... Petitioner

Versus

State of Haryana and others

... Respondents

CORAM: HON'BLE MR.JUSTICE VIKAS BAHL

Present: Mr.Uday Chauhan, Advocate
for the petitioner.

Mr.Munish Sharma, AAG, Haryana.

VIKAS BAHL, J.(ORAL)

This is a criminal writ petition under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of Habeas Corpus directing respondents no.2 and 3 to release the detenu, as mentioned in the head note of the petition, who is stated to be in the custody of Ashiana, Sector 16 , Panchkula.

Learned counsel for the petitioner has submitted that the petitioner was born on 10.06.1996 and is 26 years of age and has referred to the vernacular of the Aadhar card with respect to the same. It is argued that even as per the reply filed by the Assistant Commissioner of Police, Panchkula, the date of birth of the detenu is 15.03.2006 and thus, she is more than 16 years of age. It is stated that even at the time of marriage, the said detenu was more than 16 years of age and the marriage was performed by the petitioner and the detenu out of their free will and without any pressure and for the said purpose, reference has been made to statement

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under Section 164 Cr.P.C. which has been annexed as Annexure R-1 with the reply filed by the State, in which the detenue has specifically stated that she had run from the house along with the present petitioner out of her own will as the detenue is fond of the petitioner and wished to marry him. It is further submitted that both the petitioner and the detenue belong to the Muslim religion and they have performed Nikah on 27.07.2022 in a Mosque situated at Manimajra. Learned counsel for the petitioner has relied upon the judgment of coordinate Bench of this Court in **Yunus Khan vs. State of Haryana & Ors.** reported as **2014(3) RCR (Criminal) 518** in support of his argument that the custody of detenue should be handed over to the petitioner under such circumstances.

Learned State counsel, on the other hand, has opposed the present petition and has submitted that the date of birth of the detenue has been found to be as 15.03.2006 and thus, she is a minor as she is less than 18 years of age and therefore, she is being rightly kept in Ashiana Home, Sector 16, Panchkula and has prayed that the present petition be dismissed.

This Court has heard learned counsel for the parties and has perused the paper book.

The petitioner was born on 10.07.1996 as is apparent from his Aadhar card (Annexure P-1). It is, thus, apparent that petitioner no.1 has attained the age of majority. As per the reply of the State, it has been found that the detenue was born on 15.03.2006 and thus, she is more than 16 years and 6 months of age. A further perusal of the reply as well as statement under Section 164 Cr.P.C. which has been recorded on 28.07.2022 before the Judicial Magistrate Ist Class, Panchkula, would show that the detenue had run away from her house along with the present petitioner out of her

own will and has stated that her family members forcefully engaged her with her maternal uncle and she has performed Nikah with the present petitioner on 27.07.2022 in a Mosque at Manimajra and she does not want to stay with her family and in fact, is married to the petitioner and wishes to reside with him. The petitioner as well as the detenu are both Muslims religion. A coordinate Bench of this Court in **Yunus Khan's** case (supra) has held as under:-

“33. As such, the marriage of a Muslim girl continues to be governed by the personal law of Muslims. In this regard, it would be useful to reproduce what is stated in the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla, in Article 195 thereof. (10th Edition of 1933):

195. Capacity for marriage (1) Every Mahomedan of sound mind, who has attained puberty may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.

(3) A marriage of a Mahomedan who is sound mind and has attained puberty, is void, if it is brought about without his consent.

Explanation. Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

(This Article is shown as Article 251 in Mulla's Principles of Mahomedan Law, 19th Edition, by M.Hidayatullah),

The same principle is also reproduced in Article 27 of Muslim Law by Faiz Badruddin Tyabji, which is also reproduced hereinunder:

27. Age of competence to marry-With reference to the age of competence to marry, it is presumed in the absence of evidence of attainment of puberty, that males attain puberty at the age of 15 years, and females at the age of 9[51]

years.

34. Keeping in view the above, it is obvious that even taking 15 years to be the age of puberty and not prior to that, the present applicant. Le. Sanjeeda is well above the said age by appearance an even by admission of all parties concerned. As such, unless her marriage can be shown to have been not validly performed for any other reason, she has, even ex-facie, without any evidence to the contrary having been shown, performed a valid marriage with her consent.

35. The wishes of her father would be, therefore, inconsequential, in law.

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As such, this Court cannot direct further detention of the applicant in the Protection Home and, on the principal issue, it is held that upon a nikah having been performed by a Muslim female, on her own willingness and consent, after attaining puberty, such a marriage would not be void in terms of Section 12 of the Prohibition of Child Marriage Act 2006, though it may be voidable at the instance of the minor ("child") in terms of Section 3 thereof. Therefore, though the present order would amount to modifying the earlier order to that extent however, as already stated earlier, the liberty of an individual cannot be curtailed by this Court against the provisions of law.

38. The issue of the present application not being maintainable, having been filed by a minor would also lose significance in view of the fact that such minor has been held to have performed a nikah) as per her consent, permissible by the personal law which governs the community to which she belongs. As such, since the application only seeks that the minor be restored to the custody of the person she has married by her own consent, she cannot be refused such permission on the technicality of the application not having been moved by respondent No.4, in view of the fact that he is denied access to her in the protection home.

Otherwise also, this order also arises out of a petition seeking a writ of habeas corpus, and the alleged "detenue" not actually having been found to be illegally detained by respondent No.4, her

custody would naturally be returned to him, in case the so called "detenue expresses her wish to go back with him.

39. Still, in view of the fact that the present application (CRM No.930 of 2014) is not accompanied by an affidavit, the presence of the applicant, as also of Respondent No.4, would be necessary. The matter be listed for that limited purpose, on 17.02.2014.

In case the applicant states in Court that she wishes to accompany respondent No.4 to his home and respondent No.4 also states to the effect that he wishes to take her to his home, she would be ordered to be released to his custody immediately thereafter."

A perusal of the above said judgment would show that a coordinate Bench of this Court in the above said judgment had observed that the marriage of a Muslim girl continues to be governed by the personal law of Muslims and has relied upon the Principles of Mohammedan Law by Sir Dinshah Fardunji Mulla moreso Article 195 thereof, and after considering the same, it has been observed that 15 years is the age of puberty of a Muslim female, and on her own willingness and consent, after attaining puberty (15 years of age) can marry a person of her choice and such a marriage would not be void in terms of Section 12 of the Prohibition of Child Marriage Act 2006 and after considering all the aspects, the Coordinate Bench of this Court had further observed that in case she wishes to accompany respondent no.4 therein, then she would be entitled to the same and respondent no.4 in the said case was a person who had married the Muslim girl who was more than 15 years of age but below 18 years of age. The law laid down in the above said judgment would apply to the facts of the present case. To a similar effect, are the judgments of coordinate Benches of this Court in ***Mohd. Samim vs. State of Haryana and others*** reported as ***2019(1) R.C. R.(Criminal) 685*** as well as in ***Kammu vs. State***

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of Haryana and others reported as **2010(4) R.C.R. (Civil) 716.**

Keeping in view the above said facts and circumstances and law laid down in the above said judgments, the present petition is allowed and the Incharge, Ashiana, Sector 16, Panchkula is directed to hand over the custody of the detinue, as mentioned in the head note of the present petition, to the petitioner.

Pending miscellaneous application, if any, stands disposed of in view of the abovesaid order.

(VIKAS BAHL)
JUDGE

September 30, 2022

Davinder Kumar

Whether speaking / reasoned
Whether reportable

Yes/No
Yes/No

सत्यमेव जयते

