

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

W.P.(CRL) 535 of 2010

% Date of Decision: 13th May, 2010.

ASSOCIATION FOR SOCIAL JUSTICE & RESEARCH

..... Petitioner

Through: Mr. Divya Jyoti Jaipuria, Advocate

VERSUS

UNION OF INDIA & OTHERS

..... Respondents

Through: Mr. Pawan Sharma, Standing
Counsel for the State
Mr. Rajan Chaudhary, Advocate for
R-13
Mr. Sunil Kumar, Inspector with Mr.
Baljeet, Sub-Inspector, Crime Branch

CORAM :-

**THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE AJIT BHARIHOKE**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. The Association for Social Justice and Research, the petitioner herein has filed this petition for a direction in the nature of habeas corpus to trace minor child Chandni @ Chandrawati, daughter of Mr. Vijay Pal. It is stated that the said girl is only 11-12 years of age and at this tender age, her parents have married her for consideration to one Mr. Yashpal, resident of Viillage and Post – Baliana who is stated to be 40 years of age. It is further stated that on coming to know about this incident, several civil society groups came up to rescue the child, but failed to trace the girl. The petitioner-Association has, in fact, constituted a fact-finding inquiry. The said team as well as Mahila Panchayat working for the cause of gender justice and equality for women came to know

from the residents of locality that the father of Chandni has married his minor daughter for consideration to one Mr. Yashpal, respondent No.13. It is also alleged in the petition that the respondent No.13 has kept her in hiding.

2. Directions were given to the concerned Police Station to trace and produce the girl. Matter was adjourned from time to time, as in the beginning police authorities were unsuccessful in tracing out the girl, her father, Vijay Pal and her husband, Yashpal. In these circumstances on 04.05.2010, it was direct that the matter be referred to the Crime Branch. Crime Branch succeeded in its effort to trace the girl, who was produced on 11.05.2010. Here we put on record the exemplary efforts made by Mr. Sunil Kumar, Inspector and Mr. Baljeet, Sub-Inspector, Crime Branch. Father of the girl as well as Yashpal, husband of the girl were arrested and produced before the concerned Magistrate who remanded them to judicial custody. They are still in judicial custody.
3. The girl, Chandni was sent to a Children Home, i.e., 'Nirmal Chhaya' from where she was produced in this Court on 11.05.2010. We took up the matter in Chamber and conversed with Chandni. She stated that she was 17 years of age and that she consented to the marriage with Yashpal without any pressure. She denied that she was sold by her father to Yashpal or any money was taken by her father in this behalf. Learned counsel for the State informed us that Chandni was got medically examined and as per the medical report, the age of Chandni was fixed between 16 to 18 years.
4. Since the father of child, Vijay Pal as well as husband of the child were in judicial custody, in order to find a proper and just solution to the entire problem, we directed their presence today.

5. Yashpal has denied having given any money to Vijay Pal and Vijay Pal also denied having received any money from Yashpal. We may point out at this stage that Vijay Pal has six children, viz., five daughters and one son. Chandni, the eldest daughter, as mentioned above, is 17 years of age. On the other hand, Yashpal states that he is 35 years of age and a widower. From his first marriage, he has two daughters, who are 7 and 3 years of age respectively. It was mentioned by Yashpal that having regard to the fact that he has two daughters of adolescent age, in order to ensure that they be brought up in a proper manner, he decided to marry again. Marriage was fixed with Chandni with the intervention of some common friends and relatives. Chandni did not have any education at all. Vijay Pal is a labourer, who states that his earning is about Rs.150 per day. He further stated that because of large family and meager income, he was not in a position to give any education to his children. In these circumstances, he decided to marry his eldest daughter, Chandni to Yashpal.

6. Sociologists even argue that for variety of reasons, child marriages are prevalent in many parts of this country and the reality is more complex than what it seems to be. The surprising thing is that almost all communities where this practice is prevalent are well aware of the fact that marrying child is illegal, nay, it is even punishable under the law. NGOs as well as the Government agencies have been working for decades to root out this evil. Yet, the reality is that the evil continues to survive. Again, sociologists attribute these phenomenon of child marriage to a variety of reasons. The foremost amongst these reasons are poverty, culture, tradition and values based on patriarchal norms.

Other reasons are: low-level of education of girls, lower status

given to the girls and considering them as financial burden and social customs and traditions. In many cases, the mixture of these causes results in the imprisonment of children in marriage without their consent.

7. The present case is a telling example, which proves the sociologists correct.
8. It cannot be disputed that the aforesaid marriage is in violation of provisions of the Prohibition of Child Marriage Act, 2006 inasmuch as Chandni is minor and in below the age of 18 years. At the same time, marriage is not void under civil law. The circumstances under which Chandni is married to Yashpal are narrated above and presumably under these forced circumstances, economic or otherwise, Vijay Pal decided to marry Chandni to Yashpal even when she was less than 18 years. Be as it may, since Vijay Pal and Yashpal are already arrested and FIR is also registered against them, insofar as that aspect is concerned, law will take its own course.
9. The purpose and rationale behind the Prohibition of Child Marriage Act, 2006 is that there should not be a marriage of a child at a tender age as he/she is neither psychologically nor physically fit to get married. There could be various psychological and other implications of such marriage, particularly if the child happens to be a girl. In actuality, child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty. Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising

children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18. Some of the ill-effects of child marriage can be summarized as under:

- (i) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.
- (ii) Young girls who lack status, power and maturity are often subjected to domestic violence, sexual abuse and social isolation.
- (iii) Early marriage almost always deprives girls of their education or meaningful work, which contributes to persistent poverty.
- (iv) Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.
- (v) Getting the girls married at an early age when they are not physically mature, leads to highest rates of maternal and child mortality.

Young mothers face higher risks during pregnancies including complications such as heavy bleeding, fistula, infection, anaemia, and eclampsia which contribute to higher mortality rates of both mother and child. At a young age a girl has not developed fully and her body may strain under the effort of child birth, which can result in obstructed labour and obstetric fistula. Obstetric fistula

can also be caused by the early sexual relations associated with

child marriage, which take place sometimes even before menarche. Child marriage also has considerable implications for the social development of child brides, in terms of low levels of education, poor health and lack of agency and personal autonomy. The Forum on Marriage and the Rights of Women and Girls explains that 'where these elements are linked with gender inequities and biases for the majority of young girls... their socialization which grooms them to be mothers and submissive wives, limits their development to only reproductive roles. A lack of education also means that young brides often lack knowledge about sexual relations, their bodies and reproduction, exacerbated by the cultural silence surrounding these subjects. This denies the girl the ability to make informed decisions about sexual relations, planning a family, and her health, yet another example of their lives in which they have no control. Women who marry early are more likely to suffer abuse and violence, with inevitable psychological as well as physical consequences. Studies indicate that women who marry at young ages are more likely to believe that it is sometimes acceptable for a husband to beat his wife, and are therefore more likely to experience domestic violence themselves. Violent behaviour can take the form of physical harm, psychological attacks, threatening behaviour and forced sexual acts including rape. Abuse is sometimes perpetrated by the husband's family as well as the husband himself, and girls that enter families as a bride often become domestic slaves for the in-laws. Early marriage has also been linked to wife abandonment and increased levels of divorce or separation and child brides also face the risk of being widowed by their husbands who are often considerably older. In these instances, the wife is likely to suffer additional discrimination as in

many cultures divorced, abandoned or widowed women suffer a loss of status, and may be ostracized by society and denied property rights.

10. The Prohibition of Child Marriage Act has been enacted keeping in view the aforesaid considerations in mind.
11. In this backdrop, the dilemma of the Court is as to whom custody of Chandni be entrusted. There have been judgments of this Court handing over the custody of minor girl to the husband to whom with whom she is married. Some of these cases are: (i) **Ravi Kumar Vs. The State & Anr.** [2005 (124) DLT], (ii) **Phoola Devi Vs. The State & Ors.** [2005 VIII AD Delhi 256], (iii) **Manish Singh Vs. State Govt. of NCT & Ors.** [2006 (1) CCC (HC) 208] and (iv) **Sunil Kumar Vs. State NCT of Delhi & Anr.** [2007 (2) LRC 56 (Del) (DB)]. The sum and substance of these authorities is that marriage solemnized in contravention of the age prescribed under Section 5(iii) of the Hindu Marriage Act, i.e., 21 years for male and 18 years for female are neither void nor voidable under Sections 11 and 12 of the Hindu Marriage Act. The only sanction prescribed against such marriages was noticed to be a punishment prescribed under Section 18 of the said Act, which was to the extent of 15 days and a fine of Rs.1,000/-. Furthermore, while permitting the minor girls to reside with their husbands, the Courts also noticed that these girls had come of age of discretion. In all these judgments, Prohibition of Child Marriage Act were not taken note of, which makes the contracting of a marriage by a boy above the age of 18 with a girl less than 18 as a cognizable and non-bailable offence. This aspect was taken note of by a Division Bench of this Court in **Lajja Devi Vs. State** (WP (Crl.) No.338 of 2008) and vide orders date 31.07.2008, the

matter is referred to Full Bench. Operative part of that order reads as under:

“... We are of the view that a question of public importance is involved in the matter which needs consideration by a Full Bench on account of the absence of consideration of all extant statutes:-

- (a) The first reason why *prima facie*, we hesitate to agree with the observations passed by the Division Bench of this Court is on account of the fact that although there may be different definitions of the word “child” with regard to the age of the minor girl given in different enactments by the purpose of each enactment is to be seen. The enactment which is of utmost importance with regard to the child marriage or for that matter the marriage with a minor girl would be the Prohibition of Child Marriage Act, 2006.
- (b) According to Section 2(a) of the Prohibition of Child Marriage Act, 2006, a “child” means a person who, if a male, has not completed twenty-one years of age, and if female, has not completed eighteen years of age.
- (c) Section 12(a) of the said Act makes the marriage of a minor girl who has been taken or enticed out of the keeping of the lawful guardian shall be null and void. The language of Section 12(a) of the said Act is mandatory in nature and does not admit of any reservation. Further it makes the marriage of a child, or a minor girl as null and void. That means the marriage itself is non-existent and the law does not recognize the same. Section 9 of the said Act provides for punishment for a male adult above 18 years of age contracting a child marriage punishable with rigorous imprisonment which may extend to two years or with fine which may extend to Rs. 1 lac or with both.
- (d) The offence carries a punishable which may extend upto 2 years and, therefore, clearly the offence would be bailable and non-cognizable. Despite this, by virtue of the non-obstante clause of the Section 15 of the Act, such offence is a cognizable and non-bailable offence under Cr.P.C. This aspect of the matter has not been previously considered by the Court and accordingly quashing of FIR under Section 363 or in the instant case under Section 363 and 376 would not only be in contravention of law but also against the letter and spirit of the Act by observing that the girl has attained the age of discretion with the reference to Sections 5(iii), 11, 12 and 18 of the Hindu Marriage Act.

11. Accordingly, we are of the opinion that the following questions require to be considered by Larger Bench:

- (1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 years could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?

- (2) Whether a minor can be said to have reached the age of discretion and thereby walk away from the lawful guardianship of her parents and refuse to go in their custody?
- (3) If yes, can she be kept in the protective custody of the State?
- (4) Whether the FIR under Section 363 IPC or even 376 IPC can be quashed on the basis of the statement of such a minor that she has contracted the marriage of her own?
- (5) Whether there may be other presumptions also which may arise?"

12. The Full Bench has yet to answer the questions referred for consideration. In integerrum, the issue is as to what course of action to be adopted in the instant case. It hardly needs to emphasize that we are concerned with the welfare of girl, Chandni, who is minor. Having taken note of the provisions of the Prohibition of Child Marriage Act, 2006, the adverse effects of child marriage and also to the fact that the earlier judgments of this Court where custody of such minor girl was given to the husband are pending reconsideration before the Full Bench, we are of the view that custody of Chandni cannot be given to her husband at this stage.

13. Keeping in view the aforesaid considerations in mind, we had asked the learned counsel for the petitioner as well as learned Standing Counsel for the State to suggest a just solution to the problem to ensure that the girl Chandni, at this age is not subjected to any such pressure. After hearing the counsel for the parties on these aspects, we are of the opinion that in order to ensure that the interest of Chandni shall be duly protected, the following directions are needed to be passed:

- a) Till Chandni attains the age of 18, she shall stay with her parents and not with Yashpal, her husband.

- b) Yashpal shall not consummate the marriage. It would be responsibility of not only Yashpal, but the parents of Chandni shall also ensure this.
- c) *Gauna* ceremony of Chandni shall be performed only after she attains the age of 18 years, i.e., not before 30.06.2011. Neither the parents of Chandni nor the husband, Yashpal will be allowed to perform the aforesaid *Gauna* ceremony without taking the option and consent of Chandni at that time. To put it otherwise, we may make it clear that it is the option of Chandni to accept this marriage or not. In case she does not accept this marriage, it shall be treated as null and void. This choice is given to Chandni under Section 3 of Prohibition of Child Marriage Act.

14. Vijay Pal, Yashpal as well as Premawati, mother of Yashpal have sworn the affidavits accepting the aforesaid terms, which are taken on record. All these persons shall remain bound by the undertaking given in the affidavits.

15. Writ petition is disposed of in the aforesaid terms. We make it clear that the affidavit filed by Yashpal, Vijay Pal as well as Premawati would be without prejudice to the rights and contentions of the parties.

(A.K. SIKRI)
JUDGE

(AJIT BHARIHOKE)
JUDGE

MAY 13, 2010.

Pmc/skb