

Muslim Marriages Not Excluded From POCSO Act, Physical Relationship With Minor An Offence Irrespective Of Validity Of Marriage: Kerala High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

BECHU KURIAN THOMAS, J.

B.A. No. 8216 of 2022; 18th November, 2022

KHALEDUR RAHMAN versus STATE OF KERALA

Petitioner / Accused by Advs. N. Anand, Bijith S. Khan, Rajesh O.N.; Respondent / State / Complainant by K.A. Noushad, Public Prosecutor

ORDER

Petitioner is indicted for the offences of kidnapping and rape of a minor and seeks reprieve from detention. He claims that he had validly married the victim under the personal laws applicable to them. Despite the victim being a minor, petitioner urges that he be granted regular bail as the prosecution is inherently illegal.

2. Petitioner is facing an investigation into the alleged commission of offences punishable under sections 366, 376(2) (m) and 376(3) of the Indian Penal Code, 1860 and under sections 5(j)((ii), 5(i) and section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') in Crime No.1604 of 2022 of Thiruvalla Police Station.

3. According to the prosecution, the accused had abducted the minor victim, who is a native of West Bengal, and committed repeated penetrative sexual assaults during the period before 31.08.2022, due to which the victim became pregnant and thereby, the accused committed the offences alleged.

4. The incident came to light pursuant to an intimation received from the Family Health Centre, Kaviyoor when the victim had gone there for an injection for her pregnancy. On noticing the victim's age as 16 from her Aadhaar Card, the Medical Officer immediately informed the police on 31.08.2022.

5. Sri.N.Anand, the learned counsel for the petitioner, contended, with elan, that the allegations are based on a wrong notion as the victim is petitioner's wife, and they had married each other in accordance with the Mahomedan law on 14-03-2021. The learned counsel contended that since Mahomedan law permits marriage of girls below 18 years and such marriages being legally valid, he cannot even be prosecuted for the offence of rape or those under the POCSO Act. Adv.Anand further contended that the victim is presently residing with the parents of the accused and, therefore, no purpose would be served by the continued detention. Learned counsel also contended that petitioner was arrested on 01.09.2022 while they were living a happy married life and also that his wife needs his presence and support during the time of her pregnancy. The learned counsel also argued that in any event, considering the young age of the petitioner and the existing marital relationship between them, continued detention is neither essential nor does it serve any purpose.

6. Sri.K.A.Noushad, the learned Public Prosecutor, opposed the application and contended that the date of birth of the victim is 16.12.2006, and hence she is, at present, less than 16 years of age. It was further contended that during the course of the investigation, it was revealed that the victim was abducted by the petitioner from her parents and that the alleged marriage is unknown to her parents. The learned Public Prosecutor further submitted that even if it is assumed that the marriage had

taken place, the same is not a justifiable reason to ignore the provisions of the POCSO Act as the said Act will prevail over the Mahomedan law. It was also submitted that the investigation, which is still continuing, has not unearthed any convincing evidence even to prove the alleged marriage.

7. I have considered the rival contentions.

8. Petitioner and the victim are both alleged to be Muslims. While the petitioner is 31 years in age, the victim is only 15 years and 8 months on the date of registration of the FIR (date of birth is 16.12.2006). The crime was registered after intimation was received from the doctor whom the victim and the petitioner had approached for a checkup on her pregnancy. Petitioner was arrested on 01-09-2022 and has been in detention since then. It is alleged that their marriage took place on 14.03.2021 in West Bengal as per Islamic rites and customs under Mahomedan law and was registered under the West Bengal Act XXVI of 1961. The age of the victim at the time of marriage was, therefore, only 14 years and 4 months.

9. Muslims are governed by their personal laws in the matter of marriage. Article 251 in the book 'Principles of Mahomedan Law' by Dinshaw F. Mulla states as below:

"S.251. 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 of 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"

10. The Muslim Personal Law (Shariat) Application Act, 1937, statutorily recognizes that in all questions relating to marriage, the rule of decision shall be the Muslim Personal Law (Shariat).

11. However, after the coming into force of the Prohibition of Child Marriage Act, 2006, it is questionable whether the said personal law will prevail over the special statute relating to marriages. Under section 3 of the said Act, a child marriage shall be voidable at the option of the contracting party, who is a child. But section 12 makes a child marriage void in certain circumstances. For the purpose of easier comprehension, section 12 is extracted as below.

"S.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."

12. In the instant case, since the investigating officer alleges that the victim was enticed by the accused without the knowledge of her parents and the age of victim being only just above 14 years at the time of the alleged marriage, the existence of a valid marriage, even according to Muslim Personal Law, is debatable.

13. However, the petitioner is arrested for the offences under the POCSO Act as well as the IPC. The POCSO Act is a special statute enacted specifically for the

protection of children from sexual offences. Sexual exploitation of every nature against a child is treated as an offence. Marriage is not excluded from the sweep of the statute.

14. In this context, it is relevant to refer to the legal maxim '*Generalia Specialibus Non Derogant*' - a special law will prevail over the general law and '*Specialia Generalibus Derogant*' special things derogate from general things. The said legal principle has been deployed for resolving conflicts between two different Acts. Reference to the decisions in **J.K.Cotton Spinning and Weaving Mills Co. Ltd v. State of Uttar Pradesh and Others** (AIR 1961 SC 1170) and **P.V.Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda and Another** [(2002) 5 SCC 548] will be apposite. In the latter of the above decisions, it was observed that:

"When the Courts are confronted with such a situation, the Courts' approach should be "to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific".

15. Further, it is trite law that when the provisions of a statute are repugnant to, or contrary to the customary law or personal law, in the absence of any specific exclusion of the said customary or personal law from the statutory provisions, the statute will prevail, and the personal law or the customary law shall stand abrogated to the extent of the inconsistency. On an appreciation of the above principles, it can prima facie be held, for the purpose of this bail application, that the very marriage allegedly entered into between the petitioner and the victim cannot be relied upon as a legally valid marriage.

16. As mentioned earlier, the POCSO Act is a special enactment. The advances and progress achieved in societal thinking have resulted in the enactment. This special statute was enacted based on principles arising out of jurisprudence relating to child abuse. The child abuse jurisprudence evolved out of the need to protect the vulnerable, the gullible and the innocent child. The legislative intent to protect the child from sexual predators hovering over them under different labels, including that of marriage, is explicitly evident from the statutory provisions. Child marriages have been regarded as a human right violation. A child marriage compromises the growth of the child to her full potential. It is the bane of society. The legislative intent reflected through the POCSO Act is to prohibit physical relationships with a child, even under the cover of marriage. This is the intent of society, too, for a statute is, as is often said, the expression or reflection of the will of the people.

17. In accomplishment of the said intent, the POCSO Act has defined the word 'child' in section 2(d) as 'any person below the age of 18 years'. To put at rest any doubts over the applicability of the Act, section 42A has also been incorporated, which reads as below:

"S.42A. Act not in derogation of any other law.- *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

18. The aforesaid section categorically asserts that in the event of any inconsistency with provisions of any other law, the POCSO Act will prevail. Personal Laws and customary laws are both laws. Section 42A intends to override such laws also. Therefore it cannot be gainsaid that after the coming into force of the POCSO Act, penetrative sexual intercourse with a child, even if it is under the guise of marriage, is an offence.

19. In the decisions in **Javed v. State of Haryana** (2022 LiveLaw (PH) 276), the Punjab & Haryana High Court and in **Fija and Another v. State Govt. of NCT of Delhi and Others** (2022 LiveLaw (Del) 793), the Delhi High Court, had observed that a Muslim girl on attaining 15 years is entitled to marry a person of her choice. Further, in **Mohammad Waseem Ahamad v. State** (2022 LiveLaw (Kar) 436), the Karnataka High Court quashed the criminal case against the accused, who had married a 17 year old girl as per Mahomedan law. With respect to the learned Judges, I am unable to agree to the proposition laid down in those decisions that an offence under the POCSO Act will not get attracted against a Muslim marrying a minor.

20. Adv. Anand referred to the decision of the House of Lords in **Gillick v. West Norfolk and Wisbech Area Health Authority** [(1985) 3 All ER 402], and contended that the victim in the present case has the intellectual ability to give consent and was under no compulsion or any sexual exploitation to attract the POSCO Act. Though the argument is attractive, I am unable to accede to the proposition canvassed by him. In **Gillick's** case (supra), the House of Lords was considering a case where doctors were authorised by virtue of a circular issued by the Department of Health Services to prescribe contraceptives to girls below the age of 16 as long as they were protecting the girl against the harmful effects of sexual intercourse. A father who had five daughters below the age of 16 challenged the circular and also sought for a declaration that such advice cannot be given without the parent's consent. After referring to the child's rights, the Court found the circular valid. The said decision has no application to the facts of the present case as we are governed by the POCSO Act, which defines a child as below the age of 18 and does not provide any leeway on the age of majority.

21. In this context, it is appropriate to mention the decision in **Sri. Aleem Pasha v. The State of Karnataka** (Crl. R.P No. 7295/2022) . In the said judgment, the Karnataka High Court granted bail to an accused who had married a 17-year-old Muslim girl and was booked for the offences under the POCSO Act. A reading of the above judgment reveals that the learned Single Judge had observed that the POCSO Act will prevail over the personal law. However, on the facts of the said case, the court felt it appropriate to grant bail, especially considering the age of the victim, which was more than 17 years.

22. In view of the above discussion, I am of the considered view that marriage between Muslims under personal law is not excluded from the sweep of the POCSO Act. If one of the parties to the marriage is a minor, irrespective of the validity or otherwise of the marriage, offences under the POCSO Act will apply.

23. In the instant case, apart from the allegation of abduction for the purpose of marriage, the victim is still less than 16 years. She was brought to Kerala from West Bengal and that too, allegedly behind the back of her parents. This Court cannot be oblivious to the above circumstances. The investigation is also stated to be still continuing. Reckoning the aforesaid circumstances, I am of the view that this is not a fit case where the petitioner can be released on bail at this juncture.

Accordingly, this bail application is dismissed.