(2011) 04 MAD CK 0417

Madras High Court (Madurai Bench)

Case No: H.C.P. (MD) No. 190 of 2011

G. Saravanan	APPELLANT
Vs	
The Commissioner of Police, The Inspector of Police and P. Chandrasekar	RESPONDENT

Date of Decision: April 6, 2011

Acts Referred:

- Guardians and Wards Act, 1890 - Section 17, 19
- Hindu Marriage Act, 1955 - Section 11, 12, 13(2)(4), 18, 5
- Prohibition of Child Marriage Act, 2006 - Section 12, 3

Hon'ble Judges: S. Rajeswaranan, J; G.M. Akbar Ali, J

Bench: Division Bench

Advocate: B. Janath Ahmed, for the Appellant; P.N. Pandidurai, Assistant Public Prosecutor for R1 and R2 and Ilanchezian, for R3, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Rajeswaran, J.
This Habeas Corpus Petition has been filed by the Petitioner to trace his wife Lakshmi Priya, aged about 18 years.

2. The case of the Petitioner is that he has married the detenue on 09.01.2011 at Samayapuram Mariamman Temple and they were living peacefully at Sangliandapuram, Trichy. On 24.01.2011, when they proceeded to attend a function at Kumbakonam, the third Respondent/father of the detenue/his wife, came along with a few persons and threatened them with dire consequences. Immediately they rushed to the Kumbakonam All Women Police Station and lodged a complaint. On the same day i.e., 24.01.2011, the Petitioner/husband received a phone call from second Respondent/Inspector of Police, Trichy stating that his brother was confined

to the Police Station and he should came to Police Station with his wife. The Petitioner and his wife rushed to Polise Station and there all the persons were present and Assistant Commissioner of Police threatened him to leave his wife and get away. Fearing for his life, his brother and the Petitioner came out of the Police Station and after consulting their elders, they went back to the Police Station the next day and enquired second Respondent about his wife. The second Respondent informed the Petitioner that his wife was taken away by her family members. On 27.01.2011, his wife Lakshmi Priya/the detenue herein contacted him over phone and informed him that she was kept in illegal custody by her parents. On the same day the Petitioner gave a complaint to the second Respondent. Since the complaint given to the second Respondent has not been seriously investigated into, the above Habeas Corpus Petition has been filed.

3. On notice, the third Respondent/father of the detenue, brought the detenue to court today. The Petitioner is also present before this Court. The respective counsel are also present.

4. The learned Counsel appearing for the third Respondent/father of the detenue would submit that the detenue is a minor girl and as a father, he is having the legal and statutory custody.

5. To ascertain the truth, we interacted with the detenue/Lakshmi Priya who has clearly stated that after marrying the peititoner on 09.01.2011, she lived with him as his wife for more than 15 days. But, she has been forcibly taken by her parents against her wish and she is compelled to live in her native place, a village near Bangalore. She asserts that she would like to live only with the Petitioner/her husband and she prays for setting her at liberty to go with the Petitioner/her husband. When we asked the Petitioner, he also claims that he has married the detenue and lived with her for more than 15 days as her husband. His adoptive mother, an elderly woman, who is present before this Court also, admits that they are married and they were living together as husband and wife in her house. She also leads for appropriate orders to be passed so that both could be united and made to live as husband and wife.

6. The primary question that arises for consideration in this case is, whether the detenue, a minor girl could be set at liberty to go along with her husband/the Petitioner herein?

7. In the instant case, as the parties are Hindus, the validity of the marriage is to be considered in the context of Section 5 of the Hindu Marriage Act (herein after referred to as HMA).

8. Section 5 of the HMA sets out the conditions for a Hindu Marriage, one of them, Clause (iii) being the stipulation as to age of the bride-groom and the bride.

9. According to Section 5.3 of HMA, the bridegroom has to complete the age of 21 years and the bride the age of 18 years. But, does this mean that a marriage where this twin condition as to age is violated, would be void or voidable? Section 11 of HMA deals with the void marriages and a perusal of that Section would show that a marriage solemnised after the commencement of this Act, shall be null and void on a petition presented by either party thereto against the other party, is declared by a decree of nullity, if it contravenes any one of the conditions specified in Clauses (i), (iv), (v) of Section 5. Clause (iii) of Section 5 is conspicuously missing in Section 11. Thus, a Hindu marriage solemnised in contravention of Clause (iii) of Section 5 of the HMA cannot be regarded as void or invalid marriage. Therefore the Petitioner''s marriage with the detenue is not a void marriage.

10. Now let us consider whether it is a voidable marriage u/s 12 of HMA. A perusal of Section 12 in its entirety makes it very clear that the violation of sub Clause (iii) of Section 5 is conspicuously absent in Section 12 also, which means, the Petitioner''s marriage with the detenue is also not voidable.

11. In this connection, it is useful to refer to Section 18 of the HMA, which prescribes punishment for contravention of certain conditions of Hindu marriage. It specified that violation of conditions psecified in Clauses (iii), (iv), (v) of Section 5 is punishable and in particular it contemplates a simple imprisonment which may extend to 15 days or with fine which may extend toRs.1000/-or both in the case of violation of condition specified in Clause (iii) of Section 5. Therefore, it is clear that the marriages conducted in contravention of the age stipulation is no longer a void or voidable or invalid marriage and it is punishable u/s 18 of the Hindu Marriage Act.

12. Further Section 13(2)(iv) of HMA enables a wife to petition for desolution of her marriage on the ground that he marriage was solemnised before she attained the age of 15 years and she has repudiated the marriage after attaining that age, but before attaining the age of 18 years. Thus, it shows that even a marriage of a minor girl is regarded as valid one and can only be dissolved on her petition provided she repudiates the marriage between the time she is 15 years old and 18 years old.

13. Further, in respect of the provisions of The Prohibition of Child Marriage Act, 2006, a specific provision deals with void and voidable marriage. Section 12 deals with the circumstances, under which, the marriage of a minor child would be void. The minor child refers to a person under 18 years of age.

14. Section 12 of the Prohibition of Child Marriage Act, 2006 reads as under:

12. Marriage of a minor child to be void in certain circumstance. 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 immral purposes, such marriage shall be null and void.

15. A Hindu marriage which is not a void marriage under HMA would continue to be such, provided the provisions of Section 12 of the Prohibition of Child Marriage Act, 2006 are not attracted. In the case in hand, none of the circumstances specified in Section 12 arises.

16. Therefore, the marriage between these two is not void or voidable or invalid and it would also be unaffected by the provisions of the Prohibition of Child Marriage Act, 2006.

17. Now let us consider the voidability of marriage u/s 3 of The Prohibition of Child Marriage Act, 2006 also. Section 3 is extracted below for better appreciation.

3. Child marriages to be voidable at the option of

contracting party being a child. (1) Every child marriage, whether solemnised before or after the commencement of the Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage;

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the Petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, WP(CRL) 1003/10 Page 12 of 24 or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this Section shall be

passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

18. The above provision makes it very clear that irrespective of whether the child marriage is voidable or not under Personal Law, makes every child marriage voidable at the option of a party to the marriage, who was a child at the time of marriage. The important aspect of this provision is that a petition for annulling a child marriage by a decree of nullity can be filed only by a party to the marriage, who was a child at the time of marriage. Nobody other than a party to the marriage can petition for annulment of the marriage.

19. In the instant case, the marriage of the detenue with the Petitioner is neither void nor voidable nor invalid undr both Acts, HMA and the Prohibition of Child Marriage Act, 2006, as no petition was filed u/s 3 of Prohibition of Child Marriage Act, 2006 by the detenue who is still a minor. Excepting the detenue, nobody has the locus-standi to question the validity or otherwise of the marriage with the Petitioner. In this case, not only she does not want to exercise this right conferred on her u/s 3 of Prohibition of Child Marriage Act but also she wants to reinforce and strengthen, consolidate and preserve their marital bond by living together as she married the Petitioner on her own will and volition.

20. Now, the question of custody calls for discussion. The detenue is a minor. She does not want to go to any home. She has also refused to live with her parents for fear of her life. She wants to go with her husband/the Petitioner and resume her married life with him. In fact, her case is that she was separated from her husband and taken to the native place by her parents and kept her in illegal custody against her wish and desire. She was not allowed to even contact any one and her husband was also not able to contact her. Therefore, she prefers to live with her husband where she will be looked after with love and affection. From this it is very clear that the detenue is interested in going with her husband and considering the settled law that it is the welfare of the minor which is the paramount consideration of this Court, she has to be allowed to join her husband provided there is no bar for her husband to act as her guardian.

21. In this connection, Section 17 of the Guardian and Wards Act is also relevant and Section 17 reads as under:

17. Matters to be considered by the Court in appointing guardian. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minore, the Court shall have regard the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relatiions of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.***

(4) The Court shall appoint or declare any person to be a guardian against his will.

22. The above provision makes it very clear that what is relevant is the welfare of the minor and what is very significant as if the minor is old enough to form an intelligent preference, then the Court could consider that preference. Therefore the wishes of a minor need to be seriously considered by the Court, where the minor is

old enough. In the present case, the detenue was born on 17.11.1994 as seen from her birth certificate which means she is above 16 years of age. Hence her preference should definitely be considered in the interest of her welfare.

23. Section 19(a) of the Guardians and Wards Act is also relevant to be considered in this case, and accoridng to Section 19(a), only when the husband is unfit to be a guardian of a married female then only the other persons could be considered. Here the Petitioner/husabnd is not only a major but he has also not suffered any disqualification to act as her guardian. In fact he is the natural guardian of the detenue as per provisions of Hindu Minority and Guardianship Act, 1956.

24. Thus, a compendus reading of the provisions of these Acts would make it clear that a natural guardian of a minor Hindu girl who is married, is her husband. Furthermore, no guardian of the person of a minor, married female, can be appointed when her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an independent preference are to be considered by this Court. Most importantly the welfare of the minor is to be the paramount consideration.

25. In the instant case, the detenue is a minor girl who is married to the Petitioner. Her natural guardian is no longer her father, but, her husband and he shall be a guardian of the minor wife. The detenue has refused to live with her parents and has categorically expressed her desire and wish to live with her husband/the Petitioner. Sending her to a home against her will is also not in the interest of the welfare of the minor. If she is sent to the home against her will, it is tantamount to her detention against her will and it would be violative of her life guaranteed u/s 21 of the Constitution of India.

26. Therefore, considering the detenue''s welfare which is the paramount importance, we are of the view that her welfare would be best served if she has to live with her husband, who has promised to give her the love and affection. Further, she would have support of her adoptive mother-in-law who has already welcomed her. Sending her to her parents place is not advisable as the minor herself says that her liberty is curtailed and her movements are restricted there.

27. Therefore, considering the above facts and circumstances and with particular references to laws on the subject, we are of the considered opinion that the interest of the minor would be best served if she is set at liberty to go and live with her husband/the Petitioner. Accordingly, the H.C.P. is allowed setting the detenue at liberty and permitting her to go with her husband.