

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Misc. Application No.124 of 2023

Date	Order with signature of Judge
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1. For order on office objection at 'A'
2. For hearing of main case
3. For hearing of MA No.2192/2023

20.11.2023

Mr. Bhagwan Das Bheel advocate for the applicant
Mr. Talib Ali Memon, Assistant PG
Mr. Muhammad Ashraf Samoo advocate for respondent No.4 alongwith
respondent No.4

Through this Criminal Miscellaneous Application under Section 561-A Cr. P.C, the applicant Mst. Sakina has assailed the legality of the order dated 14.12.2022 passed by the learned 2nd Judicial Magistrate Malir Karachi whereby direction was issued to the Investigating officer to ascertain the age of the applicant.

2. Learned counsel for the applicant submits that the Investigating Officer recommended the FIR No. 241 of 2022 registered for offenses under Section 365-B / 34 PPC of PS Memon goth Malir Karachi under C Class, however, the learned Magistrate has sought a determination of the age of the applicant, which was/is not required for, as she has already contacted free will marriage with Irfan Ahmed son of Noor Hassan after executing the affidavit of free will and Nikhanama, however, her father lodged false FIR for her alleged abduction. He has further contended that her spouse filed C.P. No. 5108 of 2022 before this Court whereby protection was granted to him vide order dated 02.09.2022, consequently Investigating Officer after recording 161 Cr. P.C. statement of the applicant disposed of the FIR under C Class as such the aforesaid petition was disposed of vide order dated 15.09.2022. He next contended that in compliance with the direction contained in the order dated 15.09.2022, a report was submitted before the learned Magistrate, who without assigning reason disagreed with the report submitted by the Investigating Officer and erroneously directed for Medical examination of the petitioner to determine her age. Per learned counsel as per the medical report (available on page 33 of the Court file), the applicant has given birth to a child in such a situation question of determination of age is irrelevant and cannot be considered under the garb of false FIR lodged by her father against

her husband. He prayed for allowing the instant Criminal Miscellaneous Application.

3. Learned counsel for respondent No.4, has opposed the Criminal Miscellaneous Application and referred to the statement dated 20.11.2023 coupled with certain documents and argued that the applicant is underage and cannot perform Nikah, therefore the offense has been committed under the Sindh Child Restraint Marriage Act 2014. learned counsel for the respondent has emphasized that marriage of children under the age of 18 is unlawful and the marriage contract is void *ab initio*. He added that a girl below the age of 16 was/is married in violation of the Act 2013. He argued that the law prohibits sexual intercourse with a child under the age of 16 and even if a child was/is to consent to engage in sexual intercourse, the action of the accused would still constitute the offense and would be punishable under the Act 2013 read with Pakistan Penal Code. He has further contended that under Sections 3 & 4 of the Sindh Child Marriage Restraint Act, it is a cognizable offense. Learned counsel asserted that the Sindh Child Marriage Restraint Act 2013 is a valid law and that section 2(a) of the Act is in line with the Islamic teachings of protecting the rights of children and ensuring their well-being. Per learned counsel setting a minimum age limit provides a reasonable period for girls to complete basic education at least, which normally helps in developing mental maturity in a person as such no protection could be given to the alleged couple. He prayed for the dismissal of the instant Criminal Miscellaneous Application.

4. I have heard learned counsel for the parties and perused the record with his assistance.

5. So far as the question raised by the learned counsel for respondent No.4 that under The Sindh Child Marriage Restraint Act 2014, the purported marriage of applicant Mst. Sakina with Irfan Ahmed son of Noor Hassan is illegal on the plea that she has not attained the age of 18 years, suffice it to say that the Dissolution of Muslim Marriages Act 1939 recognizes such age as sixteen years (which earlier was 15 years but was substituted as sixteen years by the Muslim Family Laws Ordinance, 1961 (VIII of 1961), which finds a place as Section 13 of the Muslim Family Law Ordinance, 1961 and reads as under:-

(13. Amendment of the dissolution of Muslim Marriage Act, 1939 (VIII of 1939).In the Dissolution of Muslim Marriage Act, 1939 (VIII of 1939) in section 2:-

1. After clause (ii) the following new clause (ii-a) shall be inserted, namely:-

“(ii-a) that the husband has taken any additional wife...

(b) In clause (vii), for the word 'fifteen' the word 'sixteen' shall be substituted)

6. Further, per Section 271 and 272 of Mulla's Principles of Muhammadan Law a marriage of a minor (who has not attained puberty) is not invalid for the simple reason that it was brought about by the father or grand-father and continues to be valid unless same is repudiated by that girl before attaining age of 18 years. Therefore, such act of the father and grandfather is protected by Muslim Laws unless the same is established or proved to be in manifest disadvantage of the minor. Besides, Section 273 of the Mulla's Principles of Muhammadan Law, provides that the marriage brought about by other guardians is also not *invalid* unless she, resorted to her operation to repudiate the marriage on attaining puberty.

7. At this juncture, it would be significant to refer to the case of Mauj Ali v. Syed Safder Hussain (1970 SCMR 437), wherein the Child Marriage Restraint Act 1929 was an issue while deciding such controversy the Supreme Court held as under:

"It is not disputed that Mst. Musarrat has attained the age of puberty and she had married with respondent No.1 of her own free will. Such a marriage is valid according to Muhammadan Law. It was urged that such marriage is invalid under the Child Marriage Restraint Act and, therefore, it should not have been recognized by the High Court. This contention also has no force. Since the marriage is valid under the Muhammadan Law, respondent No.1, is the guardian of Mst. Musarrat and the High Court was perfectly justified in allowing her to go with her husband. We are satisfied that substantial justice has been done in this case. We, therefore, do not consider this as a fit case to interfere in our special jurisdiction."

8. There can be no denial to the fact that the 'event of the marriage' is always an event of honor of family particularly, when it is being solemnized without an attempt to keep it secret, therefore, all authorities, otherwise, are entitled to question the validity thereof, should strictly act keeping this aspect in mind and should not act in a manner prejudicial to the honor of such family or girl. The authority should try to first satisfy itself about the genuineness of the information and then decide whether to proceed or otherwise because if at the end of the day, the information is found false or causeless there would be nothing to compensate the loss, sustained by the family complained against. However, in terms of the statement made by the applicant before this Court in C.P. No. D-5108 of 2022, no further action is required to be taken against the couple and due protection shall be provided to them accordingly as the parties are at daggers drawn.

9. Primarily, this is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes; if the parents of the

boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate for acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. I, therefore, direct that the administration/police authorities will see, if any boy or girl who is major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is neither harassed by anyone nor subjected to threats or acts of violence and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such person(s) as provided by law. However, the above observation is without prejudice to the legal rights of the parties, arising out of the marriage of the couple, if any, pending before the competent court of law.

10. In view of the above, this Criminal Miscellaneous Application having served its purpose is disposed of with a direction to the concerned police to provide legal protection to the couple as and when they approach for such protection, in the meanwhile no further action is required against them and no harassment shall be caused to the couple by the family of the private respondent No.4 at any cost. Consequently, the impugned order 14.12.2022 passed by the learned 2nd Judicial Magistrate Malir Karachi is set aside as the case has already been recommended under C Class in terms of the order dated 15.09.2022 passed by this Court in C.P. No. D-5108 of 2022. Let a copy of this order be forwarded to Chief Secretary Sindh & IGP Sindh for information and compliance.

J U D G E