

ORDER SHEET
IN THE HIGH COURT OF SINDH
CIRCUIT COURT MIRPURKHAS

Constitutional Petition No.D-870 of 2024

(Mst. Arshana & another Vs. Province of Sindh & others)

DATE	ORDER WITH SIGNATURE OF JUDGE
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Before
Adnan-ul-Karim Memon, J
Amjad Ali Bohio, J

Date of hearing and Order: 12.08.2024

Mr. Sajjad Ali Laghari, advocate a/w petitioners.
Mr. Muhammad Yaqoob, advocate for respondent No.04
Mr. Dhani Bakhsh Mari, Assistant P.G Sindh a/w I.O of PS
Choutiayaroon.

ORDER

Adnan-ul-Karim Memon, J. Petitioners Mst. Arshana and Ali Arzan have filed this petition under Article 199 of The Constitution of the Islamic Republic of Pakistan, seeking protection against the highhandedness of private respondents, who in connivance with the official respondents have lodged FIR No.29/2024 under section 365-B, 34 PPC read with section 3 & 4 of Child Marriage Restraint Act, 2013 at P.S Chotiaryoon.

2. Petitioner No.1 is present in Court and states that she has contracted marriage with Petitioner No.2 with her free will and consent. The Investigating Officer is present in Court and states that he has recorded the statement of the petitioner No.01 and such report shall be placed before the learned Magistrate for appropriate order.

3. Learned counsel for the petitioners, has submitted that the petitioners have solemnized marriage with each other according to Muslim Rites and Custom. Learned counsel has submitted that the petitioners have solemnized marriage with each other according to Muslim Rites and Custom. He added that an adult Muslim female was/is entitled to marry any man of her own free will without having to obtain the consent of her wali, or guardian; that a Muslim female, on reaching the age of 18 years, was not required to seek the permission of her guardian or father to enter into a valid contract of nikah, or marriage, and that an attestation by the couple was sufficient proof of marriage. As per learned counsel, Islam has already empowered women to exercise their free will while they are getting married. He argued that these are the tactics of our male-dominated society to suppress women, either in the name of religion or the deep-rooted so-called traditions of

society. He argued that Marriage is a bilateral agreement and not a multilateral one, and one for which the willingness of two individuals to enter into that very contract is essential, while the approval of other members of the family is of secondary importance. He argued that the Supreme Court ruling on the subject issue is available. He prayed for allowing the petition as prayed.

4. At this stage, the advocate representing the private respondent has referred to the objections and submitted that petitioner No.01 is minor born on 02-07-2007 aged about 16 years and cannot contract marriage with petitioner No.02, which is an offence under the Sindh Child Marriage Restraint Act, 2014. He 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, as discussed supra. He argued that law prohibits the sexual intercourse with a child under the age of 16 years and even if a child was/is to consent to engage in sexual intercourse, the action of the accused would still constitute the offence and would be punishable under the Act r/w Pakistan Penal Code. He has further contended that under sections 3 & 4 of the Act is a cognizable offence. He added that the Act is valid law and in line with the Islamic teachings. 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 dismissal of the instant petition.

5. I have heard learned counsel for the parties present in Court as well as learned A.A.G on the subject point of law.

6. 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 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 to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not 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 persons as provided by law. However, the above observation is without prejudice to the legal rights of the parties, if any, pending before the competent court of law. So far as the issue of underage is concerned the same

shall be taken care of by the competent court of law if approached by the aggrieved party as we will not travel into that controversy at this stage.

7. So far as the question raised by the learned counsel for the private respondent that under the Act, the purported marriage of the petitioner No.01 with Ali Arzan is illegal on the plea that she has not attained the age of 18 years, suffice it to say that the Dissolution of Muslim Marriage Act 1939 recognizes such age 16 years, which was earlier 15 years, but was substituted as 16 years by the Muslim Family Laws Ordinance 1961. Further, per section 271 and 272 of Mulla's Principle of Muhammadan Law, a marriage of a minor, who has not attained the puberty is not invalid for the simple reason that it was brought about by the father or grand father and continued to be valid unless same is repudiated by that girl before attaining the age of 18 years. Before 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 Mulla's principle of Muhammadan Law, provides that marriage brought about by the Guardian is also not invalid unless she resorted to her operation to repudiate the marriage on attaining puberty. At this juncture, it would be significant to refer to the case of *Mouj Ali Vs. Syed Safdar Hussain* [1970 SCMR 437], where the Child Marriage Restraint Act 1929 was an issue. There can be no denial to the fact that the event of the marriage is always an event of honour of family is 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 honour of the family or girl. The authority should try to first satisfy 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 petitioner No.01 before this Court 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.

8. In view of the above, the petitioners are at liberty to live together and no person shall be permitted to interfere in their peaceful living. In case any disturbance is caused in the peaceful living of the petitioners, the petitioners shall approach the concerned Senior Superintendent of Police or Superintendent of Police with a copy of this order, who shall provide immediate protection to the petitioners. So far as the issue of underage marriage is concerned, this aspect can

be looked into by the competent Court, if approached by the aggrieved party, keeping in view the observations recorded hereinabove.

9. In view of the above, this petition has served its purpose. Accordingly, the instant petition is disposed of in terms of statement of the Petitioner No.01 recorded by the Investigating Officer. In the meanwhile, no harassment shall be caused to the petitioners, as well as no arrest shall be made in the subject crime.

10. The instant petition is disposed of along with the pending application.

JUDGE

JUDGE

Ali Sher