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HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-855-2021
Date of decision:26.08.2021

Yogesh Kumar.....Appellant

V/s.

Priya .....Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ARUN MONGA

Present: Ms. Gitanjali Chhabra, Advocate for the appellant.

Mr. Raman B.Garg, Advocate for the respondent.

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Ritu Bahri, J. (Oral).

The appellant as well as respondent are aggrieved of order dated 12.01.2021 whereby the learned Principal Judge, Family Court, District Ludhiana has dismissed the petition filed under Section 13-B of Hindu Marriage Act, 1955.

The brief facts of the present case are that the marriage between the parties was solemnized on 27.02.2009 as per Hindu rites and ceremonies. At the time of marriage i.e. on 27.02.2009, the appellant (husband) was major being of the age of 23 years, 5 months and 10 days because his date of birth was 17.09.1985 as per Aadhar Card (Mark-B). Whereas the respondent (wife) was of the age of 17 years, 6 months and 8 days on the date of marriage i.e. on 27.02.2009 because her date of birth was 19.08.1991 as per Aadhar Card (Mark-A). Both the parties continued to live together and cohabited as husband and wife till 31.08.2017. Out of this wedlock, a male child namely Manas was born on 31.01.2010, who has been living with the appellant (father) since 31.08.2017.

The grievance of the parties is that they had filed a joint petition under Section 13-B of the Hindu Marriage Act, 1955 for dissolution of marriage by way of decree of divorce by mutual consent before the learned Family Court on 22.06.2020. However, the learned Family Court dismissed their joint petition vide judgment and decree dated 12.01.2021 by observing that the marriage of the parties was not a valid marriage as the respondent (wife) had not completed the age of 18 years as per the mandate of Section 5(iii) of the Hindu Marriage Act, 1955 vide which the parties were required to fulfill the basic condition of the said Section.

The Family Court had referred to a judgment passed by the Madras High Court in ***Prema Kumari Vs. M. Palani***, 2013 (6) RCR (Civil) 2953 and held that parties were required to get their marriage nullified as per Section 13(2)(iv) of the Hindu Marriage Act.

Heard learned counsel for the parties and perused the case file.

The above said judgment is not applicable to the facts of the present case. Section 13(2)(iv) is reproduced as under:-

> 13-(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-
> (iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

The girl who has attained 15 years of age and has got married can seek dissolution of marriage before she attains the age of 18 years by filing a petition under Section 13(2)(iv) of the Hindu Marriage Act.

In the facts of the present case, the marriage of Yogesh Kumar was solemnized on 27.02.2009 and the appellant (husband) was major being the age of 23 years, 5 months and 10 days being his date of birth as

17.09.1985 as per Aadhar Card (Mark-B) and the respondent (wife) was of the age of 17 years, 6 months and 8 days being her date of birth as 19.08.1991 as per Aadhar Card (Mark-A). The wife was not 15 years of age and could not invoke the provisions of Section 13(2)(iv) of the Hindu Marriage Act. Had she been 15 years of age, she could have invoked the provisions only before she attains the age of 18. In the present case, after marriage both the parties continued to live together till 31.08.2017. The respondent (wife) had crossed the age of 18 years in the year 2010 itself. Hence, the Family Court has wrongly dismissed the petition by relying on ***Prema Kumari's case (supra)***.

Reference at this stage can be made to a Full Bench judgment of Delhi High Court in ***Court on its own Motion (Lajja Devi) Vs. State***, 2012 (4) R.C.R. (Civil) 821 where the girl eloped with the boy and married him. A case under Sections 363 and 376 IPC was registered against the accused husband and the issue was whether FIR can be quashed on the basis of the statement of such a minor that she had contracted the marriage on her own. While referring to Sections 5(iii), 11 and 12 of Hindu Marriage Act, 1955 and Sections 2 and 3 of the Prohibition of Child Marriage Act, 2006, the Delhi High Court observed that if a marriage contracted with a female of less than 18 years or a male of less than 21 years, would not be a void marriage but voidable one, which would become valid if no steps are taken by such “child” within the meaning of Section 2(a) of the Prohibition of Child Marriage Act, 2006 seeking declaration of this marriage as void. Section 5 (iii) of the Hindu Marriage Act, 1955 is reproduced as under:-

> 5. Conditions for a Hindu marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

> (iii)the bridegroom has completed the age of 21 [twenty-one years] and the bride, the age of 18 [eighteen years] at the time of the marriage;

The Full Bench of Delhi High Court had examined a case of a minor girl who ran away with a boy and as per the Prohibition of Child Marriage Act, 2006, she could seek declaration of the marriage as void under Sections 2 and 3 of the said Act and Section 13(2)(iv) of the Hindu Marriage Act, 1955.

In the facts of the present case, the respondent-wife was of the age of 17 years, 6 months and 8 days at the time of marriage and she could file a petition for declaration of this marriage as void before she attains the age of 18 as per Section 11 of Hindu Marriage Act, 1955, which reads as under:-

> 11. **Void marriages**. Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto 1 [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

Both the parties continued to live together and cohabited as husband and wife since 2009 till 2017 and the respondent-wife had not chosen to file a petition for getting her marriage void. Hence, for all intents and purposes, when they made a petition under Section 13-B of Hindu Marriage Act, 1955, the respondent-wife was major and the marriage was valid as per the observation made by the Delhi High Court Full Bench in para 40 which is reproduced as under:-

> 40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No.1 by concluding that the marriage contracted with a female

> of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void.

The Division Bench of Delhi High Court in ***Jitender Kumar Sharma Vs. State and another,*** 2010(4) R.C.R. (Criminal) 20 was considering a case where a boy aged 18 years and a girl aged 16 years fled away from their homes and married as per Hindu Rites. The Division Bench was examining the provisions of Guardians and Wards Act, 1890 and held that minor was competent to act as guardian of his wife as the sole consideration is the welfare of the minor. In para nos. 22 and 23, the Division Bench observed as under:-

> 22. A reading of the 1890 Act and the 1956 Act, together, reveals the guiding principles which ought to be kept in mind when considering the question of custody of a minor hindu. We have seen that the natural guardian of a minor hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where 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 intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor ***[****See:* ***Anjali Kapoor v. Rajiv Baijal: (2009) 7 SCC 322 at 326]***.
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> 23. In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her

husband. A husband who is a minor can be the guardian of his minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reasons other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam's welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention against her will and would be violative of her rights guaranteed under article 21 of the Constitution. Neetu Singh's case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.

The Full Bench of Madras High Court in ***T.Sivakumar Vs. The Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District and others,*** 2012 AIR (Madras) 62 was examining provisions of Section 5 of Hindu Marriage Act, 1955 and Section 3(3) of Prohibition of Child Marriage Act, 2006 and held that if no petition is filed for annulment of the marriage, it will become a full fledged valid marriage. The relevant portion of this judgment is reproduced as under:-

21. From a reading of the above, we infer that probably the Division Bench was of the view that if only a petition is filed under Section 3 of the Prohibition of Child Marriage Act , the said marriage will be voidable. We are unable to agree with the said conclusion arrived at by the Division Bench. In our considered opinion, the marriage shall remain voidable [vide Section 3] and the said marriage shall be subsisting until it is

avoided by filing a petition for a decree of nullity by the child within the time prescribed in Section 3 (3) of the Prohibition of Child Marriage Act. If, within two years from the date of attaining eighteen years in the case of a female and twenty-one years in the case of a male, a petition is not filed before the District Court under Section 3 (1) of the Prohibition of Child Marriage Act for annulling the marriage, the marriage shall become a full-fledged valid marriage. Similarly, after attaining eighteen years of age in the case of female, or twenty-one years of age in the case of a male, if she or he elects to accept the marriage, the marriage shall become a full-fledged valid marriage. Until such an event of acceptance of the marriage or lapse of limitation period as provided in Section 12 (3) occurs, the marriage shall continue to remain as a voidable marriage. If the marriage is annulled as per Section 3 (1) of the Prohibition of Child Marriage Act, the same shall take effect from the date of marriage and, in such an event, in the eye of law there shall be no marriage at all between the parties at any point of time.

22. As per Section 11 of the Hindu Marriage Act, any marriage solemnized in violation of Clause (i) (iv) and (v) of section 5 of the Hindu Marriage Act is void and the same may be declared by a decree of nullity, whereas under Section 12 of the Hindu Marriage Act, a voidable marriage may be annulled by a decree of nullity. The different expressions used in these two provisions cannot go unnoticed. So far as Section 11 of the Hindu Marriage Act is concerned, the marriage is not annulled and is only declared as void by a decree of nullity. Thus, what is done by the court is only a declaration and not annulment of marriage. But, under Section 12 of the Hindu Marriage Act, since the marriage is not void ab initio, the same requires to be annulled by a decree of nullity. Here, it is not declaration but a positive act of annulment of the marriage by a decree of nullity. Similarly, under Section 3 of the Prohibition of Child Marriage Act also, the court annuls the marriage by a decree of nullity. Thus, Section 12 (1) of the Hindu Marriage Act and Section

3(1) of the Prohibition of Child Marriage Act are in pari materia. Therefore, unless there is a positive decree passed by the competent court annulling the child marriage, the marriage shall be subsisting.

In the present case, the marriage between the parties was solemnized on 27.02.2009 and they got separated on 31.08.2017. Every possible effort made by the parties and friends for reconciliation was failed and the parties decided to dissolve their marriage by way of mutual consent. There was a minor child from this marriage namely Manas and as per the settlement, the custody of the son was given to the husband and he undertook to bear all the expenses for the upbringing of the child and will not claim any kind of expenses from the respondent-wife. The parties agree that they will withdraw all the cases/police complaint filed against each other. A joint petition under Section 13-B of the Hindu Marriage Act, 1955 (Annexure A-1) for dissolution of marriage by mutual consent was filed before the Family Court alongwith the affidavits Ex.PW1/A and Ex.PW2/A, which are also appended herewith as Annexures A-4 and A-5 respectively. Aadhar card of petitioner No.1-wife was annexed as Mark-A and Aadhar card of petitioner No. 2-husband was annexed as Mark-B. The statements of both the parties were recorded on 23.06.2020. The Family Court has wrongly dismissed the petition filed under Section 13-B of Hindu Marriage Act, 1955 by referring to the Madras High Court judgment that the parties were required to get their marriage nullified as per Section 13(2)(iv) of the Hindu Marriage Act, 1955.

A petition for nullity under Section 13(2)(iv) could be filed if she-wife had got married at the age of 15 and she could file petition for dissolution of marriage before she attains the age of 18, as per the

judgments of Madras High Court and Delhi High Court. Since the respondent-wife was 17 years, 6 months and 8 days at the time of marriage, hence for all intents and purposes, no petition was filed for declaration of her marriage as void by the wife and the petition under Section 13-B of the Hindu Marriage Act, 1955 should have been allowed. The appellant-husband has placed on record petition under Section 13-B of the Hindu Marriage Act, 1955 as Annexure A-1 alongwith affidavit of the respondent-wife as Annexure A-2 and his affidavit as Annexure A-3 and their statements and affidavits as Annexures A-4 to A-7 placed before the Family Court. The Family Court had recorded the statements of the parties and had taken on record their affidavits alongwith their Aadhar Cards (Mark-A and Mark-B) and copy of birth certificate of the minor son (Mark-C).

Keeping in view the above observations and since the first motion statements were recorded on 23.06.2020 (Annexures A-4 and A-5) and second motion statements were recorded on 08.01.2021 (Annexures A-6 and A-7), this appeal is allowed and order dated 12.01.2021 is set aside and the decree of divorce under Section 13-B of the Hindu Marriage Act, 1955 is granted to the parties. Decree-sheet be drawn accordingly.

(RITU BAHRI)
JUDGE

26.08.2021 **(ARUNG MONGA)**
Divyanshi **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No