

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Constitutional Petition No. S-1091 of 2023

Date	Order with signature of Judge
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For hearing of main case

08.11.2023

Syed Haider Imam Rizvi advocate for the petitioner along with. Mr. Asadullah Shar advocate
Ms. Neha alleged detenuue is present along with Muhammad Shahzad/respondent No.1
Qazi Hamid Hussain advocate for respondents No.1 to 3
Ms. Rahat Ehsan, APG along with SI Asif Javed, PS Ibrahim Hyderi Karachi

The petition is filed by the petitioner Mst. Salma Bano under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 read with Section 491 of Cr. P.C., to issue a writ of Habeas Corpus directing the respondent police officials to produce her minor daughter Neha aged about 16 years to enable her to take her custody.

2. The petitioner is present along with her counsel and has submitted that her Minor daughter Neha went missing with effect from 12.10.2023. It is further submitted that the police have not taken any steps to track down her Minor daughter, who has now been abducted by private respondents and the report of such an incident has already been given to the Ibrahim Hyderi Police Station, who registered the F.I.R No.444 of 2023 under Section 365-B PPC. It is the grievance of the petitioner that respondent No. 1 Shahzad, in connivance with his accomplices, has manipulated the documents of Free will and Nikahnama of her minor daughter, who is being less than 16 years old at that time and as such purported Nikah was performed in violation of the Sindh Child Marriage Restraint Act 2013, (**hereinafter referred as "Act, 2013"**).

3. Syed Haider Imam Rizvi learned counsel for the applicant 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

4. In response to the averments of the petition, Ms. Neha alleged detinue has put her appearance along with one Shazad, who claims to be her husband and has taken the stance that she was/is sui juris and competent to enter into a marriage contract with respondent No.1 Shahzad. Their grievance is that official respondents in connivance with the petitioner, who is the mother of Ms Neeha, are harassing them and interfering in their matrimonial affairs, without lawful justification. The counsel for the petitioner refuted the claim of Ms. Neeha and private respondents on the ground that Ms. Neeha cannot contract marriage under the Act 2013. This issue shall be resolved by the trial court if the party approaches.

5. Learned counsel representing the private respondents has referred to the statement dated 08.11.2023 coupled with certain documents including an affidavit of free will, Nikhanama, and statement under Section 161 Cr. P.C. was recorded by Ms. Niha before the learned Judicial Magistrate Malir Karachi where she deposed that nobody had abducted her and she contracted marriage with Shahzad out of her free-will and showed her reservation against her parents. He further submitted that Ms. Neha is no more in illegal detention and has contracted a valid Marriage with Shahzad and the issue of underage is to be decided by the competent forum under the law. Learned Addl. P.G. present in Court submits that no harassment shall be caused to the couples on the part of the police.

6. After careful consideration of what has been pleaded by respective sides and meticulous examination of the available record, the questions for determination or whether the petition filed by the petitioner Mst. Salma Bano under Article 199 of the Constitution read with Section 491 Cr. P.C. has served its purpose on the premise that Ms. Neha has put her appearance before this Court and made a categorical statement that she has contracted valid marriage with Respondent No.1 Shahzad and plead harassment at the hands of her parents.

7. In my view the aforesaid proposition, a habeas corpus writ is to be issued only when the person concerning whose liberty, the petition has been filed, is illegally detained by respondents in the petition. Based on a habeas corpus petition the power under Article 199 of the constitution is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal

Procedure. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is asking this court to direct the police to track down her daughter, who is now present in court and wants to go with her husband, at this stage this Court cannot form an opinion for or against the issue of underage marriage, if any, as it is the function of the Family/competent Court to see all the relevant issues after recording the evidence of the parties.

8. So far as the question raised by the learned counsel for the petitioner that under The Sindh Child Marriage Restraint Act 2014, the purported marriage of Ms. Neha with Shahzad 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)

9. 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.

10. 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.”

11. 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 Ms. Neha 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.

12. 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.

13. In view of the above, this petition 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 petitioner and/ her family at any cost.

JUDGE