

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Constitutional Petition No. S-966 of 2023

Date	Order with signature of Judge
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1. For order on MA No. 9633/2023
2. For orders on office objection a/w reply
3. For hearing of MA No. 6998/23
4. For hearing of main case

08.12.2023

Petitioners are present in person

Mr. Ahmed Hussain Jokhio advocate for respondents

Mr. Saleem Akhtar Buriro, along with Faisal Lateef, SHO Memon goth Karachi

Mr. Sharafudin Jamali, AAG

Through this petition, the petitioners Mst Rashida and Shahzado simply seek directions to restrain the official respondents from harassing them.

2. SHO Police Station Memon Goth Karachi is present and has recorded the statement of Petitioner No.1 wherein she has narrated the same facts as disclosed in the preceding paragraph with further narration that she being sui juris, without any coercion or force has contracted marriage with Shahzado and she is performing her marital obligations and living with her husband on her consent. She further submitted that being antagonized upon their marriage, the private respondents and other relatives are causing threats to her and her husband. As per petitioners, the private respondents attacked their houses at the behest of private respondents destroyed their all valuables, and illegally pressured them to discontinue their marriage. She further submits that they were harassed and also threatened to be booked in false cases. Her statement and Nikahnama have been placed on record.

3. Mr. Saleem Akhtar Buriro learned Additional P.G. assisted by learned counsel for respondents, has opposed the petition and argued that the petitioner is underage and cannot perform Nikah, therefore the offense has been committed under the Sindh Child Marriages Restraint Act 2014. learned Additional P.G. 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 Marriages Restraint Act, it is a cognizable offense. Learned Additional P.G. asserted that the Sindh Child Marriages 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 Additional P.G. 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 Petition.

4. I have heard the learned counsel for the parties as well as Petitioners who are present in person on the subject issue and perused the record with their assistance.

5. Since the petitioners simply seek protection against the police officials, and her parents who allegedly are extending threats of life to her and her husband, learned AAG has candidly agreed that no harassment shall be caused to the petitioners; because of such a statement, the petitioners are ready and willing to seek disposal of the matter subject to the aforesaid statement made by the learned AAG. However, Mr. Saleem Akhtar Buriro learned Additional P.G. has reservations about the disposal of the instant Petition simply on the statement of learned AAG and strongly objected to the maintainability of the petition on the plea he narrated in the preceding paragraph.

6. First and foremost, the question of maintainability of this Petition is to be resolved. Primarily, this is a free and democratic country, and once a person becomes 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 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. In the present petition petitioners simply seek protection against the police officials, and parents of petitioner No.1, who allegedly are extending threats of life to her and her husband in such a scenario, Constitution, 1973, provides protection of life and liberty and free movement in accordance with law and the petitioner's life and liberty as stated by them is at stake at the hands of police and private respondents as such this petition is held to be maintainable. I, therefore, direct that the administration/police authorities will see, that if any boy or girl who is major undergoes inter-caste or inter-religious marriage with a woman or man who is 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 will be taken against such person(s) 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 marriage if any is concerned the same shall be taken care of by the competent forum under the law.

7. So far as the question raised by the learned counsel for respondents that under The Sindh Child Marriage Restraint Act 2014, the purported marriage of petitioner No.1 with petitioner No.2 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).*

8. Further, per 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 the same is repudiated by that girl before attaining age of 18 years in terms of section 263. 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 264 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.

9. 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."

10. 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 petitioner before this Court and recorded before the police officials, 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.

11. Admittedly, this is the case of harassment at the hands of police in connivance with private respondents. The meaning of the word "harass" has been explained as "Injure and injury"; these words have numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word "harass" excluding the latter from being comprehended within the word "injure" or "injury". The synonyms of "harass" are: To weary, tire, perplex, distress tease, vex, molest, trouble, and disturb. They all have relation to mental annoyance." In the Oxford Dictionary of New Words, the meaning of the word "harassment" has been explained, which reads as "The subjection of a person to aggressive pressure or intimidation. "Harassment" should be interpreted as potentially producing some unreasonably adverse impact on the victim. The conduct should produce more than "worry", "trouble", "discomfort" or "unease" unless perhaps these are experienced to an extreme degree."

12. In my view, the learned A.A.G. statement is tenable and this petition is liable to be disposed of in terms of the statement of learned

AAG; however, it is made clear that if the police officials exceeded their power and authority in connivance with the private respondents, they must be brought to book which is only possible if the DIGP concerned take prompt action against the police officials who are indulged in the crime as the Police Officers are required to protect and not abduct.

13. In view of the above, the Investigating Officer to submit the report to the concerned Magistrate if there is any F.I.R, in terms of the statement made by petitioner No.1 that she had neither been kidnapped nor pressured by anyone, rather she had contracted a valid marriage with petitioner No.2 under the law as such this aspect is to be looked into by the concerned Magistrate in terms of the statement of the petitioner No.1.

14. The learned Magistrate is directed to pass an appropriate order on the statement of petitioner No.1. In the meantime, no harassment shall be caused to the petitioners.

15. In view of the above and with the consent of learned AAG, the captioned petition is disposed of with the directions that the married couples are at liberty to live together and no person shall be permitted to interfere in their peaceful living. In case, any disturbance is caused to them, they shall approach the concerned DIGP or Superintendent of Police with a copy of this order, who shall provide immediate protection to them. So far as the issue of underage marriage and other ancillary matters are concerned the same shall be looked into by the concerned Court, if approached by the aggrieved party.

16. Let a copy of this order be forwarded to Chief Secretary Sindh & IGP Sindh for information and compliance.

JUDGE