

JUDGMENT

Before Muhammad Anwar Khan Kasi, C J

MUHAMMAD SAFEER---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE (WEST) ISLAMABAD and others---Respondents

Criminal Revision No.69 of 2017, decided on 3rd September, 2018.

MUHAMMAD ANWAR KHAN KASI, C.J.---This petition is directed against the Orders and Judgments dated 10.04.2017 and 11.05.2017 passed by learned Assistant Commissioner/SDM Shalimar and ADJ, Islamabad-West, respectively whereby the complaint under Section 5 of the Child Marriage Restraint Act, 1929, filed by respondent No.3 [Muhammad Riaz], was entertained and petitioners [Muhammad Safeer and Muhammad Asim father and son inter se] were awarded punishment for ten days, while co-accused Muhammad Rashid, Sarfraz and Haji Shafique, respondents 4 to 6 were acquitted and the matter was referred to the Judicial Magistrate, P.S Ramna as a complaint for registration of FIR, while appeal was dismissed.

2. Learned counsel in support of this petition argued that both the impugned orders are coram non judge and without jurisdiction because under Section 9 of the Act *ibid*, no Court shall take cognizance of any offence under this Act except on a complaint made by the Union Council or if there is no Union Council in the area, by such authority, as the Provincial Government may in this behalf prescribe.

3. It is further averred that direct complaint before the Magistrate is not competent and, therefore, proceedings conducted there-under are violative of the law.

4. It is added that the provisions of the Act, 1929 are contrary to the injunctions of Islam besides Article 2-A of the Constitution while both the Courts failed to appreciate the documents tendered by the petitioners with regard to age of petitioner No.2.

5. It was next submitted that according to birth certificate, master card issued by NADRA dated 05.01.2009, domicile, CNIC and the documents issued by Federal Government Services Hospital the petitioner No.2's date of birth was 06.07.1996, but the learned Trial Court did not accede to the request for medical examination by a Radiologist to ascertain the actual date of birth and this error was overlooked by the learned Appellate Court which caused failure of justice. He lastly submitted that petitioner No.1 was not part of the marriage from where the alleged offence ensued as neither he accompanied his son nor arranged or participated during solemnization of marriage as the latter contracted matrimonial contract without consent of his father. According to learned counsel, the Executive Magistrate did not frame the charge and conducted the trial without fulfilment of requirements contained in Criminal Procedure Code vis-a-vis cross-examination on the prosecution witnesses and recording of evidence.

6. Conversely, learned State Counsel assisted by counsel for the complainant, repelled the above submissions. It is argued that the evidence on record clearly established that petitioner No.2

was of tender age at the time of marriage which is sufficient to constitute offence under section 5 of the Child Marriage Restraint Act, 1929. According to the learned counsel, the documents produced to establish date of birth as 28.02.1999 instead of 06.07.1996, were proved to be forged and in absence of any malice or mala fide on the part of complainant, concurrent findings cannot be interfered with at revisional stage.

7. Learned counsel on the point of jurisdiction explains that prior to promulgation of ICT Local Government Act, 2015, the legislative frame work under ICT Local Government Ordinance, 2002, was in vogue. However, the Local Government Institution i.e. Union Council etc were not established, therefore, under Section 153 of the Ordinance ibid read with Section 115 of the Capital Territory Local Government Ordinance, 1979, the Chief Commissioner was exercising powers of Federation in accordance with the Islamabad Capital Territory [Administration] Order 1980 and as such the cognizance taken by the learned Executive Magistrate does not suffer from illegality. In this context, learned counsel referred order dated 15.03.2016 passed by the learned Trial Court wherein the objection upon jurisdiction was rejected.

8. Heard and record perused.

9. The background of the present case is that Mst. Ayesha Kiran daughter of complainant Muhammad Riaz contracted marriage with petitioner No.2 [Muhammad Aasim] on 10.11.2014 at Havellian District Abbottabad. Initially, the complainant lodged FIR at Police Station Ramna Islamabad against petitioners/accused for abduction of his daughter; but the case was discharged after production of Nikahnama. Subsequent thereto he moved private complaint under The Child Marriage Restraint Act, 1929 with the allegation that bridegroom/ petitioner No.2 was aged about 15 years and being a child within the meaning of Section 2(a) solemnization of marriage is punishable under the Act ibid. It is pertinent to mention that in Column No.3 of Nikahnama, the date of birth of bridegroom/petitioner No.2 was mentioned as 28.02.1999. The learned Trial Court i.e. Assistant Commissioner Shalimar/Sub-Divisional Magistrate ICT Islamabad summoned the accused vide order dated 12.12.2014 who produced birth certificate issued by the Poly Clinic Hospital, CDA as well as N.I.C by NADRA to establish that the actual date of birth was 06.07.1996, but the documents were contested through proceedings conducted by NADRA due to production of forged documents and after examination of report dated 19.10.2015 submitted to Human Rights Cell of the honourable Supreme Court by FIA consisting chemical analysis of hospital register indicated tampering of the record. The learned Trial Court rejected application for radiological examination and vide Judgment dated 10.04.2017 convicted petitioner No.1 in capacity of promoting child marriage and petitioner No.2 being contracting party with punishment of ten days imprisonment under Section 5 of The Child Marriage Restraint Act, 1929. They filed appeal which remained unsuccessful vide impugned Judgement dated 11.05.2017 by the learned ASJ (West) Islamabad.

10. Petitioners' main objection is that the Trial Court had no jurisdiction as under Section 9 of the Act, the complaint had to be filed by Union Council and cognizance cannot be taken without fulfilment of this requirement. It is admitted position that both the parties are residing at Islamabad and the FIR regarding disappearance of complainant's daughter was also registered at Police Station Ramna Islamabad. The incident took place in the year 2014 when ICT Local Government Ordinance, 2002 was in vogue and the institution of Union Council was not established due to non-holding of Local Government Elections while under Section 153 of the CDA Ordinance read

with Section 115 of The Capital Territory Local Government Ordinance 1979, interim authority was empowered by Federal Government to perform functions of the Local Government. Similarly, under Section 9 of the Act 1929, provincial government is empowered to designate the authority for the purpose of setting law in motion.

11. In the peculiar circumstances of Islamabad Capital Territory, the Administrator [subsequently designated as Chief Commissioner] exercises the powers and duties conferred or imposed on the Provincial Government under any law for the time being enforced in the Islamabad Capital Territory vide Presidential Notification dated 31.12.1980. The Chief Commissioner in this backdrop designated Administrators comprising Assistant Commissioners of the Territory to perform functions of Local Government, therefore, the order dated 15.03.2016 passed by the Trial Court does not suffer from any illegality and cognizance was rightly taken in the circumstances.

12. While referring to Section 10 of The Child Marriage Restraint Act 1929, learned counsel for petitioners raised the objections that it was mandatory for the Trial Court to have conducted a preliminary inquiry under Section 202 of the Code of Criminal Procedure but this requirement was ignored and instead the petitioners/ accused were summoned mechanically without recording statement of the complainant. This contention does not align with the scope and object of Section 202 of Cr.PC because purpose of this inquiry is to see as to whether sufficient material is available to put the accused on trial. It is an admitted fact that the Nikahnama and its veracity had never been disputed at any stage which shows the age of petitioner No.2 less than 18 years making the complaint sufficiently credible for summoning the accused. The honourable Supreme Court in case titled as "Muhammad Fiaz Khan v. Ajmer Khan and another" [2010 SCMR 105] held that "object and scope of Section 202 Cr.PC is twofold i.e. to allow free and fair opportunity to complainant to produce some evidence to make out grounds for issuing process against accused. It is the duty of Magistrate to scrutinize contents of complaint, nature of allegations made therein, material in support of accusation and object intended to be achieved, possibility of victimization and harassment, if any, to ensure himself that no innocent person against whom allegations were levelled should suffer ordeal of protracted, time consuming and cumbersome process of law." Even if it is presumed that some procedural error has crept in the mode of trial, same does not render the Judgment void unless it is proved that some serious miscarriage of justice has occurred because the admitted document i.e. Nikahnama sufficiently establishes a prima facie case against accused persons.

13. It was also argued that learned Trial Court did not follow the procedure for formulation of charge and conduct of trial envisaged under Chapter XX of the Code, because the offence entails maximum punishment of one month and under Section 260 Cr.P.C. a Magistrate of 1st Class can try such offences in a summary way. Even otherwise, under Sections 535 and 537 Cr.P.C, it has been envisaged that the error which does not cause failure of justice particularly where no such objection has been raised at an earlier stage before the competent court of jurisdiction cannot be fatal to the findings of the Trial Court. The honourable Supreme Court in case titled as "Shahzada and others v. Malik Shamsuddin and another" (PLD 1977 SC 384) laid down that technical defect or omission in the procedure does not render the trial as void.

14. The Act *ibid* does not invalidate marriage rather stipulates punishment for those participating or promoting the same, therefore, cannot be said to be in contravention to the injunctions of Islam. It is without any substance to put forth that Islam has fettered legislative

domain of the State in stipulating appropriate age of marriage in consideration of prevailing medical and sociological conditions.

15. So far as the dispute about date of birth of petitioner No.2 is concerned, report submitted by NADRA proved that his actual date of birth is 28.02.1999, as mentioned in the Nikahnama, therefore, medical examination was not justifiable and the application was rightly turned down by the learned Trial Court.

16. The defence had also taken the plea that petitioner No.1 did not take part in the solemnization of marriage and, therefore, cannot be held liable for the same runs counter to the scheme of Section 6 of the Act, 1929 because it lays down a legal presumption against the guardian of the child whose marriage is being solemnized and it is for the defence to produce evidence in rebuttal. The learned Appellate Court also observed that the affidavit prepared at the time of Nikah proved that father of bridegroom/petitioner No.2 had not only identified him but also signed as witness. As such he was securely liable in that capacity.

17. The Child Marriage Restraint Act 1929, places responsibility on three categories i.e contracting party, promoter of the marriage and; guardians/parents. There are three penal provisions in the Act. Section 04 makes a contracting party/male adult above 18 years of age liable to punishment while Section 05 lays down punishment for those who perform, conduct or direct any child marriage and lastly Section 06 provides punishment for parent or guardian of the minor who contracts the child marriage. It nowhere holds a minor liable for punishment; therefore, conviction of petitioner No.2, who was aged 15 years and 8-months at the time of solemnization of marriage is not legal.

18. So far as sentence awarded to petitioner No.1 is concerned, admittedly he is an aged person of about 57 years with no criminal record and had been facing the rigours of trial since 2014, therefore, deserves moderate reduction.

19. Consequently, both the impugned judgments are modified in terms that conviction and sentence of petitioner No.2 is set-aside and he is acquitted while the conviction of petitioner No.1 is upheld by reducing the sentence from 10- days imprisonment to already undergone.

20. Petition stands disposed of.

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