

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Misc. No.1269-B/2021

Abdul Razaq

Versus

The State, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	13.01.2022	Malik Sohab Aslam, Advocate for the petitioner. Raja Shehzad Javed, Advocate for the complainant. Barrister Zafarullah Khan, ASC, Amicus Curiae. Mr. Zohaib Hassan Gondal, State counsel. M. Hassan, ASI.

The petitioner (Abdul Razaq) seeks bail after arrest in case FIR No.470/21, dated 10.09.2021, under section 365-B PPC, registered with Police Station Sihala, Islamabad.

2. Case of the prosecution against the petitioner is that on the complaint of respondent No.2, the above-mentioned FIR was registered wherein it was alleged that Mst. Laiba Noor, was abducted by the petitioner for the purposes of sexual desires.

3. The petitioner filed bail application before the Sessions Court, which was dismissed by the learned Additional Sessions Judge vide order dated 27.09.2021, hence the petition.

4. Learned counsel for the petitioner, *inter alia*, contended that the petitioner contracted Nikah with Mst. Laiba Noor, hence case against him is without substance. It was further contended that respondent No.2 is

harassing and coercing his daughter for resiling from the Nikah entered into between the parties. It was also submitted that investigation stands concluded, hence the petitioner is no longer required for the same and case against him is one of further inquiry.

5. Learned State counsel alongwith counsel for the complainant, *inter alia*, contended that Mst. Laiba Noor is minor, hence Nikah is not valid. It was also contended that she made statement under section 164 Cr.P.C, wherein she categorically stated that she contracted Nikah with the petitioner under coercion/duress. It was submitted that there is no harassment or duress. Learned counsel further contended that under the facts and circumstances, sections 498-B and 366-A PPC are also attracted.

6. In rebuttal, learned counsel for the petitioner contended that since petitioner is above the age of 16 years and has attained puberty, therefore, Nikah is valid and as such no offence has been committed.

7. Keeping in view the anomalies in law with respect to the age of a person to contract Nikah, Barrister Zafarullah Khan, ASC, was appointed as an *Amicus Curiae* to assist the Court. Learned Amicus Curiae, *inter alia*, contended that the law is vague and not clear about the age of a person to contract Nikah, especially in Islamabad Capital Territory (ICT). He relied upon the verse of *Surah An-Nisa* to substantiate his argument that it is not only puberty which is the criteria

for granting consent but there is also requirement of being '*Rushd*' i.e. a person being able to decide for himself and exercise good judgment. It was also contended that other Islamic countries have passed laws fixing age for both a male and female person to contract marriage. He placed on record various Articles. In this behalf, he also relied upon an Article, whereby the Medical Science has spelt out the hazards of early marriage on the life of a woman and the adverse on child born to a young mother. He submitted that, good age for a person to be adult is 18 years, however, it was contended that in the Child Marriage Restraint Act, 1929, the age for entering into Nikah/ Marriage is 16 years.

8. Learned *Amicus Curiae* also submitted that Muhammadan Law by D.F. Mulla prescribed the age for marriage for a female as 15 years. The learned counsel then submitted that since majority of fiqh followed in this country is *Hanafi* and since the parties are also *Hanafi*, Imam Abu Hanifa (R.A) is of the opinion that age for giving consent to marriage by a female Muslim woman/girl is 17 years. He also contended that in one of the judgments titled "**Hafiz Abdul Waheed versus Mrs. Asma Jehangir and another (PLD 2004 SC 219)**", the august Apex Court opined that for a valid contract of marriage by a woman without '*Wali*', she is to be *sui juris*. It was further contended that in light of various opinions and laws, it is uncertain as to the age upon which the girl can enter into Nikah as such.

9. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

10. The petitioner is implicated with an offence under section 365-B PPC. The maximum punishment for the referred offence is imprisonment for life, hence the offence falls within the prohibitory clause of section 497 Cr.P.C.

11. On record, there is a *Nikahnama* dated 14.09.2021, which shows that petitioner entered into Nikah with Mst. Laiba Noor and there is also an affidavit executed by her to the effect. However, subsequently, she also made statement under section 164 Cr.P.C stating that she entered into Nikah with petitioner under duress and through coercion. Mst. Laiba Noor was 16 years and 05 months at the relevant time.

12. In the Holy Qur'an, no definite age has been prescribed for marriage of man and woman. In surah An-Nisah verse No.6, Allah (S.W.T) says:

"اور یتیموں کی آزمائش کرتے رہو، یہاں تک کہ وہ نکاح کے قابل عمر کو پہنچ جائیں۔ پھر اگر تم ان کے اندر اہلیت پاؤ تو انکے مال ان کے حوالے کر دو۔ ایسا کبھی نہ کرنا کہ حد انصاف سے تجاوز کر کے اس خوف سے انکے مال جلدی جلدی کھا جاؤ کہ وہ بڑے ہو کر اپنے حق کا مطالبہ کریں گے۔ یتیم کا جو سرپرست مالدار ہو، وہ پرہیزگاری سے کام لے۔"

In the explanation to this verse, Abul A'la Maududi (R.A), in the book Tahfeem-ul-Quran explained it as under:-

"مال اُن کے حوالے کرنے کے لیے دو شرطیں عائد کی گئی ہیں: ایک بلوغ، دوسرے رُشد، یعنی مال کے صحیح استعمال کی اہلیت۔ پہلی شرط کے متعلق توفیقہائے امت میں اتفاق ہے۔ دوسری شرط کے بارے میں امام ابو حنیفہ رحمہ اللہ کی رائے یہ ہے کہ اگر سن بلوغ کو پہنچنے پر یتیم میں رُشد نہ پایا جائے تو ولی یتیم کو زیادہ سے زیادہ سات سال اور انتظار کرنا چاہیے۔ پھر خواہ رُشد پایا جائے یا نہ پایا جائے، اس کا مال اس کے حوالے کر دینا چاہیے۔ اور امام ابو یوسف، امام محمد اور امام شافعی رحمہم اللہ کی رائے یہ ہے کہ مال حوالے کیے جانے کے لیے بہر حال رُشد کا پایا جانا ناگزیر ہے۔ غالباً مؤخر الذکر حضرات کی رائے کے مطابق یہ بات زیادہ قرین صواب ہوگی کہ اس معاملے میں قاضی شرع کی طرف رجوع کیا جائے اور اگر قاضی پر ثابت ہو جائے کہ اس میں رُشد نہیں پایا جاتا تو وہ اس کے معاملات کی نگرانی کے لیے خود کوئی مناسب انتظام کر دے۔"

As per above explanation, it is not only *balughat*/puberty but also *rushd*, which is the second important criteria for a person to enter into Nikah. According to the Dictionary of Modern Written Arabic by Hans Wehr, the word '*Rushd*' has been explained/defined as integrity of (one's) actions, proper, sensible conduct; reason, good sense, senses; consciousness; maturity (of the mind). Meaning thereby a person who has attained puberty and he/she can form good decision and have maturity of mind can contract Nikah. Based on the above, in the book "*Tehqeeq e Umar e Hazrat Ayesha R.A*", the *Hanafi* point of view is as follow:

"حنیف نے کہا مذکر میں بلوغ معلوم کیا جاتا ہے احتلام سے انزال
منی سے اور عورت کو حاملہ کرنے سے اور مؤنث میں حیض سے اور حمل
سے اور جب مذکورہ بالا علامات میں سے کوئی علامت بھی نہ پائی جائے تو
عمر سے بلوغت کا حکم لگائیں گے جب دونوں کی عمر پندرہ سال ہو
جائے تو وہ مفتی بہ قول کے مطابق بالغ ہو گئے اور امام ابو حنیفہ نے کہا وہ
عمر کے لحاظ سے تب بالغ قرار دیئے جائیں گے جب مذکر اٹھارہ سال
پورے کرے اور مؤنث سترہ سال"

Under the above opinion according to The Hanafi School of thought proper age for marriage, as per Imam Abu Hanifa (R.A), for male is 18 years and for female 17-years. D.F. Mulla in Muhammadan Law has mentioned the age for *Hanafi* woman as 15 years. Under section 4 of the Child Marriage Restraint Act, 1929, it is an offence for a person above 18 years to undertake child marriage. Child is defined under section 2 (a) *ibid* as, a male who is under 18 years and female who is under 16 years of age. Likewise, according to section 6 *ibid*, it is an offence for parent or guardian to marry a child. Keeping in view the menace of child marriage, the Government of Sindh enacted the Sindh Child Marriages Restrained Act, 2013 and the same defines child as under 18 years of age (both for male and female).

13. Recently the Hon'ble Federal Shariat Court in the judgment titled *Farooq Omar Bhoja versus Federation of Pakistan (Shariat Petition No.10/I of 2020)*, dated 25.10.2021, opined that where an act appears to be harmful to the society collectively or to a particular

segment of society, the State has the power to make that act prohibited even if permissible generally in Shariah. The relevant extract from the referred judgment is as follows:-

"6. *It is settled principle of Shariah if any Mobah (مباح) act appears to be harmful to the society collectively or to a particular segment of a society, the State has power to make that act prohibited so that the society can be protected from a larger damage. Many example of such actions taken by the Muslim State are available in the historical record. One such example is of Hazrat Umar (R.A), the second caliph of Islam who made it prohibited under the law for Muslim males to enter into a marriage contract with Ahle Kitab (اهل كتاب) ladies, although in Shariah it is legally (حلال) (jaiz) or (مباح) (Mubah) permitted but for the larger interest of the Muslim community of the Muslim State at that particular time, Hazrat Umar (R.A) prohibited such marriages. In addition to that Hazrat Umar (R.A) took several steps in which under special circumstances, he suspended even some wajibaat. Hence, setting limitations on a (مباح) (Mubah) act in such a precautionous way that it does not affect any other hokum setout by Shariah. The setting of the minimum age limit of 16 for girls is one of such examples.*

اصول التشریع الاسلامی، علی حبیب اللہ، ناشر: ادارہ القرآن والعلوم

الاسلامیہ، ص 79"

7. *In Islamic law, there is a well developed concept of Sad-uz-Zaraey (سد الزرائع) based on Quran and Sunnah, according to this principle it is also a duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is. According to this principle of Sad-uz-Zaraey (سد الزرائع), therefore, such enactment like "impugned sections" of a law are not*

against Quran and Sunnah. As in the reign of Hazrat Umar (R.A) when people started to divorce their wives very commonly and very easily by saying the word of "talaq" three times in one go and subsequently demanded that it may be considered as only one Talaq and on that pretext they took that lady back as their wife. Hazrat Umar (R.A) in order to discourage this ill practice commonly undertaken by men passed a law that: henceforth on uttering the word of "Talaq" three times in a row will be considered as three Talaqs causing permanent separation in that couple. Hazrat Umar (R.A) did that because marriage is a sacred relation and one should not be allowed to mock it according to his whims. This famous ruling of Hazrat Umar (R.A) is a perfect example that when a rule is efficiently abused or misused then it can be defined clearly to protect it from being abused. The impugned provisions of the law do the same thing. The law or principle of Shariah is defined in a more clear way, that minimizes the chance of its abuse or misuse, i.e., a marriage should not be consummated before the attainment of the age of medical maturity by the girl. Setting an age of 16 years reduces the possibility of breach of this principle of Shariah to the maximum. There are many other examples available from the life of Hazrat Umar (R.A)."

اصول التشریح الاسلامی، الفقہ الاسلامی وادلت، الدكتور وھب الزحیلی، ج ۷، ص 183)

The Hon'ble Supreme Court of Pakistan while deciding the appeal from celebrated judgment of the larger Bench of the Hon'ble Lahore High Court in case titled **Hafiz Abdul Waheed versus Mrs. Asma Jehangir and another (PLD 2004 SC 219)**, opined that consent of *Wali* is not required and a *sui juris* Muslim female can enter into Nikah/marriage of her own free will. Black's Law Dictionary defines *sui juris* as a person who is of full

age and capacity. The full age or maturity in Pakistan is 18 years.

14. In light of the above laws, the position that emerges for the purposes of Islamabad Capital Territory (ICT) is that:

- (i) Under the Child Marriage Restraint Act, 1929, it is an offence for any person who gives in Nikah any girl below the age of 16 years.
- (ii) A *sui juris* Muslim girl can enter into a contract without *Wali* (*sui juris* means 18 years old girl).
- (iii) According to Hanfi School of thought, a girl can enter into Nikah on attaining the age of 17 years.
- (iv) According to D.F. Mulla, a girl can enter into Nikah on attaining the age of 15 years.
- (v) In any case, for a person to contract Nikah, either male or female, he/she not only needs to have attained puberty but also to be *rushd*, i.e. a person who is mature enough to form reasonable judgment.

15. In the above backdrop, it is appropriate that the Federal Government should intervene and legislate upon the matter to remove all the anomalies as such in light of the afore-noted judgment of the Hon'ble Federal Shariat Court. Though no age limit is prescribed in the Holy Qur'an and as such the criteria for entering into

Nikah is fluid, there is no bar on the State to legislate upon the matter and fix the age for the said purposes as has been done by the Government of Sindh.

16. In the instant case, Mst. Laiba Noor was 16 years and 05 months at the relevant time, hence the Child Marriage Restraint Act, 1929 is not attracted, however, she does not qualify to enter into contract in accordance with Hanafi School of thought which would be applicable to her in light of Article 227 of the Constitution of the Islamic Republic of Pakistan, 1973. Moreover, she was not sui juris at the relevant time, hence the requirement of *Wali* would be applicable as per the dictum of the august Apex Court in **PLD 2004 SC 219** *supra*. However, since there is Nikahnama and an affidavit sworn by Mst. Laiba Noor in contrast to her statement under section 164 Cr.P.C, where she has alleged coercion, makes the case against the petitioner one for further inquiry. Investigation stands concluded and continued incarceration of the petitioner will not serve any purpose. However, the police shall also take into account the facts and circumstances and consider incorporation of section 498-B PPC in the facts and circumstances.

17. For what has been stated above, the instant petition is **allowed** and the petitioner is enlarged on bail after arrest in the above case subject to furnishing bail bonds in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of learned Trial Court. The

instant order shall be forwarded to the Ministry of Law and Justice and Ministry of Interior, Government of Pakistan for considering the position of law and making amendment(s) therein in light of the observations made hereinabove. Needless to observe that the observations made hereinabove are tentative in nature and shall not prejudice the learned trial court while deciding the matter in the trial.

(AAMER FAROOQ)
JUDGE

M. Shah/*

Approved For Reporting.