SUPREME COURT OF INDIA

Nandakumar

Vs.

State of Kerala

Crl.A.No.597 of 2018

(A.K.Sikri and Ashok Bhushan,JJ.,)

20.04.2018

JUDGMENT

A.K.Sikri, J.,

SLP(Crl.)No.4488 of 2017

1. Leave granted.

2. The brief facts leading to the present appeal are that appellant No. 1 has married Ms.Thushara. According to the appellant, this marriage was solemnised on 12.04.2017 at the Chakkulathukavu Bagavathi Temple situated in the Trivandrum District, Kerala. Insofar as Thushara is concerned, as on the date of marriage, she was admittedly 19 years of age and was, therefore, competent to enter into wedlock. It appears that after that marriage, she started living with appellant No. 1 as his wife. Respondent No. 4 is the father of Thushara. He filed Habeas Corpus petition being W.P.(Crl.) No. 149/2017(S) in the High Court of Kerala alleging therein that ever since 10.04.2017, his daughter Thushara was missing. He also stated in the said petition that Thushara was in the illegal custody of appellant No. 1. In fact, respondent No. 4 had lodged FIR regarding missing of his daughter on 10.04.2017. Stating this fact in the writ petition, he averred that though the said FIR was registered, but no effective investigation had been conducted in the matter. On that basis, prayer made in the petition was to issue writ of Habeas Corpus commanding the appellants to produce his daughter in the High Court. This writ petition was admitted on 25.04.2017 and notice was ordered to the appellants herein by special messenger. On that day, the High Court also directed respondent Nos. 1 to 3 to trace out and produce the respondent No. 4's daughter in the Court. On 28.04.2017, when the writ petition was taken up, respondent No. 4 and his wife were present. Appellants were also present. The Sub Inspector of Police, Vatgtiyoorkavu Police Station produced the detenue in the Court. The High Court interacted with the parties, including Thushara. As pointed out above, insofar as Thushara is concerned, she was 19 years of age and, therefore, competent to marry, as the marriageable age for females is 18 years. However, dispute arose about the age of appellant No. 1 herein. It was the contention of respondent No. 4 that appellant No. 1 was less than 21 years of age and,

therefore, he was not of marriageable age. To ascertain this fact, the High Court asked appellant No. 1 to inform his date of birth. He stated his date of birth to be 30.05.1997, and in support thereof, produced driving licence issued by the licensing authorities. Treating it to be the date of birth of appellant No. 1, the High Court found that he would be attaining the age of 21 years only on 30.05.2018. Therefore, on 12.04.2017, when the marriage was solemnised between appellant No. 1 and Thushara, appellant No. 1 was not of marriageable age. On that basis, the High Court concluded that the daughter of respondent No. 4 is not the lawfully wedded wife of appellant No. 1. The High Court also remarked that apart from the photographs of marriage which were produced in the High Court, there was no evidence to show that a valid marriage was solemnised between the parties and that a certificate issued by the local authority under the Kerala Registration of Marriages (Common) Rules, 2008, was also not produced. On these facts, the High Court allowed the writ petition by entrusting the custody of Thushara to her father i.e., respondent No. 4 herein, as is clear from the following directions contained in the impugned order:

> "We accordingly dispose of the writ petition by entrusting custody of Ms. Thushara, the daughter of the petitioner with the petitioner. The Sub Inspector of Police, Vattiyoorkavu shall, to ensure their safety accompany them to their residence at Thirvananthapuram."

3. Assailing the aforesaid order, the present appeal is preferred.

4. Notice was issued to the respondents. Respondent No. 1/State of Kerala as well as official respondent Nos. 2 and 3, viz., the Superintendent of Police and Sub-inspector of Police, have put in their appearance through the State counsel. Nobody has appeared on behalf of respondent No. 4 in spite of service of notice. In the aforesaid circumstances, we have heard learned counsel for the appellants as well as learned counsel for the State.

5. A neat submission which is made by the learned counsel For the appellants is that the High Court has adopted an approach which is not permissible in law by going into the validity of marriage. It is submitted that when Thushara is admittedly a major i.e., more than 18 years of age, she has right to live wherever she wants to or move as per her choice. As she is not a minor daughter of respondent No. 4, "custody" of Thushara could not be entrusted to him.

6. Learned counsel for the appellants is right in his submission. Even the counsel for the State did not dispute the aforesaid position in law and, in fact, supported this submission of the learned counsel for the appellants.

7. Insofar as marriage of appellant No. 1 (who was less than 21 years of age on the date of marriage and was not of marriageable age) with Thushara is concerned, it cannot be said that merely because appellant No. 1 was less than 21 years of age, marriage between the parties is null and void. Appellant No. 1 as well as Thushara are Hindus. Such a marriage is not a void marriage under the Hindu Marriage Act, 1955, and as per the provisions of section 12, which

can be attracted in such a case, at the most, the marriage would be a voidable marriage. Section 5 and Section 12 of the Hindu Marriage Act make this position clear which are reproduced below:

> "5. Conditions for a Hindu marriage. - A Marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely-
>
> (iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;"
>
> 12. Voidable marriages.-(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-
>
> 1(a) that the marriage has not been consummated owing to the impotence of the respondent; or
>
> (b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or
>
> (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, the 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or
>
> (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

8. We need not go into this aspect in detail. For our purposes, it is sufficient to note that both appellant No. 1 and Thushara are major. Even if they were not competent to enter into wedlock (which position itself is disputed), they have right to live together even outside wedlock. It would not be out of place to mention that 'live-in relationship' is now recognized by the Legislature itself which has found its place under the provisions of the Protection of Women from Domestic Violence Act, 2005.

9. In a recent judgment rendered by this Court in the case of '*Shafin Jahan v. Asokan K.M. & Ors*[1].' after stating the law pertaining to writ of Habeas Corpus, this writ has been considered as "a great constitutional privilege" or "the first security of civil liberty". The Court made the following pertinent observations: -

> "28. Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that

the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subgterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her indpendent choice and see to it that the person is released form illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.

29. In the instant case, the High Court, as is noticeable from the impugned verdict, has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 herein with the appellant. It felt perturbed. As we see, there was nothing to be taken exception to. Initially, Hadiya had declined to go with her father and expressed her desire to stay with the respondent No. 7 before the High Court and in the first writ it had so directed. The adamantine attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him. True it is, she had gone with the respondent No. 7 before the High Court but that does not mean and can never mean that she, as a major, could not enter into a marital relationship. But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to."

10. The Court also emphasised due importance to the right of choice of an adult person which the Constitution accords to an adult person as under:

"54. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person.

The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her automony; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the

realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

55. Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.

11. We also reproduce the following discussion from the concurring judgment rendered by Dr. Justice D.Y. Chandrachud in the said case:

"81. In a more recent decision of a three Judge Bench in Soni Gerry v. Gerry Douglas', this Court dealt with a case where the daughter of the appellant and respondent, who was a major had expressed a desire to reside in Kuwait, where she was pursuing her education, with her father. This Court observed thus:

"9 She has, without any hesitation, clearly stated that she intends to go back to Kuwait to pursue her career. In such a situation, we are of the considered opinion that as a major, she is entitled to exercise her choice and freedom and the Court cannot get into the aspect whether she has been forced by the father or not. There may be ample reasons on her behalf to go back to her father in Kuwait, but we are not concerned with her reasons. What she has stated before the Court, that alone matters and that is the heart of the reasoning for this Court, which keeps all controversies at bay.

10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation."

12. It may be significant to note that insofar as Thushara is concerned, she has expressed her desire to be with appellant No. 1.

13. Accordingly, we allow this appeal and set aside the impugned judgment of the High Court. However, since Thushara has not appeared as she was not made party in these proceedings, while setting aside the directions of the High Court entrusting the custody of Thushara to respondent No. 4, we make it clear that the freedom of choice would be of Thushara as to with whom she wants to live.

Judgment Referred.

[1]*(2018) SCC Online SC 0343*