

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

(AFR) (Reserved)

Court No. - 23

Case :- HABEAS CORPUS No. - 190 of 2013

Petitioner: - Shalu Mishra

Respondent: - State Of U.P.Throu.Its Prin.Secy.Home Civil Sectt.Lko.& Ors.

Counsel for Petitioner: - G.S.Pandey,Himanshu Tiwari

Counsel for Respondent :- Govt.Advocate

Hon'ble Sudhir Kumar Saxena,J.

This Habeas Corpus petition has been filed under Article 226 of the Constitution of India seeking the release of Shalu Mishra from Naari Niketan, Lucknow.

I have heard Sri G.S. Pandey, learned counsel for petitioner, Sri Sunil Dixit, learned counsel for respondent and Km. Nand Prabha Shukla, learned A.G.A.

Briefly stated petitioner's case is that Sunil Kumar Mishra married Shalu Mishra on 16.05.2013 before 'Arya Samaj Mandir, Aliganj, Lucknow'. Copy of marriage certificate as well as photographs have been filed to buttress the submission. Parents of Shalu Mishra are trying to marry her with some other person, although she is married wife of Sunil Mishra.

It is stated that mother of Shalu Mishra lodged an F.I.R. against Sunil Mishra, registered as Case Crime No. 872 of 2013 under Sections 363, 366, 120-B I.P.C., Police Station Purwa, District Unnao alleging that Sunil Mishra had enticed Shalu Mishra, aged about 16 years, with the collusion of Mukesh and Ashish and father of Sunil Mishra is also involved in the incident.

Apprehending his arrest, Sunil Mishra filed a Writ Petition No. 4189 of 2013 (MB) in this Court wherein following order was passed on 21.05.2013 : "Heard learned counsel for the petitioners and also learned A.G.A. appearing for the State. We have been taken through the allegations contained in the F.I.R. and the material on record. The victim petitioner no.2 is present in the Court and has been identified by her counsel. It is submitted by learned counsel for the petitioners that she has married with petitioner no.1 out of her own free will and both are major. Issue notice to respondent no.3 who may file counter affidavit within four weeks. Learned A.G.A. may also file counter affidavit within the same period. Rejoinder affidavit may thereafter be filed within two weeks. List this matter after expiry of the aforesaid period. Till the next date of listing, the arrest of the petitioners, who are involved in case crime no.617 of 2013 under Sections 363, 366 and 120-B I.P.C P.S. Purwa District Unnao shall remain stayed."

After obtaining interim order of this Court, when they were returning, Jai Prakash Tiwari, Rajendra @ Bawali intercepted and assaulted them. Bhola Mishra, father of the girl and one Anoop dragged Shalu and her husband and took them in a Bolero vehicle forcibly and beat them up. Shalu was taken to her parental house forcibly where she was detained against her wishes.

Matter was reported to DGP by Kailash Mishra, father of Sunil Mishra by means of application dated 24.05.2013, with copy to S.P., Unnao and concerned police station. It is submitted that since Shalu Mishra is major, she cannot be detained by respondents, as such order of her release may be passed. This Court on 03.06.2013 directed S.P., Unnao to hold enquiry into the allegations made in the application dated 24.05.2013.

A.G.A. informed the Court that application dated 24.05.2013 led to the registration of a Case Crime No. 696 of 2013, under Sections 364-A, 307, 352, 506, 323 I.P.C. on 04.06.2013 and on 05.06.2013 final report was prepared.

Shalu Mishra was directed to appear in the Court who stated that she wants to go with Sunil Mishra. Case was fixed on 13.06.2013 on which date S.O., Mahila Thana, Unnao submitted report informing that Shalu Mishra had stated that she and her husband were dragged by Jai Prakash Tiwari and Rajendra @ Bawali and taken them in a Bolero vehicle forcibly from where she was detained in her parental house.

This Court directed S.P., Unnao to get the investigation done by the officer not below the rank of Deputy S.P. as Shalu in her statement partly confirmed the incident dated 21.05.2013. So far as the investigation is concerned, it is going on and no comment is required from this Court. So far as habeas corpus petition is concerned, learned counsel for the petitioner submitted that Shalu Mishra and Sunil Mishra both are major, having married, have a right to live together without any interference from anybody. She cannot be detained against her wishes.

Learned counsel for the private respondents submits that according to educational certificate, Shalu Mishra is minor, as such, her marriage was illegal. Moreover, she is now detained in 'Naari Niketan' in pursuance of order passed by Sessions Judge, Unnao on 01.06.2013. Consequently, her detention is not illegal and petition is not maintainable.

From the case diary submitted by learned A.G.A., it appears that date of birth of Shalu Mishra recorded in High School Marksheet is 21.02.1996, as such, she was less than 18 years on 16.05.2013 i.e. date of marriage. She was medically examined by the Police in district hospital, Unnao. According to medical report, she was found to be more than 19 years.

It further appears that Investigating Officer produced Shalu Mishra before the Sessions Judge, Unnao on 01.06.2013 where Sunil Mishra claimed her custody. Raj Kumari, mother of Shalu also claimed her custody. Sessions Judge, Unnao directed Shalu Mishra to be placed in Naari Niketan and fixed 04.06.2013 for further orders. On 04.06.2013, learned Sessions Judge recorded the statement wherein Shalu Mishra disclosed her date of birth 21.02.1996, however, she disclosing her actual age to be 19 years, expressed her willingness to go with her husband. Sessions Judge observed that according to medical report, she was about 19 years. Learned Sessions Judge believing the age recorded in High School Certificate to be correct, treated her minor and directed her to be detained in Naari Niketan. This order was further subjected to the order that may be passed by this Court in this writ petition. Except under the provisions of Juvenile Justice Act where question regarding determination of age of juvenile in conflict with law is concerned, there is no law that age mentioned in educational certificate has to be preferred over the age recorded by doctor on the basis of radiological observations, while determining the age of a victim or witness.

It is not clear as to under what provisions of law, Sessions Judge has sent Shalu Mishra to Naari Niketan. Even minor cannot be detained against her wishes in Naari Niketan. Shalu Mishra categorically stated before Sessions Judge that she wants to go with her husband. She has specifically stated that she does not want to go Naari Niketan. Her detention in Naari Niketan is absolutely illegal. It is argued that it is not a case of private detention as such Single Judge cannot hear this matter. In reply it is submitted that petition was filed on 30th May, 2013 before this Court challenging private detention of Shalu Mishra in Home; after filing of the writ petition, she was produced before the Sessions Judge for deciding the question of custody who sent her to Naari Niketan. Matter has come up before this Court after report of Stamp Reporter. In the matter of violation of fundamental rights, Court has a duty to zealously safeguard the same.

Sri Sunil Dixit, learned counsel for the respondents has cited a decision of this Court given in the case of Smt. Sakshi Tomar Vs. State of U.P. and others [2013(1) JIC 578 (All)]. The aforesaid case was decided on its own facts as apparent from Para-7 of the judgment. Court found that there was no proof of marriage. Victim stated her place of marriage to be some temple in Mansoorie while Munnu Bhati stated the place of marriage to be some Shiv Temple at Ghaziabad. Her date of birth being 20.09.1996, she was less than 16 years on the date of alleged marriage i.e. 26.05.2012. Moreover, the Court has found on the basis of its own assessment of X-ray report that she was below 18 years. Regarding age, there was no material. Court upheld the detention of victim in Naari Niketan. Court has specifically relied on the finding in Para-7 that no marriage has been proved.

In the instant case, not only certificate of marriage has been filed but also on the date of alleged marriage, even according to High School Certificate, she was more than 17 years and according to medical certificate, she was more than 19 years, as such, above cited case has clearly no application. The case of Smt. Manoja Devi and Another Vs. State of U.P. and others [2013(1) JIC 224 (All)] was also decided on its own facts. Court has found that "Corpus was telling a lie and according to medical examination report also she was aged about 18 years". So far as the person claiming her custody was concerned, Court observed that " he could not disclose the name and address of his owner. He stated that he wanted to keep corpus in his detention and ready to maintain her as wife but he did not appear to be mature person." Consequently, Court did not find it proper to give corpus in the custody of Santosh. This decision is also not useful to the respondents.

This Court is not going into the merits of the investigation and the statement given by her before the I.O. or the Magistrate. In this Court she has categorically stated that she does not want to stay in Naari Niketan. She wants to go with her husband Sunil Mishra.

To prove the marriage, marriage certificate has been filed, thus this marriage is not void, even if, wife is minor. Therefore, husband has a right to seek the custody of his wife being her natural guardian. It has been held by this Court in the case of Sonu Paswan Vs. State of U.P. and Another passed in Criminal Misc. Case No. 1705 of 2012 (u/s 482 Cr.P.C.) that:

"husband is the natural guardian of a married girl and it is not in the welfare of female to keep her in Nari Niketan for prolonged period, particularly when she wants to join the company or remain in the custody of her husband, who would be the natural guardian."

It has been held by Andhra Pradesh High Court in the case of Kokkula Suresh Vs. State of A.P. and others AIR, 2009 AP 52 that husband being natural guardian under the provisions of Hindu Minority and Guardianship Act, 1956, is entitled to have the custody of his minor wife as marriage is neither void nor voidable.

A Division Bench of this Court in the case of Smt. Saroj Vs. State of U.P. and others (Habeas Corpus writ petition no. 19037 of 2011) faced with the similar problem concluded that: ".....Victim of an offence under Sections 363, 366-A, 366 or 376 I.P.C. could not be falling in the category of an accused, as such no court could be authorized under any provisions of law to authorize the detention of such a lady even into protective custody if the lady objects to such detention.

.....There is no age bar when it comes to valuing the liberty of a person be she a woman or be he a gent. Even a child has a right to avail of his or her liberties."

In another case of Smt. Lakshmi @ Kamini & another Vs. State of U.P. and others (Habeas Corpus writ petition no. 33814 of 2011), a Division Bench of this Court consisting of Hon'ble Dharnidhar Jha and Ramesh Sinha, JJ. dealt with a case where age recorded in medical report was at variance with the age mentioned in the educational certificate. Following observations can be usefully quoted : ".....We want to point out that there was no such law which could justify the above observation of the A.C.J.M, that in a case of present nature the assessed age of the victim in an offence of the present nature has to be discarded in the light of the entries made in the school records. Probably, the A.C.J.M., Farrukhabad having in his mind the provisions of Juvenile Justice (Care and Protection of Children) Rules, 2007, by virtue of Rule 12, had granted credence to the age of a victim of such an offence which is mentioned in the school leaving certificate over the medically assessed age of such a victim.

.....We have repeatedly been pointing out that the victim of an offence under Sections 363, 363A or 366 I.P.C. may not be confused as an accused. She may also not be treated, if she is below 18 years of age as a juvenile in conflict with law, and the law applicable to juvenile may not be applicable to such a victim of the offence. We have also noted at some earlier occasions that even a child had its rights internationally recognized which as per cultural heritage and constitutional provisions inherently assumed the character of fundamental rights of a child and no Court could have the authority to encroach upon those rights of a child. If at all any offence is constituted by facts, no law could justify the detention of such a victim if there is a dispute of custody of the victim.

.....On account of being a citizen of India, she could have enjoyed the fundamental rights and move in whatever direction she desired if that movement was not detrimental to the Constitutional provision and national security."

In view of the above decision, it is apparent that detention of Shalu Mishra in Naari Niketan, despite her objection, merely on the ground that according to High School certificate she is less than 18 years although medical report suggested her age to be 19 years, cannot be treated as legal. Sessions Judge has himself while making transitory arrangement observed that his order shall be subject to the decision of this writ petition.

Taking into consideration the marriage certificate, educational certificate, medical reports regarding age and her categorical statement, this Court is of the opinion that this petition deserves to be allowed. Petition is allowed .

Superintendent, Government Protective Home, Lucknow is directed to set Shalu Mishra free to go with Sunil Mishra.

Order Date :-05/07/2013