R

IN THE HIGH COURT OF KARNATAKA

CIRCUIT BENCH AT DHARWAD

DATED THIS THE 26th DAY OF FEBRUARY 2013

BEFORE

THE HON'BLE MR. JUSTICE ASHOK B. HINCHIGERI

WRIT PETITION NO.75839 OF 2013(GM-RES)

BETWEEN:

Mis.Seema Begaum,
D/o.Khasimsab,
Age: 16 years,
Minor represented by her
Natural guardian
i.e. her father Khasimsab,
S/o.Buddin Sab,
Age: 45 years,
R/o.Goudar Oni,
Ward No.1, Kanakagieri,
Tq.Gangavathi,
Dist: Koppal. ... Petitioner

(By Sri Chandrashekar P.Patil, Advocate)

AND:

1. State of Karnataka,
By its Secretary, Woman and
Child Development Department,
M.S.Building,
Bangalore.

2. Sanyojakara (Coordinator)
District Child Protection Plan
Karnataka State Government
UNISEF Office Deputy Commissioner,
Koppal, Dist: Koppal.

3. The Deputy Commissioner,
Koppal, Dist: Koppal.

4. Deputy Superintendent of Police,
Koppal, Dist: Koppal.

5. The Sub Inspector of Police,
Kanakagiri Police Station,
Kanakagiri,
Tq. Gangavathi,
Dist: Koppal.

6. Karnataka Integrated Development
Services (Kids),
O/o.Kalmat Building,
Tikare Road, Dharwad,
R/by its Secretary,
Sri Ashok,
S/o.Girimallappa Yaragatti,
Age: 45 years,
Occ: Social Development Worker

7. Ujwala Rural Development Service
Society (URDSS),
O/o. Near Hakeem Chowk,
Shanti Nagar,
Bijapur – 586 104.
R/by its Secretary,
Vasudev S.Tolabandi,
Age: 52 years,
Occ: Social Worker. ... Respondents

(By Sri K.M.Nataraj, A.A.G., for Respondent No.1 to R5:
Sri R.H.Angadi, Advocate for R6 & R7)

This writ petition is filed under Articles 226 & 227 of the Constitution of India praying to declare that the provisions of Prevention of Child Marriage Act, 2006 produced at Annexure-F are not applicable to the petitioner, etc.,

This writ petition, coming on for orders, this day, the Court made the following:

ORDER

The petitioner has sought the relief of declaration that the provisions of the Prevention of Child Marriage Act, 2006 ('P.C.M.Act' for short) are not applicable to her. The petitioner belongs to Muslim community. She has attained puberty and she is now aged 16 years.

2. Sri Chandrashekhar P.Patil, the learned counsel for the petitioner submits that a Mohammedan girl of 15 years, who has attained puberty, is competent to marry without the consent of her parents. He submits that the marriage of a Mohammedan minor girl, who has not attained the puberty, may be contracted by her guardian. He submits that when the petitioner's personal law provides for the child marriages, the same cannot be taken away or diluted by the P.C.M. Act.

3. The learned counsel submits that the petitioner's personal law would prevail over the other laws. In support of his submissions, he read out Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, which is extracted hereinbelow:

> *"2. Application of Personal Law to Muslims – Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."*

4. He submits that as per Section 2(a) of the P.C.M. Act, 'child' means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. This prescription of the marriageable age has no application for the girls belonging to Mohammedan community, as they are governed by Muslim Personal Law (Shariat) Application Act, 1937, the provisions of which are extracted hereinabove.

5. Sri Patil sought to draw support from the Division Bench's decision of the Patna High Court in the case of

MD.IDRIS vs. STATE OF BIHAR reported in ***1980 Crl.L.J.764.*** In the said case a feud took place between the father and husband of a minor girl of 15 years. The Magistrate's order awarding the custody of the minor girl to her husband was upheld by the Division Bench of the Patna High Court. He submits that the said decision is also followed by the Division Bench of Delhi High Court in the case of ***MRS.TAHRA BEGUM vs. STATE OF DELHI AND OTHERS in Crl.M.A.3701/2012 disposed of on 09.05.2012.*** On considering the catena of decisions, the Delhi High Court has also taken the view that the Muslim girl can marry without the consent of her parents, once she attains the age of puberty. She has the right to reside with her husband, even if she is below 18 years of age. Such a marriage is not a void marriage but is voidable at the instance of the girl on her attaining the age of 18 years, so submits the learned counsel.

6. The learned counsel read out Section 375(sixthly) of the Indian Penal Code to buttress the submission that holding the forcible sexual intercourse amounts to rape, when

the same is with or without the woman's consent when she is under 16 years of age. He would therefore contend that, if she has completed 16 years of age and has given her consent, it does not amount to rape. Nextly, he also read out the second exception to Section 375 of IPC, which is as follows: "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape". He marshals these provisions to buttress his submission that a girl, who has crossed 15-16 years of age, is in a position to give or not to give her intelligent consent. She need not wait two or three more years, that is till she attains 18 years of age.

7. Urging these submissions, the learned counsel prays for the allowing of the petition. If the petitioner is prevented from marrying, she may run away. If such a thing happens, her parents become very hapless and helpless. In the guise of enforcing the P.C.M. Act, the petitioner and her parents cannot be subjected to catastrophic consequences.

8. Sri K.M.Nataraj, the learned Additional Advocate General appearing for the respondent Nos.1 to 5 brings to my

notice, at the very outset, that the validity of the P.C.M. Act itself is not under challenge. The petitioner has only sought a declaration that the provisions of the P.C.M. Act are not applicable to the petitioner. To decide the applicability of the P.C.M. Act for Mohammedan girls, it is necessary to consider the statement of objects and reasons of the Bill. He submits that the avowed objective of bringing about the said legislation is to make the solemnization of the child marriages punishable. One of the salient features of the Bill itself is to empower the Courts to issue the injunction prohibiting the solemnization of marriages in contravention of the provisions of the then proposed legislation.

9. The learned Additional Advocate General submits that the P.C.M. Act has the application for all the people belonging to all religions and regions. The only exception made is in the case of the State of Jammu and Kashmir. He brings to my notice the provisions contained in Section 1(2) of the P.C.M. Act, which read as follows:

"1. Short title, extent and commencement – (1) ……

(2) It extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India without and beyond India:

Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry."

10. The learned Additional Advocate General submits that the religion or community, to which a person belongs, makes no difference for the offence. The consequences of committing an offence cannot be avoided on the ground of the offender belonging to a particular religion.

11. He submits that the statute can always extinguish the customary law and the customary right. He read out paras 441, 442 and 443 from the Halsbury's Laws of England, IV Edition. They are extracted hereinbelow:

"441. Abolition only by statute.- Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished by Act of Parliament. An Act of Parliament may abolish a custom either by express provision or by the use of words which are inconsistent with the continued existence of the custom.

442. Statute repugnant to custom.- As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words. Although the question whether the custom is destroyed or not has been said to turn on the question whether the statute is an affirmative or a negative statute, this distinction appears to be merely one of the factors to be considered in this rule, no one can allege a custom against an Act of Parliament, unless the custom be saved or preserved by another Act of Parliament.

443. Effect of confirmation by statute.- Where an Act of Parliament has, according to its true construction, embraced and confirmed a right which has previously existed by custom, that right becomes henceforward a statutory right and the lower title by custom is merged in and extinguished by the higher title derived from the Act of Parliament, unless the Act of Parliament merely intended to confirm the right as a custom. Where the custom has been so extinguished, the old rights do not re-emerge on the repeal of the Act or, it seems, at the termination of a temporary Act. It appears that the custom would not be affected by the repeal of the Act if the Act merely confirmed and recognised the custom.

An Act of Parliament which recognises the existence and validity of a custom may not operate to create new

statutory rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute. Thus some old customs in London have not only had the force of a custom, but also have been supported and justified by authority of Parliament.

In determining how far an Act of Parliament has affected rights of this kind, the whole Act must be considered to see whether the rights given by the Act are intended to supersede the rights which previously existed."

12. He relies on the Apex Court's judgment in the case of ***RADHAKISHAN LAXMINARAYAN TOSHNIWAL vs. SHRIDHAR RAMCHANDRA ALSHI AND OTHERS*** reported in ***AIR 1960 SC 1368,*** wherein it is held that the transfer of property, where the Transfer of Property Act applies, has to be under the provisions of the said Act only; the Mohammedan Law of transfer of property cannot override the statutory law. It has expressed the considered view that wherever the Transfer of Property Act is in force, the Mohammedan Law or any other personal law is inapplicable to the transfer of

properties. He brings to my notice that this judgment is followed subsequently by the Hon'ble Apex Court in the case of ***KUMAR GONSUSAB vs. MOHAMMED MIYAN URF BABAN*** reported in ***AIR (SCW) – 2008-0-6311.***

13. The learned Additional Advocate General relies upon the Apex Court's decision in the case of ***SHABANA BANO vs. IMRAN KHAN*** reported in ***Laws (SC)-2009-12-62*** wherein it was held that a divorced Muslim woman is entitled to claim the maintenance from her husband under Section 125 of the Criminal Procedure Code even after the expiry of iddat period also, so long as she does not remarry. Just because her personal law provides for the award of the maintenance only during the iddat period, the maintenance cannot be restricted to the iddat period only.

14 He has also referred to the Apex Court's judgment in the case of ***MOLLY JOSEPH ALIAS NISH vs. GEORGE SEBASTIAN ALIAS JOY*** reported in ***AIR 1997 SC 109***, wherein the Kerala High Court's view that where the Ecclesiastical Court purports to grant the annulment or

divorce, the Church authorities would still continue to be under the disability to perform or solemnize a second marriage for any of the parties until the marriage is dissolved or annulled in accordance with the statutory law in force. Once the Divorce Act, 1869 has come into force, a dissolution or annulment granted under the personal law cannot have any legal impact, as the statute has provided a different code and different procedure for divorce.

15. He has also relied on the Apex Court's judgment in the case of ***SMT.PARAYANKANDIYAL ERAVATH KANAPRAVAN KALLIANI AMMA AND OTHERS vs. K.DEVI AND OTHERS*** reported in ***AIR 1996 SC 1963.*** He submits that just because the Hindus were earlier permitted to acquire a second wife under certain circumstances, the same cannot be re-agitated in the aftermath of the coming into force of the Hindu Marriage Act, 1955. The P.C.M. Act is a beneficial legislation. It is enacted in the best interest of the child only. The health of the child and of the society have weighed with the legislature in coming out with such a progressive statute. He submits that a religion cannot be

used as a shield to commit an offence. He submits that the P.C.M. Act is a complete code by itself.

16. He submits that the decisions of the Patna High Court and of Delhi High Court are in different contexts. In the cases which fell for consideration before the said High Courts, the marriage of the minor had already taken place. Those judgments cannot be used as the foundations or precedents for demanding that the girl's parents be permitted to arrange the child marriage

17. Sri R.H.Angadi, the learned counsel has filed the impleading application on behalf of the Karnataka Integrated Development Services and Ujwala Rural Development Service Society. He submits that both the organisations are committed to the prevention of the child marriages. He submits that the impleading applicants have lodged 20 complaints against those persons, who were making the arrangements for the performance of child marriages. He submits that the impleading applicants' mission is to safeguard the interests of the children of this country.

18. Sri Chandrashekhar Patil fairly indicates his no objection to the allowing of the impleading application. The impleading applicants may not be necessary parties, but they are the proper parties for the adjudication of the issues falling for consideration in this case. The impleading application is therefore allowed. The petitioner's side amends the cause title right here arraigning the two impleading applicants as the respondent Nos. 6 and 7.

19. In the course of rejoinder, Sri Chandrashekhar Patil, the learned counsel for the petitioner submits that none of the decisions relied upon by the respondents have any application for the facts of this case. In none of the reported decisions relied upon by the respondents, permitting the Mohammedan girl of 15 years, who has attained the puberty, to marry was an issue.

20. The submissions of the learned advocates have received my thoughtful consideration. The question that falls for my consideration is whether the statutory law prevails over the personal law?

21. An operative Act is the expression of the will of sovereign legislature; it overrides the consistent provisions of the existing personal law. The personal law has to submit to the statute law. The personal law cannot be repugnant, contrariant or derogatory to the statute.

22. When a later statute makes a contrary provision to the earlier statute, it has to be taken that the Parliament has intended the earlier statute to be repealed, though it may not have said so expressly. The same is in accordance with the maxim leges posteriores priores contrarias abrogant. (later laws abrogate earlier contrary laws).

23. The statement of objects and reasons can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. Reference to the statement of objects and reasons is permissible to understand the surrounding circumstances which render the remedying of the evil a paramount requirement.

24. The prime reason for bringing in the P.C.M. Act is the prohibition of the solemnization of the child marriage. When the prescribed marriageable age of the girl is 18 years, this Court cannot be called upon to issue the sought declaration that the provisions of the P.C.M. Act are not applicable for the petitioner, as she belongs to Muslim community. The courts have the power coupled with the duty to prevent and not to promote the child marriages. This Court cannot and would not pass an order by virtue of which little girls become child brides.

25. It is also profitable to refer to Section 13 of the P.C.M. Act, which empower the courts to issue injunctions prohibiting the solemnization of marriages in contravention of the said Act. Section 13(1) reads as follows:

> ***"13. Power of court to issue injunction prohibiting child marriages. –*** *(1) Notwithstanding anything to the contrary contained in this Act, if, on an application of the Child Marriage Prohibition Officer or on receipt of information through a complaint or otherwise from any person, a Judicial Magistrate of the first class or a Metropolitan Magistrate is satisfied that a child marriage in contravention of this Act has been*

arranged or is about to be solemnised, such Magistrate shall issue an injunction against any person including a member of an organization or an association of persons prohibiting such marriage."

26. When there is legislative ban on the child marriages, the courts cannot go out of their way to help the promoters of child marriages.

27. The courts will prefer the construction, which advances the object rather than the one which attempts to find some way of circumventing it. It is the duty of the courts not to facilitate the circumvention of the parliamentary intent.

28. As held by the Apex Court in the case of ***Radhakishan (supra,)*** when the statutory law has commenced to govern a particular field, the personal law becomes inapplicable. Reiterating this view in the subsequent case of ***Kumar Gonsusab (supra),*** the Hon'ble Supreme Court has held that the personal law dealing with the transfer of property cannot override the provisions of the Transfer of Property Act.

29. In the case of **Shabana Bano (supra)**, it was contended that under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, the divorced wife is not entitled to maintenance after the expiry of the iddat period. Not accepting this contention, the Hon'ble Supreme Court has laudably held as follows:

> *"The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only."*

30. In the case of ***Molly Joseph (supra),*** the Apex Court has categorically held that when the legislature enacts the law in respect of the personal law of a group of persons following a particular religion, then such statutory provisions would prevail over and override any personal law, usage or custom prevailing before the coming into force of such Act.

31. In the case of ***Smt.Parayankandiyal (supra),*** the Apex Court has negatived the submissions that a person can be permitted to acquire a second wife during the life-time of

the first wife and during the subsistence of the first marriage, just because the second marriage was customarily permitted under certain circumstances and for some purposes in the era of pre Hindu Marriage Act, 1955.

32. On the conspectus reading of paras 441, 442 and 443 of the Halsbury's Laws of England, the contents of which are extracted hereinabove, it becomes clear that the custom stands abrogated or destroyed, if it is running contrary to the statutory provisions, unless the custom is saved or preserved by a statute. The previously existing rights do not re-emerge, as they are superseded by the statute.

33. As the codified law prevails over all other laws, be they are ecclesiastical, personal or customary, the rights which the Muslim girls had under Muslim Personal Law (Shariat) Application Act, 1937 do not remain alive on the commencement of the P.C.M.Act.

34. There can be no dispute with what Patna and Delhi High Courts have said. But then, in both the cases, the Courts were confronted with a situation where the child

marriage had already taken place. But the said decisions cannot be used to demand that a Mohammedan girl be permitted to marry before she attained the age of 18 years.

35. The issue can be examined with reference to the territorial dimension of the P.C.M.Act. That the P.C.M.Act has the application for the people of all States and Union Territories of India except the State of Jammu and Kashmir is spelt out in the P.C.M. Act itself. Section 1(2) of the P.C.M Act, the provisions of which are extracted supra, makes it sternly clear that it applies to all the citizens of India, whether they are in India or outside India. The only exceptions made are in respect of State of Jammu and Kashmir and renoncants of the Union Territory of Pondicherry. Therefore, no Indian citizen on the ground of his belonging to a particular religion, can claim immunity from the application of the P.C.M. Act. The Legislature has not left anything to implication or interpretation as far as the application of P.C.M. Act is concerned.

36. The childhood of a person is precious. On the child attaining the age of majority, anything may be given to it like the job, house, husband/wife; but what cannot be got back is its precious childhood. What is therefore of paramount importance is that the child should fully enjoy his/her childhood before entering the wedlock. More often than not, it is the girl's happy childhood that would ensure a happy wifehood and happy motherhood. In whatever form it is, the child marriage is a gross violation of human rights of a girl or boy.

37. For all the aforesaid reasons, I dismiss this petition. No order as to costs.

Sd/-
JUDGE

Cm/-