

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE**

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 27th OF MAY, 2024

WRIT PETITION No. 9589 of 2024

BETWEEN:-

1. SARIKA SEN D/O DADU RAM SEN, AGED ABOUT 23 YEARS, OCCUPATION: UNEMPLOYED, R/O WARD NO.16, BHALUMADA, POLICE STATION BHALUMADA, DISTRICT ANUPPUR (MADHYA PRADESH)
2. SAFEER KHAN S/O MOHAMMAD HARUN KHAN, AGED ABOUT 23 YEARS, OCCUPATION: PRIVATE WORK R/O WARD NO.10, NEAR MASJID BHALUMADA, POLICE STATION BHALUMADA, DISTRICT ANUPPUR (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI DINESH KUMAR UPADHYAY - ADVOCATE)

AND

1. STATE OF MADHYA PRADESH, HOME (POLICE) DEPARTMENT, THROUGH ITS SECRETARY, VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)
2. COLLECTOR, ANUPPUR, DISTRICT ANUPPUR (MADHYA PRADESH)
3. SUPERINTENDENT OF POLICE, ANUPPUR, DISTRICT ANUPPUR (MADHYA PRADESH)
4. POLICE STATION BHALUMADA, THROUGH ITS SHO, DISTRICT ANUPPUR, (MADHYA PRADESH)
5. DADURAM SEN S/O LATE GAYADEEN SEN, AGED ABOUT 50 YEARS, R/O WARD NO.16, KOTMA COLONY, BHALUMADA, DISTRICT ANUPPUR (MADHYA PRADESH)

.....RESPONDENTS

(RESPONDENTS NO.1 TO 4/STATE BY SHRI K.S. BAGHEL - GOVERNMENT ADVOCATE AND RESPONDENT NO.5 BY SHRI RAHUL MISHRA - ADVOCATE)

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This petition coming on for admission this day, the court passed the following:

ORDER

This petition under Article 226 of Constitution of India has been filed seeking following relief(s):-

- i. Issue a writ in the nature of mandamus directing the Respondent authority to provide the security to the petitioners from the family members of the petitioner no.1.
- ii. Issue a writ in the nature of mandamus directing the Respondent authority to provide the follow-up guard to the petitioners for appearing before the Marriage Registration Officer i.e. Addition Collector Anuppur in Special Marriage Act Case fixed on 25.04.2024.
- iii. Issue a writ in the nature of mandamus directing the Respondent authority to not registered any case against the petitioner No.2 in respect of kidnapping of petitioner No.1 or other related offences in the complaint made by the family members of the petitioner fo.1
- iv. Any other relief which this Hon'ble Court deem fit may also is granted.

2. It is submitted by counsel for petitioners that petitioners are in love with each other. They have already approached the Marriage Officer under Special Marriage Act, however on account of objections raised by respondent No.5, they are not in a position to appear before the Marriage Officer. As a result, their marriage is not being registered. Accordingly, it is submitted that in the light of judgment passed by Supreme Court in the

case of **Lata Singh Vs. State of U.P.** reported in **(2006) 5 SCC 475**, petitioners may be granted Police protection.

3. *Per contra*, petition is vehemently opposed by counsel for respondent No.5. It is submitted that petitioner No.1 has left her house by taking jewellery of all the family members and has also taken away cash amount. It is further submitted that since the petitioner No.1 wants to perform an inter-religion marriage and in case if it takes place, then respondent No.5 and his family would be boycotted by the Society, therefore petitioners are not entitled for any protection.

4. Heard learned counsel for the parties.

5. Petitioners belong to different religions, therefore counsel for the petitioners was directed to address this Court as to whether marriage of petitioner No.1 with petitioner No.2 will be a valid marriage or not?

6. It is submitted by counsel for petitioners that since petitioners want to perform marriage under the Special Marriage Act, therefore *Nikah* is not required. It is further submitted that both the petitioners have come to a consensus that petitioner No.1 shall continue to follow her Hindu religion, whereas petitioner No.2 shall continue to follow his Islam religion and nobody would interfere with religious feelings of each other. It is further submitted that there is no intention of petitioner No.1 to accept the Islam religion.

7. The next question for consideration is as to whether marriage of a Muslim boy with a Hindu girl would a valid marriage or not?

8. The aforesaid question is no more *res integra*.

9. The Supreme Court in the case of **Mohammed Salim (D) Through LRs. & Ors. Vs. Shamsudeen (D) Through LRs. & Ors.** decided on 22/01/2019 in **Civil Appeal No.5158/2013** has held as under:-

"8. In the 21st edition of Mulla, at page 338, §250, marriage is defined as follows:-

“Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children.”

Thus it appears that a marriage according to Muslim law is not a sacrament but a civil contract. Essentials of a marriage are dealt with in § 252 at page 340 of Mulla (21st edition) as follows:

“It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohamedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential.”

§ 259(1) at page 345 of the 21st edition deals with difference of religion, providing that marriage of a Muslim man with a non-Muslim woman who is an idolatress or fire worshipper is not void, but merely irregular. It reads:

“A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a

Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage however, with an idolatress or a fire-worshipper, is not void, but merely irregular.”

Before proceeding further, it is crucial to note that under Muslim law, there are three types of marriage—valid, irregular and void, which are dealt with in § 253 at page 342 of *Mulla* (21st edition):

“A marriage may be valid (*sahih*), or irregular (*fasid*) or void from the beginning (*batil*).”

The High Court, while dealing with the contention that the correct translation of the Arabic word “*fasid*” was “invalid”, and not “irregular”, and that therefore a *fasid* marriage was a void marriage, considered the changes over time in the interpretation of “*fasid*”. It would be worthwhile for us to refer to these changes as well. In the 6th edition of *Mulla*, at §§ 197, 199 and 200, *fasid* marriage is interpreted as “invalid”. So also in §§ 197, 199 and 204A of the 8th edition of *Mulla*, *fasid* is stated to mean “invalid”. For instance, in the 6th edition of *Mulla*, § 200 at page 162, dealing with the difference of religion, reads:

“(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman but with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. If he does marry an idolatress or a fire-worshipper the marriage is not void (*batil*), but merely **invalid** (*fasid*).”

(emphasis supplied)

§ 204A at page 164 of the same edition deals with the distinction between void (*batil*) and invalid (*fasid*) marriage. It provides that a marriage which is not valid may be either void (*batil*) or invalid (*fasid*). A void marriage is one which is unlawful in itself, the prohibition against such a marriage being perpetual and absolute. An invalid marriage (*fasid* marriage) is described as one which is not unlawful in itself, but unlawful “for something else”, as here the prohibition is temporary or relative, or when the invalidity arises from an accidental circumstance such as the absence of a witness. § 204A(3) at page 165 of the 6th edition of *Mulla* reads:

“...Thus the following marriages are ***invalid***, namely—

- (a) a marriage contracted without witnesses, (ss. 196-197);
- (b) a marriage by a person having four wives with a fifth wife (s. 198);
- (c) a marriage with a woman who is the wife of another, (s. 198A);
- (d) a marriage with a woman undergoing *iddat* (s.199);
- (e) a marriage prohibited by reason of difference of religion (s. 200);**
- (f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 204)...”

(emphasis supplied)

The reason why the aforesaid marriages are invalid and not void has also been provided later in the same paragraph. With respect to marriages prohibited by reason of

difference of religion, it is stated thus:

“...in cl. (e) the objection may be removed by the wife becoming a convert to the Mussulman, Christian or Jewish religion, or the husband adopting the Moslem faith...”

In the 10th edition, a change has been made to the meaning of *fasid* marriage. In §196A, valid, irregular and void marriages are dealt with. It reads:

“A marriage may be valid (*sahih*) or **irregular** (*fasid*), or void from the beginning (*batil*).”

(emphasis supplied)

From the 10th edition onwards, *fasid* marriage has been described as an irregular marriage, instead of invalid, but there has been no change with regard to the *effect* of a *fasid* marriage from the 6th edition onwards. The effects of an invalid (*fasid*) marriage have been dealt with in the 6th edition of *Mulla* at § 206 at page 166, clauses (1) and (2) of which read:

“(1) An invalid marriage has no legal effect before consummation.

(2) If consummation has taken place, the wife is entitled to dower [“proper” (s.220) or specified (s.218), whichever is less], and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties.”

In the 8th edition of *Mulla*, the effects of a *fasid* marriage have been dealt with in § 206 at page 173. As in the 6th edition, it is stated that children conceived and born during the subsistence of a *fasid* marriage are legitimate, as in the case of a valid marriage. As noted supra, the same position has been followed in the subsequent editions also, except that *fasid* has been described as “irregular” from the 10th edition onwards rather than as “invalid”.

Irrespective of the word used, the legal effect of a *fasid* marriage is that in case of consummation, though the wife is entitled to get dower, she is not entitled to inherit the properties of the husband. But the child born in that marriage is legitimate just like in the case of a valid marriage, and is entitled to inherit the property of the father.

9. Evidently, Muslim law clearly distinguishes between a valid marriage (*sahih*), void marriage (*batil*), and invalid/irregular marriage (*fasid*). Thus, it cannot be stated that a *batil* (void) marriage and a *fasid* (invalid/irregular) marriage are one and the same. The effect of a *batil* (void) marriage is that it is void *ab initio* and does not create any civil right or obligations between the parties. So also, the offspring of a void marriage are illegitimate (§ 205A of the 6th and 8th editions and §§ 205A of the 10th edition, and 266 of the 18th edition of *Mulla*). Therefore, the High Court correctly concluded that the marriage of Defendant No.9 with Mohammed Ilias cannot be held to be a *batil* marriage but only a *fasid* marriage.

10. We find that the same position has been reiterated in the 21st edition of *Mulla* as follows. The distinction between void and irregular marriages has been dealt with in § 264 at page 349:

“(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (§260), affinity (§261), or fosterage (§262), is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful ‘for something else,’ as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely—

(a) a marriage contracted without witnesses (§ 254);

(b) a marriage with a fifth wife by a person having four wives (§ 255);

(c) a marriage with a woman undergoing *iddat* (§ 257);

(d) ***a marriage prohibited by reason of difference of religion (§ 259);***

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (§263).

The reason why the aforesaid marriages are irregular, and not void, is that in Clause (a) the irregularity arises from an accidental circumstance; in Clause (b) the objection may be removed by the man divorcing one of his four wives; in Clause (c) the impediment ceases on the expiration of the period of *iddat*; ***in Clause (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith***; and in Clause (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.”

(emphasis supplied)

The effect of an irregular (*fasid*) marriage has been dealt with in § 267 at pages 350-351 of the 21st edition of *Mulla* as follows:

“267. *Effect of an irregular (fasid) marriage.*—(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other “I have relinquished you”. An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place—

(i) the wife is entitled to dower, proper or specified, whichever is less (§ 286, 289);

(ii) she is bound to observe the *iddat*, but the duration of the *iddat* both on divorce and death is three course (see § 257(2));

(iii) ***the issue of the marriage is legitimate.*** But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife...”

(emphasis supplied)

The Supreme Court, in ***Chand Patel v. Bismillah Begum***, (2008) 4 SCC 774, while considering the question of the validity of a marriage of a Muslim man with the sister of his existing wife, referred to the above passages from *Mulla* (from an earlier edition, as reproduced in the 21st edition) while discussing the difference between void and irregular marriages and the effects of an irregular marriage.

11. In Syed Ameer Ali’s *Mohamedan Law* also, the same principle has been enunciated. The learned author, while dealing with the issue of the legitimacy of the children, observed at page of Vol. II, 5th edition:

“The subject of invalid marriages, unions that are merely invalid (*fasid*) but not void (*batil*) ab initio under the Sunni Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriage are without question legitimate according to all the sects.

For example, if a man were to marry a non- scriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate.”

Tahrir Mahmood in his book *Muslim Law in India and Abroad*, (2nd edition) at page 151 also affirms that the child of a couple whose marriage is *fasid*, i.e., unlawful but not void, under Muslim law will be legitimate. Only a child born outside of wedlock or born of a *batil* marriage is not legitimate.

A.A.A. Fyzee, at page 76 of his book *Outlines of Muhammadan Law* (5th edition) reiterates by citing *Mulla* that the *nikah* of a Muslim man with an idolater or fire-worshipper is only irregular and not void. He also refers to Ameer Ali’s proposition that such a marriage would not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam, which would at once remove the bar and validate the marriage.

12. The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See *Aisha Bi v. Saraswathi Fathima*, (2012) 3 LW 937 (Mad), *Ihsan Hassan Khan v. Panna Lal*, AIR 1928 Pat 19).

13. Thus, based on the above consistent view, we conclude that the marriage of a

Muslim man with an idolater or fire-worshipper is neither a valid (*sahih*) nor a void (*batil*) marriage, but is merely an irregular (*fasid*) marriage. Any child born out of such wedlock (*fasid* marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (*sahih*) marriage, but merely an irregular (*fasid*) marriage."

10. It is submitted by counsel for the petitioners that Special Marriage Act would override the personal law therefore marriage of a Muslim boy with a Hindu girl would not be an irregular marriage.

11. Considered the submissions made by counsel for the petitioners.

12. Under personal law, performance of certain rituals are necessary for solemnization of marriage. However, if marriage is performed under Special Marriage Act, then such marriage cannot be challenged on the ground of non-performance of such mandatory rituals. But marriage under Special Marriage Act would not legalise the marriage which otherwise is prohibited under personal law. Section 4 of Special Marriage Act provides that if the parties are not within prohibited relationship then only marriage can be performed.

13. § 259 reads as under:- (Mulla Principles of Mahomedan Law 21st Edition)

"§ 259. Difference of religion (1) A Mahomedan male may contract a valid marriage not only with

a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular.

(2) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a *Kitabi*, that is, a Christian or a Jew. A marriage however, with a non-Muslim, whether he is a *Kitabi*, that is a Christian or a Jew, or a non-*Kitabi*, that is, an idolater or a fire-worshipper, is irregular, not void."

14. As per Mahomedan law, the marriage of a Muslim boy with a girl who is an idolatress or a fire-worshipper, is not a valid marriage. Even if the marriage is registered under the Special Marriage Act, the marriage would be no more a valid marriage and it would be an irregular (*fasid*) marriage.

15. It is not the case of petitioners that in case if marriage is not performed, then they are still interested to live in live-in relationship. It is also not the case of petitioners that petitioner No.1 would accept Muslim religion.

16. Under these circumstances, this Court is of considered opinion that no case is made out warranting interference.

17. Petition fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

S.M.