

A.F.R.

Court No. - 5

Case :- WRIT - C No. - 18743 of 2020

Petitioner :- Asha Devi And Another

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Sheetal Prasad Pandey

Counsel for Respondent :- C.S.C.

Hon'ble Surya Prakash Kesarwani,J.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. This writ petition has been filed praying for the following reliefs:-

(i) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents not to harass or take any coercive action against the petitioners.

(ii) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iii) Award cost of the petition to the petitioners.

Submissions

2. Learned counsel for the petitioners submits that the petitioners are living as husband and wife and both are major and therefore protection may be granted to them so that the respondent no. 4, the father of the petitioner no. 1, may not harass the petitioners. He submits that a representation dated 17.09.2020 was submitted by the petitioner no. 1 before the respondent no.2 but no action has been taken so far.

3. Learned Standing Counsel submits that the petitioner no. 2 has taken away the petitioner no. 1 who appears to be duly married wife of one Sri Mahesh Chandra and thus the petitioner no. 2 is an offender and therefore no protection can be granted to the petitioner.

4. We have carefully considered the submissions of learned counsel for the parties.

Facts

5. In paragraph nos. 4, 5 and 6 of the writ petition, it has been stated as under :-

4. That the petitioner no. 2 is also major aged about 23 years old and his date of birth is 01.01.1997 according to Aadhar Card, the petitioner no. 1 is educated only Class 5th she has no any age proof except Aadhar Card.

5. That the petitioner no. 1 was married earlier with one Mahesh Chandra but who is habitual drinker and assaulted her maliciously therefore she left his home and came at her parental house.

6. That at present the petitioner no. 1 is living in relation with petitioner no.2 from 24.8.2020 but the father of the petitioner no. 1 (respondent no. 4) is very much annoyed and given threat to kill her.

6. It has been stated in paragraph no. 8 of the writ petition that the petitioner no. 1 has filed a representation dated 17.09.2020 before the respondent no. 2 which is reproduced below :-

सेवा में,

श्रीमान पुलिस अधीक्षक महोदय,
हाथरस।
महोदय,

विनम्र निवेदन है कि **प्रार्थिनी आशा** पुत्री राम बाबू नि0 बिजलीघर ससनी, थाना सासनी जिला हाथरस, जो कि **अरविन्द** पुत्र सूरजाभाना निवासी नया बिजलीघर बिजाहरी थाना सासनी जिला हाथरस **के साथ पति पत्नी के रूप में रह रही है** प्रार्थिनी बालिग है तथा अपना भला बुरा सोचने में पूरी तरह से सक्षम है लेकिन हमारे पिता जी हम लोगों के इस रिश्ते से बहुत ही नाराज है तथा हमे जाने से मारने की धमकी दे रहे है दिनांक 24.8.2020 को हमारे पिता जी तथा थाना सासनी के कुछ पुलिस वाले अरविन्द के घर पर आये और बोले अगर लडकी हमारे हवाले नहीं किया तो बहुत बुरा होगा और धमकी दिये कि तुम लोगों को फर्जी मुकदमें में फँसा देगे हमारे पिता ने पुलिस के सामने ही धमकी दिया कि तुम दोनो को जान से खत्म करे देगे। हम दोनो की जान खतरे में है तथा हम दोनो बहुत डरे हुए हैं। अतः श्रीमान जी से निवेदन है कि हमारे प्रार्थना पत्र पर सहानुभूतिपूर्वक विचार करते हुए हम लोगों को सुरक्षा प्रदान करने की कृपा करे।

सदा आभारी रहेगी।

प्रार्थिनी
दिनांक— 17/09/2020 आशा पुत्री राम बाबू
नि0 बिजलीघर ससनी
थाना सासनी, जिला हाथरस,

7. From perusal of the writ petition, we find that none of the pages of the writ petition bear signature of either of the writ petitioners. The writ petition is neither accompanied by an affidavit of the petitioners nor it is accompanied with declaration of the counsel for the petitioners.

8. It has been stated in paragraph 5 of the writ petition that the petitioner no. 1 is married with one Sri Mahesh Chandra. There is no averment in the writ petition that the petitioner no. 1 has obtained a decree of divorce from her husband Mahesh Chandra. In the alleged representation, it has been stated that the petitioner nos. 1 and 2 are living as husband and wife. The fact of the case as briefly noted above shows that the petitioner no. 1 is legally wedded wife of Mahesh Chandra who has not been even impleaded as respondent.

Questions:-

9. From the facts and submissions of learned counsels for the parties as briefly noted above, the following questions are framed with the consent of learned counsels for the parties for final disposal of the present writ petition :-

(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?

Discussion & Findings

10. Since both the questions as framed above are interlinked, therefore, both are being considered and decided together.

What is live-in-relationship

11. Live-in-relationship is a relationship which has not been socially accepted in India, unlike many other countries. In **Lata Singh v. State of U.P.**¹ and in **Indra Sarma Vs. V. K.V. Sarma**² (paras 40, 42, 43 & 53) Hon'ble Supreme Court observed that live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. In **D. Velusamy Vs. D Patchaiammal**³ (paras 31 & 32) Hon'ble Supreme Court explained the phrase "relationship in the nature of marriage" as under :-

"31. In our opinion a "relationship in the nature of marriage" is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(see 'Common Law Marriage' in Wikipedia on Google)

In our opinion a 'relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'.

32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

1 (2006)5 SCC 475

2 (2013)15 SCC 755

3 (2010) 10 SCC 469

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied by us)

12. The expression "relationship in the nature of marriage" is also described as de facto relationship, marriage-like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship etc.).

Relationship which are not live-in-relationship or relationship in the nature of marriage

13. Perusal of various judgments of Hon'ble Supreme Court reveals that the **following relationship have not being recognised or approved as live-in-relationship or relationship in the nature of marriage**. This list is not exhaustive but merely illustrative :-

(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma's Case (supra)**.

(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is

not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.**⁴ (paras 17 to 21, 27, 28 & 29). **Polygamy is also a criminal offence** under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India**⁵ (paras 299.3).

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the **offence of bigamy**, vide **Lily Thomas and another Vs. Union of India and others**⁶ (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-

“38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another

4 (2011) 7 SCC 616

5 (2017) 9 SCC 1

6 (2000)6 SCC 224

religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved.”

(Emphasis supplied by us)

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide **D Velusamy Vs. D Patchaiammal** (supra) (para 31).

What is Criminal Offence

14. "Offence" means "an act or instance of offending"; "commit an illegal act" and "illegal" means, "contrary to or forbidden by law". "Offence" has to be read and understood in the context as it has been prescribed under the provisions of Sections 40, 41 and 42 IPC which cover the offences punishable under I.P.C. or under special or local law or as defined under Section 2(n) Cr.P.C. or Section 3(38) of the General Clauses Act, 1897 (vide *S. Khushboo Vs. Kanniammal*⁷, *Proprietary Articles Trade Association Vs. Attorney General for Canada*⁸; *Thomas Dana Vs. State of Punjab*⁹; *Jawala Ram & Ors. Vs. The State of Pepsu (now Punjab) & Ors.*¹⁰; and *Standard Chartered Bank &*

⁷ (2010)5 SCC 600

⁸ AIR 1931 PC 94

⁹ AIR 1959 SC 375

¹⁰ AIR 1962 SC 1246

Ors. Vs. Directorate of Enforcement & Ors.¹¹).

Whether Writ of Mandamus can be issued

15. In **Director of Settlement, A.P. Vs. M.R. Apparao**¹², (para 17) Hon'ble Supreme Court considered the High Court's **power for issuance of mandamus** and held as under :-

“17. Coming to the third question, which is more important from the point of consideration of High Court's power for issuance of mandamus, it appears that the constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression 'for any other purpose'. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along recognised lines and subject to certain self-imposed limitations. The expression 'for any other purpose' in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Court must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation,

¹¹ AIR 2006 SC 1301

¹² (2002) 4 SCC 638

*inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. **In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition.** {Kalyan Singh vs. State of U.P., AIR 1962 SC 1183}. The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. When the aforesaid principle are applied to the case in hand, the so-called right of the respondents, depending upon the conclusion that the amendment Act is constitutionally invalid and, therefore, the right to get interim payment will continue till the final decision of the Board of Revenue cannot be sustained when the Supreme Court itself has upheld the constitutional validity of the amendment Act in Venkatagiri's case (2002) 4 SCC 660 on 6.2.1986 in Civil Appeal Nos. 398 & 1385 of 1972 and further declared in the said appeal that interim payments are payable till determination is made by the Director under Section 39(1). The High Court in exercise of power of issuance of mandamus could not have said anything contrary to that on the ground that the earlier judgment in favour of the respondents became final, not being challenged. The impugned mandamus issued by the Division Bench of the Andhra Pradesh High Court in the teeth of the declaration made by the Supreme Court as to the constitutionality of the amendment Act would be an exercise of power and jurisdiction when the respondents did not have the subsisting legally enforceable right under the very Act itself. In the aforesaid circumstances, we have no hesitation to come to the conclusion that the High Court committed serious error in issuing the mandamus in question for enforcement of the so-called right which never subsisted on the date, the Court issued the mandamus in view of the decision of this Court in Venkatagiri's case. In our view, therefore, the said conclusion of the High Court must be held to be erroneous.”*

(Emphasis supplied by us)

16. According to own case of the petitioners, the petitioner no.1

is still a legally wedded wife of one Mahesh Chandra. As per own alleged application dated 17.09.2020 (as reproduced in para 6 above), the petitioners are living as husband and wife and they have sought protection from interference in their living together as husband and wife. **Once the petitioner No.1 is a married woman being wife of one Mahesh Chandra, the act of petitioners particularly the petitioner No.2, may constitute an offence under Sections 494/495 I.P.C. Such a relationship does not fall within the phrase “live-in-relationship” or “relationship in the nature of marriage”.** The writ petition has been filed by the petitioners for protection from interference by others in their living as husband and wife. If the protection as prayed is granted, it may amount to grant protection against commission of offences under Sections 494/495 I.P.C.

17. Article 226 of the Constitution of India empowers High Court to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibitor, quo warranto and certiorari or any of them. Such directions, orders or writs may be issued for the enforcement of fundamental rights or for any other purpose. The jurisdiction under Article 226 is equitable and discretionary.

18. It is settled law that writ of mandamus can be issued if the petitioner has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. Similar view has also been taken by Hon'ble Supreme Court in **Kalyan Singh vs. State of U.P.**¹³. Applying the principles of issuance of writ of mandamus on the facts of the present case, we find that **the petitioners have no legal right for protection on the facts of the present case inasmuch as such the**

13 AIR 1962 SC 1183

protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision. The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus.

Judgments relied by the Petitioners :

19. Lastly, learned counsel for the petitioners has relied upon a Division Bench judgment of this Court dated 11.11.2020 in **Criminal Misc. Writ Petition No.11367 of 2020 (Salamat Ansari & 3 Others Vs. State of U.P. & 3 others)**. We find that the aforesaid judgment has no relevance on the facts of the present case. In the case of **Salamat Ansari and others (supra)** the F.I.R. Under Sections 363, 366, 352, 506 I.P.C. and Section 7/8 POSCO Act was quashed by the Court primarily on the ground that no offence has been made out as the two grown up individuals were living together for over a year of their own free will and choice. In the case of **Salamat Ansari and others (supra)** (paras 13,14,15,17) this Court considered the judgment of learned single Judge, dated 16.12.2014 in **Writ C No.57068 of 2014 (Smt. Noor Jahan Begum @ Anjali Misra and another Vs. State of U.P. and others)** and, without interfering with the principles of law in **Smt. Noor Jahan's (supra)** case on “conversion of religion and void marriage”; **observed** that no doubt the ladies in question could not authenticate their alleged conversion and once the alleged conversion was under cloud; the constitutional Court was obliged to ascertain the wish and desire of the girls as they were above the age of 18 years and were living together which can be classified as a relationship in the nature of marriage as distinct from the

relationship arising out of marriage in view of the provisions of Protection of Women from Domestic Violence Act, 2005. In paragraph 17 of the judgment in **Salamat Ansari and others (supra)** the Court observed that “we clarify that while deciding this petition, we have not commented upon the validity of alleged marriage/conversion”. In the aforesaid judgment in **Salamat Ansari and others (supra)** this Court had no occasion to consider what is “live-in-relationship” or “relationship in the nature of marriage” or when a writ of mandamus can be issued or whether protection can be granted to such petitioners whose act prima facie constitute offences under Sections 494/495 I.P.C.

20. Another judgment relied by learned counsel for the petitioner being judgment dated 2.11.2020 in **Writ – C No. - 17394 of 2020 (Sultana Mirza And Another Vs. State of U.P. and 5 others)** is also distinguishable on facts of the present case. Therefore, it is of no help to the petitioners.

Conclusions:

21. The discussion and findings as recorded in foregoing paragraphs are briefly summarized as under:-

(i) A “**relationship in the nature of marriage**” is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(ii) A 'relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'.

(iii) **Following relationship have not being recognised or approved as live-in-relationship or relationship in the nature of marriage.** This list is not exhaustive but merely illustrative :-

(a) **Concubine** can not maintain relationship in the nature of marriage.

(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage. **Polygamy is also a criminal offence** under Sections 494 & 495 I.P.C.

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the **offence of bigamy**

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried.

(iv) Once the petitioner No.1 is a married woman being wife of one Mahesh Chandra, the act of petitioners particularly the petitioner No.2, may constitute an offence under Sections 494/495 I.P.C. Such a relationship does not fall within the phrase “live-in-relationship” or “relationship in the nature of marriage”. The writ petition has been filed by the petitioners for protection from interference by others in their living as husband and wife. If the protection as prayed is granted, it may amount to grant protection against commission of offences under Sections 494/495 I.P.C.

(v) It is settled law that writ of mandamus can be issued if the petitioner has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. Similar view has also been taken by Hon'ble Supreme Court in **Kalyan Singh vs. State of U.P. (supra) and in **Director of Settlement A.P. (supra)**. Applying the principles of issuance of writ of**

mandamus on the facts of the present case, we find that the **petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision.** The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus.

Answer to Questions

22. We answer question Nos.(i) and (ii) in negative i.e. no protection can be granted to petitioners by this Court in exercise of powers conferred under Article 226 of the Constitution of India.

23. For all the reasons aforesaid, we are not inclined to exercise our discretionary jurisdiction. Consequently, the writ petition fails and is hereby **dismissed**.

Order Date :- 1.12.2020
Pratima/vkg