

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 338 of 2023

Petitioner :- Preeti Saroj Thru. Her Husband Dharam Raj

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Home Deptt. Lko. And 3 Others

Counsel for Petitioner :- Rakesh Kumar Singh

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar,J.

Heard learned counsel for the petitioner and learned A.G.A. for the respondent State as well as perused the record.

Notices to respondent no.4 are dispensed with in view of the proposed order.

Through this petition the petitioner has prayed for the following main prayer:-

"(i) A writ, order or direction in the nature of Habeas Corpus thereby commanding and directing the opp. party nos. 2 and 3 to produce the wife (Preeti Saroj) and child (Aryan) of Dharam Raj before this Hon'ble Court and they may be set at liberty to live with Dharam Raj.

(ii)....."

Learned counsel for the petitioner submits that the detenue Preeti Saroj was married with the deponent in June, 2015 and out of the wedlock, a male child was born who is presently aged about eight years and till 02.12.2018 everything was good and both of them were living happily along with their minor children. However, on 03.12.2018, respondent no. 3 and 4 along with Bablu Pradeep and Sunny came to the house of Dharam Raj (deponent), while he was not at home and they forcibly took away his wife (detenue) and child as well as ornaments etc.

It is further submitted that the deponent filed a complaint case No. 27438/2021 "Dharam Raj vs. Suresh Saroj" before the competent Court and summons were issued against the accused persons. Dharam Raj (deponent) also filed a suit under Section 9 of Hindu Marriage Act for restitution of conjugal rights which was registered as case No. 326/2020 "Dharam Raj Vs. Preeti Saroj" before the Principal Judge, Family court Pratapgarh who ultimately passed an ex-parte decree in favour of Dharam Raj (deponent) on 05.04.2022 and directed Preeti Saroj to perform the matrimonial life within a period of one month from the date of order.

Learned counsel for the petitioner further submits that Preeti Saroj has not filed any recall application against the ex-parte order, neither order dated 05.04.2022 has been challenged in any higher forum and she has failed to comply order dated 05.04.2022. For compliance of order dated 05.04.2022, Dharam Raj moved an application before opposite party no. 2, however, till date no action has been taken by opposite party no. 2 for compliance of the order dated 05.04.2022.

It is further submitted that there is provision under Family court for execution of the order and decree passed under Section 9 of Hindu Marriage Act.

On the basis of instructions, learned A.G.A. has submitted that the statement of the detenu has been taken and the corpus has told the Sub Inspector Ankit Srivastava that her father did not brought her from her matrimonial home, rather the deponent (her husband) abandoned her at a far place from her village. She has not been detained and she does not want to live with the petitioner anymore. She is presently residing with her son in Sultanpuri, Delhi along with her elder sister Arti and brother-in-law Santosh.

Learned A.G.A. has opposed the petition submitting that the petitioner has already availed alternative remedy in form of suit for restitution of conjugal rights before the Family Court in which ex-parte decree has been passed in favour of the deponent and hence, he should have filed an execution case before the competent court. The writ petition is liable to be dismissed on this ground.

Perused the record.

Order 21 Rule 32 of CPC provides the resolution of decree for specific performance for restitution of conjugal rights. The said Order 21 Rule 32 of CPC is extracted below:-

"32. Decree for specific performance for restitution of conjugal rights, or for an injunction.- (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it he decree may be enforced the case of decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed in a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the court, by the detention in the civil prison of the directors or

other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force month ,if the judgment debtor has not obeyed the decree and the decree holder has applied to have attached property sold, such property may be sold; and out of the proceeds the court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

[Explanation.—For the removal of doubts, it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunction.]

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the court to remove the building and may recover the cost of such removal from A in the execution proceedings."

A perusal of the above provision shows that when a decree for restitution of conjugal rights has been passed, against whom such decree has been passed has an opportunity of obeying the decree and if he/she willfully fails to obey it, the decree may be enforced in the case of restitution of conjugal rights by attachment of his/her property or detention in the civil prison or by both.

It is clear from perusal of the aforesaid Rule 32 that in case a decree is passed for restitution of conjugal rights, the same can be enforced under Order 21 Rule 32 against the judgment dated 05.04.2022 which in this case is the detinue. The petition has already approached the competent Court and there is no reason as to why he can not file an execution case under Order 21 Rule 32 of CPC for execution of the decree dated 05.04.2022.

So far as the argument of the petitioner that there is no provision under the Family Court Act for execution of the order or decree under section 9 of Hindu Marriage Act and therefore, the only option for the petitioner is to file the present petition before this Court is patently misconceived. Section 10 of the Family Court Act, 1984 provides the procedure and makes the provisions of Code of Civil Procedure applicable to the suits and proceedings before a Family Court except the proceedings under Chapter IX of Cr.P.C. No distinction has been made by the Legislature between ex-parte decree and decree passed under the Family Courts Act.

The procedure of execution under CPC is ipso facto and is applicable in view of Section 10 of the Family Courts Act, hence, the argument of the petitioner as well as pleading in para 8 of the petition that no provision under Family Court Act for execution of order or decree under Section 9 of Hindu Marriage Act and therefore, the writ petition is maintainable is erroneous and misconceived.

This Court while passing the order has taken notice of the fact that as per the pleading made in para 1, the detenue Preeti Saroj was forcibly taken away from the home of the deponent on 03.12.2018 by opposite party no. 3 and 4 along with other persons. The petitioner/deponent has already availed the remedy under Family Courts Act by filing a suit for restitution of conjugal rights and the suit having been decreed though ex-parte as exhausted the alternative remedy. Now for enforcement of the ex-parte decree against the judgment dated 05.04.2023, the only course open for the petitioner is to file an execution case under order 21 Rule 32 CPC.

The writ petition of habeas corpus cannot be entertained for two reasons. One the alternative remedy for compelling the detenue to live with deponent has already been availed by the petitioner and only the execution case is left to be filed by him for enforcement of the ex-parte decree. Secondly, the incident is of 2018 and the writ petition has been filed approximately after five years without any explanation of laches. Therefore, on this grounds, prima facie, I am of the view that writ of habeas corpus in this case is not maintainable as already alternative statutory remedy has been availed by the petitioner coupled with the fact that the writ petition is highly belated and suffers from delay and laches.

With the aforesaid observations, the petition is dismissed.

Order Date :- 31.10.2023
R.C.