

Court No. - 81

Case :- WRIT - C No. - 41207 of 2023

Petitioner :- Prateeksha And Another

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Rahul Kumar Jadaun, Shobhit Pratap Singh

Counsel for Respondent :- C.S.C.

Hon'ble Mrs. Renu Agarwal, J.

1. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus directing the respondents not to interfere in the peaceful married life of the petitioners as husband and wife and to direct the respondents No. 2 and 3 to provide protection and security to the petitioners.

2. It is submitted that the petitioner No.1 is major aged about 19 years. As per her high school certificate the date of birth of the petitioner No. 1 is 29.05.2004. It is also submitted that the petitioner No. 1 is unmarried and she fell in love with petitioner No. 2 who is aged about 19 years. It is also submitted that as per high school certificate the date of birth of petitioner No. 2 is 09.03.2004. It is also submitted that the petitioners are living in relationship since August, 2022. It is also submitted that the respondent No. 5 who is the father of the petitioner No. 1 is not happy with the choice of the petitioner No. 1 and has been constantly harassing and threatening the petitioner to their lives. It is also submitted that the petitioners moved an application to the Commissioner of Police, Kanpur

Nagar seeking protection to their lives from respondent No. 5, however, no protection has been provided to the petitioners.

3. In support of the contention, learned counsel for the petitioners has relied upon the judgment of Supreme Court passed in the case of Deepika and another Vs. State of U.P. and others (2013) ADJ 534 wherein it was held that “Where a boy and girl are major and they are living with their free will then nobody including their parents have any right to interfere with living together.” Reliance is also placed on the judgment of Supreme Court in *Nandkumar and another Vs. State of Kerala and others Criminal Appeal No. 597 of 2018* wherein it was held that “insofar as the marriage of appellant No. 1 who was less than 21 years of age on the date of marriage was not of marriageable age with girl is concerned, it cannot be said that merely because the appellant No. 1 was less than 21 years of age, marriage between the parties is null and void.” Reliance is also placed on the judgment of this Court in the case of *Smt. Saloni Yadav and another Vs. State of U.P.* and other *Criminal Misc. Writ Petition No. 7996 of 2023* .

4. Learned Standing Counsel on the other hand submitted that the petitioner No. 1 has produced her high school certificate wherein her date of birth is mentioned as 29.05.2004 and the date of birth of petitioner No. 2 as per his high school certificate is 09.03.2004. It is also submitted that the petitioner No.2 is a major for all purposes other than marriage as prescribed by the Hindu Law. It is also submitted that as per their

avermment made in the writ petition, the petitioners are living in relationship since August, 2022. It is also submitted that the petitioner No. 2 does not satisfy the eligibility criteria prescribed for a person to be in a live in relationship. Learned Standing Counsel has relied upon a judgment of a Division Bench of this Court passed in the case of ***Asha Devi and another Vs. State of U.P. Writ C No. 18743 of 2020*** to contend that the terms of live in relationship are the same as of marriage, hence, the prayer made in the writ petition is opposed.

5. I have heard the rival submissions advanced at the Bar and perused the record.

6. From the perusal of record it transpires that both the petitioners were major aged about 18 years in August, 2022 when they decided to live in relationship. Till date though the petitioner No. 2 is a major but not of marriageable age.

7. Learned counsel for the petitioners relied upon the judgment of Supreme Court in the case of ***Deepika and another Vs. State of U.P. and others (2013) ADJ 534*** wherein it was held that “*Where a boy and girl are major and they are living with their free will then nobody including their parents have any right to interfere with living together*” The case relied upon by the learned counsel for the petitioners is not applicable to the facts of this case as as in ***Deepika (supra)*** the question whether the boy and girl should be of marriageable age or not was not discussed. Learned counsel for the petitioners relied upon the judgment of Supreme

Court in the case of *Nandkumar and another Vs. State of Kerala and others Criminal Appeal No. 597 of 2018*. In the above mentioned case, the girls was of 19 years and therefore was found competent to enter into wedlock. Father of the girls filed habeas corpus petition being Writ Petition Criminal No. 149 of 2017 in the High Court of Kerala that ever since 10.04.2017 his daughter was missing and is in illegal custody of appellant No.1. The girl was produced in court on 28.04.2017. Supreme Court held that as the girls is 19 years of age and competent to marry as the marriageable age of female is 18 years, hence, she cannot be given custody of her father or anyone else and the Court set her free of her own will. The Supreme Court held that insofar as the marriage of appellant No. 1 who was less than 21 years of age on the date of marriage was not of marriageable age with girls is concerned, it cannot be said that merely because the appellant No. 1 was less than 21 years of age, marriage between the parties is null and void. marriage is not void marriage under the Hindu Marriage Act, 1955 and as per the provisions of Section 12 which can be attracted in this case at the most the marriage would be voidable marriage. Sections 5 and 12 of the Hindu Marriage Act, 1955 is reproduced below for ready reference;

“5.Conditions for a Hindu marriage- A Marriage may be solemnized between an two Hindus, if the following conditions are fulfilled, namely-

xxxx

(iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage:

12. Voidable marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds namely;-

1(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5 ; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, that 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.”

8. Supreme Court decided the custody of the girl and set aside the order of High Court. Supreme Court also held the rights of parties living together and also the fact that the marriage is a voidable marriage if any of the parties is not of marriageable age. The matter of protection of relationship was not in issue before the Supreme Court in the instant case, hence, no benefit of this case law shall be given to this case.

9. Learned counsel for the petitioners has also relied upon the judgment of this Court in the case of ***Smt. Saloni Yadav and another Vs. State of U.P. and other Criminal Misc. Writ Petition No. 7996 of 2023***, the case relied upon is not applicable to the facts of the present case as the petitioners moved to the High Court with the prayer to quash the FIR lodged on 30.04.2023 and the Division Bench of this Court refused to indulge in the case on the ground that the petitioners are live in relationship and one of the party is minor.

10. Supreme Court in the case of ***D.Velusamy Vs. D. Patchaimmal*** **2010 (10) SCC 469** rejected the claim of the respondent for maintenance under Section 125 Cr.P.C as the wife after holding that she had not married the appellant, therefore, it cannot be said that she is a divorced wife. The Apex Court considered the live in relationship from the point of view of Protection of Women from Domestic Violence Act, 2005 while considering the contention of aggrieved person as provided under Section 2 (a), Section 2 (f) and other relevant provisions in view of the term used in Section 2(f) “ or through a relationship in the nature of marriage” it was observed that certain conditions are to be fulfilled and one of the said conditions was that they must be of legal age to marry.

“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 relationship will amount to a relationship in the nature of marriage to get the benefit of Act, of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a ‘keep’ whom he maintains financially and used mainly for sexual purpose and / or as a servant it would not, in our opinion be a relationship in the nature of marriage.

33. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression ‘relationship in the nature of

marriage' and not 'live in relationship'. The Court in the grab of interpretation cannot change the language of the statute."

11. The abovequoted paragraph clearly reflects that Hon'ble Supreme Court is of the opinion that while live in relationship, the relationship should be in the nature of marriage.

12. In ***Lata Singh Vs. State of U.P and another 2006 (5) SCC 475***, Supreme Court held that a live in relationship between two consenting adults of heterogenic sex does not amount to any offence in the case at hand the boy has not completed the age of 21 years, therefore, not being of marriageable age, one cannot be permitted to be in such relationship.

13. In the case of **Asha Devi(Supra)**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(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. ?"

14. In the judgment of **Asha Devi (Supra)**, the Division Bench of this Court on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

*"(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 Vs. V. K. V. Sarma**.*

*(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 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)

(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)."

15. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of "**Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. 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, 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."

16. In the guidelines provided by the Supreme Court in various case laws, relationship should be of such nature which is akin to marriage. Section 5 of the Hindu Marriage Act provides that girl should be of 18 years of age and the boy should be of 21 years of age at the time of marriage to solemnize marriage under the Hindu Marriage Act.

17. In the instant case the petitioner No. 2 is not of marriageable age. The petitioners have not brought on record any documents to show that their relationship is in the nature of marriage; no statement of joint property is disclosed in their application, no joint holding of any bank account is disclosed though they claim to be living in relationship since August, 2022. The petitioners does not even desire to get married in future as no application for marriage is moved by the petitioners before the authorities concerned so far. Petitioners have not produced any evidence to show that their relationship is of a permanent nature.

18. Petitioner No. 2 is still a student of final year of polytechnic court as disclosed in paragraph-7 of the writ petition.

19. Hence, in view of the foregoing discussions, the court is not inclined to exercise its extraordinary power under Article 226 of the

Constitution and to command to the authorities to provide protection to the relationship of the petitioners.

20. The petition lacks merits and is accordingly dismissed.

(Renu Agarwal,J.)

Order Date :- 22.2.2024

Nadeem