

Court No. - 81

Case :- WRIT - C No. - 1845 of 2024

Petitioner :- Saleha And Anothers

Respondent :- State Of Up And 3 Others

Counsel for Petitioner :- Gurfan Ali, Abad Ali Tyagi

Counsel for Respondent :- C.S.C.

Hon'ble Mrs. Renu Agarwal, J.

1. Heard Sri Fareed Ahmad, Advocate, holding brief of Sri Gurfan Ali, learned counsel for the petitioners and Sri Ashwani Kumar Tripathi, learned Additional Chief Standing Counsel for the State.

2. The present petition under Article 226 of the Constitution has been preferred by the petitioners with the following prayers:

" (i) Issue a writ order or direction in the nature of mandamus directing the respondent nos.2 to 4 not to interfere in the peaceful life of the petitioners and further not to harass them in any manner.

(ii) Issue a writ order or direction in the nature of mandamus directing the respondent nos. 2 to 4 to provide security for the safety of petitioners.

(iii) Issue a writ order or direction in the nature of mandamus as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iv) Award the cost of the writ petition to the petitioners."

3. It is submitted by the learned counsel for the petitioners that as per aadhar card the date of birth of petitioner No.1-Saleha is 01.01.1980 and she is aged about 44 years and the date of birth of the petitioner No.2-Vikas Kumar as per his aadhar card is 15.07.1987 and he is aged about more than 36 years. It is submitted that petitioner no.1 earlier married with one Mohsin. Mohsin has solemnized his second marriage with one Najma two years back and living with her as husband and wife. Thereafter petitioner no.1 willfully decided to leave her matrimonial house and started living at her parental home. The respondent no.4, who is father of petitioner no.1 tortured her, therefore, she decided to live with petitioner no.2-Vikas Kumar, in live-in-relationship. It is further submitted that the parents of petitioner no.1 and her other family members are interfering in their peaceful live-in-relationship. The petitioners apprehend danger to the life and liberty from respondent No.4 and other family members, therefore, petitioner no.1 moved an application before the Senior

Superintendent of Police, Muzaffarnagar on 04.01.2024, seeking protection for herself and petitioner No.2 from respondent No.4, but no action has been taken by police authorities in the matter. Therefore, present petition moved by the petitioners for issuance of mandamus against respondent no.4.

4. On the other hand, learned Standing Counsel submitted that petitioner no.1 is already married to one Mohsin, she has not obtained any decree of divorce from her earlier husband and started living with petitioner no.2 in adultery, therefore, their relationship can not be protected by law. Learned Standing Counsel has relied upon the judgment of Apex Court in the case of **Kiran Rawat and Another Vs. State of U.P.** and judgment of the Division Bench of this Court passed in the case of **Asha Devi and Another Vs. State of U.P. and 3 Others**, and opposed the petition.

5. I have heard the rival submissions of learned counsel for the parties and perused the record.

6. From the perusal of record it transpires that both the petitioners are major and as per aadhar card the date of birth of petitioner No.1-Saleha is 01.01.1980 and she is aged about 44 years and the date of birth of the petitioner No.2-Vikas Kumar as per his aadhar card is 15.07.1987 and he is aged about more than 36 years. It is also apparent from the record that petitioner no.1 was earlier married to one Mohsin and leaving her earlier husband without obtaining divorce she started living with petitioner no.2-Vikas Kumar. In the case of **Kiran Rawat(Supra)**, the Hon'ble Apex Court observed that:-

"21. However, in Muslim law no recognition can be given to sex outside marriage. "Zina" which has been defined as any sexual intercourse except that between husband and wife includes both extramarital sex and premarital sex and is often translated as fornication in English. Such premarital sex is not permissible in Islam. In fact any sexual, lustful, affectionate acts such as kissing, touching, staring etc. are "Haram" in Islam before marriage because these are considered parts of "Zina" which may lead to actual "Zina" itself. The punishment for such offence according to Quran (chapter 24) is hundred lashes for the unmarried male and female who commit fornication together with the punishment prescribed by the "Sunnah" for the married male and female that is stoning to death." It is observed that in Muslim Law living-in-relationship is not permitted."

7. 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. ?"

8. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of "**D. Velusamy Vs. D. Patchaiammal**", in which the Hon'ble Apex court held that:-

"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.

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)

9. 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 supernatural 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)."

10. 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."

11. From the factual matrix of the case it is apparent that petitioner no.1-Saleha is legally wedded wife of Mohsim. She has not obtained any decree of divorce from the competent authority. She is living with petitioner no.2 in contravention of the provisions of

Muslim Law(Shariat), wherein legally wedded wife can not go outside marriage and this act of Muslim women is defined as Zina and Haram. If we go to the criminality of the act of petitioner no.1 she may be prosecuted for the offence under section 494 and 495 IPC, as such relationship is not covered within the phrase of live-in-relationship or relationship in the nature of marriage.

12. Present writ petition has been filed by the petitioners for protection from interference by respondent no.4, who is father of petitioner no.1-Saleha and others in their peaceful living as husband and wife. If such a protection is granted, it may amount to grant the protection against the commission of offence under section 494 and 495 IPC.

13. It is settled law that writ of mandamus can be issued only if the petitioners has legal right to the performance of legal duty by the party against whom the mandamus is sought. The Hon'ble Apex Court in the case of "**Kalyan Singh Vs. State of U.P., AIR 1962 SC 1183** held as under:-

"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."

14. In the present case petitioner no.1-Saleha is Muslim by religion and she has not moved any application to the authority concerned for conversion of her religion under sections 8 and 9 of the Conversion Act. Hence petitioner no.1 is living in relationship with petitioner no.2 without obtaining divorce from her husband, that constitute an offence under sections 494 and 495 IPC and also without complying the provisions of sections 8 & 9 of the Conversion Act. Hence such type of criminal act cannot be supported and protected by the Court. Therefore, the petition has no substance and is liable to be dismissed

15. Accordingly, the petition is **dismissed**.

(Renu Agarwal,J.)

Order Date :- 23.2.2024/VKG