

Court No. - 45

Case :- CRIMINAL MISC. WRIT PETITION No. - 7996 of 2023

Petitioner :- Smt. Saloni Yadav And Another

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

Counsel for Petitioner :- Mohd. Monis

Counsel for Respondent :- G.A., Amar Bahadur Maurya, Arvind Singh, Deepak Dubey, Dharmendra Kumar Mishra, Maan Singh, Manoj Kumar Kushwaha, Sunil Kumar Kushwaha

Hon'ble Vivek Kumar Birla, J.

Hon'ble Rajendra Kumar-IV, J.

1. Supplementary affidavit sworn by the petitioner no. 1 filed today is taken on record.
2. Sri Deepak Dubey submits that he has filed his Vakalatnama on behalf of the informant in the office on 10.7.2023.
3. Heard Sri Mohd. Monis, learned counsel for the petitioners, Sri Deepak Dubey, learned counsel appearing for the informant and Sri G.P. Singh, learned A.G.A. appearing for the State respondents.
4. This writ petition has been filed with the prayer to quash the First Information Report dated 30.4.2023, registered as Case Crime no. 131 of 2023, under Sections 363, 366 IPC, P.S. Pipari, District Kaushambi. Further prayer has been made not to arrest the petitioner in the aforesaid case.
5. Admitted case of the petitioners is that the petitioners are live in relationship. The date of birth of the victim is 1.1.2004 and thus, she is major and aged about 19 years, whereas the date of birth of the petitioner no. 2 is 15.3.2006 and therefore, he is minor and is aged about 17 years.
6. Submission of learned counsel for the petitioners is that the petitioner no. 1 is major and has left her house voluntarily, therefore, no offence under Section 363 IPC is made out, however, admittedly the boy is minor.
7. During course of arguments it transpired that the connected Habeas Corpus Writ Petition No. 525 of 2023 (Ali Abbas and others vs. State of U.P. and others) has been filed in respect of petitioner no. 2-Ali Abbas, who is stated to be in the custody of the brother and other relatives of the victim-Saloni Yadav. It is submitted that both the petitioners were taken away by the family members of Saloni Yadav, however, the petitioner no. 1-Saloni Yadav, somehow ran away from the spot but the petitioner no. 2-Ali Abbas is still in their custody, therefore, habeas corpus petition was filed.
8. Per contra, learned counsel for the informant submits that the offence under Section 366 IPC is made out. Whether it is a case of abduction, is yet to

be investigated and therefore, merely because the girl is major and is in live in relationship with a boy, who is admittedly a minor i.e. below 18 years, it cannot be said that the offence under Section 366 IPC is not made out. He further submits that the habeas corpus petition has been filed on false grounds.

9. Learned A.G.A. has also opposed the petition.

10. We have considered the rival submissions and have perused the record.

11. Present petition has been filed on the ground that the petitioner nos. 1 and 2 are in live-in relationship. The boy-petitioner no. 2 is muslim. Live in relationship i.e. "Zina" as per Muslim Law has been considered by Lucknow Bench of this Court in **Criminal Misc. Writ Petition No. 3310 of 2023 (Kiran Rawat and another vs. State of U.P. and others)** vide order dated 28.4.2023 and it has been noticed that in Muslim Law live in relationship is not permitted. Relevant paragraph 21 of the aforesaid judgment is quoted as under:-

"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."

(emphasis supplied)

12. That apart in the case of **D. Velusamy vs. D. Patchaiammal 2010 (10) SCC 469** the Hon'ble Apex Court rejected the claim of the respondent for maintenance under Section 125 Cr.P.C. as wife after holding that she had not married the appellant, therefore, it cannot be said that she was a divorced wife, therefore, she was not entitled for maintenance and held that a divorced wife is treated as a wife for the purpose of Section 125 Cr.P.C. but if a person has not even been married obviously that person could not be divorced. Thereafter, the Hon'ble Apex Court went on to consider the 'live-in relationship' from the point of view of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act of 2005). While considering the definition 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 such condition was that they must be of legal age to marry. In this regard Section 2(a) and Section 2(f) of Act of 2005 are quoted as under:-

"2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent";

"2(f) "domestic relationship" means a relationship between two persons who live or

have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family"

13. After considering law of different countries it was held that the 'relationship in the nature of marriage' is akin to a common law marriage. In this regard, paragraphs 31, 32 and 33 of **D. Velusamy (supra)** are quoted 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. 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'

33. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 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."

(emphasis supplied)

14. The abovequoted paragraphs clearly reflects that the Hon'ble Apex Court is of the opinion that 'relationship in the nature of marriage' must satisfy several conditions before it can be covered under the provisions of the Act of 2005. It was also noticed that 'live in relationship' is not mentioned in the aforesaid Act of 2005.

15. In this regard, it would be relevant to refer to the definition of 'child' as given in The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act), which is quoted as under:-

"2. Definitions - (1) In this Act, unless the context otherwise requires-

(a)

(b)

(c)

(d) "child" means any person below the age of eighteen years."

(emphasis supplied)

16. According to the aforesaid definition 'child' means a person below the age of eighteen years. In other words, a person below the age of 18 years is considered to be a child. It is needless to say that the POCSO Act is a gender neutral Act and as such the definition of a child would apply on a male as well as on female person and if the male is below eighteen years of age he will also be treated as a child.

17. There can be no dispute that a child cannot have live in relationship and this would be an act not only immoral but also illegal as by itself live in relationship has not been given any protective umbrella under any law of the land except that two major persons have right to live their own life and to that extent their personal liberty is to be protected. However, it does not mean that a person, who cannot have protection under any law for having such relationship because of being a child can come forward to seek protection from any criminal prosecution on the ground of such relationship. In other words, an accused who is below 18 years of age cannot seek protection on the ground of live in relationship with a major girl and thus cannot seek quashing of the criminal prosecution against him as his / her activity is not permissible in law and is thus illegal. In case, this is permitted, this would amount to putting premium on an illegal activity and thus would not be in the interest of our society and we are not inclined to put a seal of approval on such legally impermissible activities.

18. The Hon'ble Apex Court in the case of **Lata Singh vs. State of U.P. and another 2006 (5) SCC 475** has held that a live in relationship between two consenting adults of heterogenic sex does not amount to any offence.

19. There is no law which prohibits the live in relationship, which is a pre-marital sex in the present case. However, in the present case the boy is not major or of 18 years of age and being a child cannot be permitted to have such relationship.

20. In the case of **Kiran Rawat (supra)** this Court has considered this aspect of the matter. In paragraph 8 this Court has observed as under:-

"8. The Supreme Court has further observed in S. Khushboo Vs. Kanniammal, 2010 (5) SCC 600 as follows:

"21. While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of adultery as defined under section 497 I.P.C. At this juncture, we may refer to the decision given by this court in Lata Singh versus State of UP and Another AIR 2006 Supreme Court 2522, wherein it was observed that a live in relationship **between two consenting adults** of Heterogenic sex does not amount to any offence (with the obvious exception of adultery), even though it may be perceived as

immoral. A major girl is free to marry anyone she likes or to live with anyone she likes. In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under section 366 and 368 I.P.C., thereby leading to commencement of trial proceedings. This Court had entertained the Writ petition and granted relief while quashing the criminal trial. Furthermore, the court had noted that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the court. ..."

(emphasis supplied)

21. There are several conditions for live in relationship to be treated as relationship in the nature of marriage. In any case, the person has to be major i.e. 18 years of age although he may not be of marriageable age i.e. 21 years. Therefore, this activity of live in relationship in the present case, which is of an extremely short duration cannot come in support of the case of the petitioners. In any case, whether this act of 'abduction', which is covered under Section 366 IPC, by means of 'any deceitful means induces' and is result of inducement, is a matter of investigation and at this stage it cannot be said that no offence under Section 366 IPC is made out taking shelter of, as in the present case, on the ground of impermissible live in relationship.

22. In view of the undisputed fact in respect of age of the petitioner no. 2 and categorical assertion that the petitioners are living in relationship, we find that whether any offence under Section 366 IPC is made out or not is yet to be investigated. As per learned A.G.A. till date no one has come forward to cooperate in the investigation and till date no statement of any person has been recorded.

23. We have also considered the fact that the petitioner no. 1-the alleged victim-Saloni Yadav has come forward to file supplementary affidavit stating therein that the petitioner no. 1 is major and she had gone with the petitioner no. 2 with her own freewill and since both the petitioners were living with each other but it is after filing of the present petition on 13.5.2023 the informant side had kidnapped the petitioners from Prayagraj and took them to their village i.e. Jalalpur Ghosi. It is also stated that on 15.5.2023 the petitioner no. 1-the victim somehow ran away and reached the place of father of the petitioner no. 2 and narrated the entire story. In other words, she has come forward to file the affidavit against the prosecution case. The offence and date of incident of the alleged offence is 27.4.2023 as per first information report and it is merely within 15 days the petitioners were separated, therefore, to say that they have having live in relationship is not worth believe, which is, at the best only 15 days long. In any case, without going into that aspect of the matter as it is not a case where protection under any Act like Domestic Violence Act or any other Act as discussed above is being made, we find that no statement of the victim under Section 161 and 164 Cr.P.C. have been recorded by the Investigating Officer or by the court. It is also pertinent to

note that the petitioner no. 1 has come forward to file this supplementary affidavit when admittedly she is in the company of the accused side.

24. Before we proceed further it would be appropriate to take note of Section 366 IPC, which is quoted as under:-

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- Whoever, kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.”

(emphasis supplied)

25. Section 366 IPC includes kidnapping as well as abduction. The term kidnapping is defined in Section 359 IPC, which provides that kidnapping is two kinds (1) kidnapping from India and (2) kidnapping from lawful guardianship. Section 361 IPC defines kidnapping from lawful guardianship, wherein age of a female is mentioned as 18 years. The definition of abduction is provided under Section 362 IPC, which is quoted as under:-

“362. Abduction.- Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

(emphasis supplied)

26. This definition includes the words ‘by force compels’ and the words ‘or by any deceitful means induce any person to go from any place’.

27. The word ‘inducement’ has been defined in Black’s Law Dictionary as “The act or process of enticing or persuading another person to take a certain course of action”. The word ‘induce’ has been defined as “to make or persuade somebody to do something”. In Legal Glossary the word ‘induce’ has been defined as “to inspire, call forth or bring about by influence or stimulation” and word ‘inducement’ has been defined as “that which induces; something attractive by which a person is led on or persuaded to action”.

28. The element of inducement certainly affects the understanding of a person and persuade another person to take a certain course of action like in the present case running away from the house, living in with a person, who is not major and is even not 18 years of age.

29. In the background of the facts as narrated above where no one is coming forward and not even the victim to get the statement recorded under Section 161 Cr.P.C. or under Section 164 Cr.P.C., at this stage, it cannot be said that there is no use of force, or in any case, inducement.

30. Therefore, at this stage, there is no ground to be influenced by the

argument that there is no such use of force or there is no element of inducement at this stage when the girl is coming forward from the company of the accused persons.

31. In the present case, element of inducement is there or not is yet to be investigated particularly in the background of the admitted facts of this case when no body is coming forward for recording statement. Thus, act of abduction has been done and consequently offence is committed under Section 366 IPC or not is yet to be ascertained by the investigating agency.

32. In such view of the matter, we do not find any good ground to grant any indulgence in the present case on the ground that the petitioners are in live in relationship. We find that it is not a fit case for exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

33. Present petition is accordingly dismissed.

Order Date :- 11.7.2023

Lalit Shukla