

**Court No. - 50**

**Case :-** WRIT - C No. - 5589 of 2023

**Petitioner :-** Km. Bharti And Another

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

**Counsel for Petitioner :-** Atul Kumar Kushwaha

**Counsel for Respondent :-** C.S.C.

**Hon'ble Ram Manohar Narayan Mishra,J.**

1. Heard learned counsel for the petitioners, learned Standing Counsel for the State-respondents and material placed on record.

2. As per the office report dated 17.7.2023, steps has not been taken by the learned counsel for the petitioners for service of notice on respondent No.4 whereas learned counsel for the petitioners denied this statement of office report and stated that he has already taken steps and prayed that present writ petition be decided on merits as per the averments made in the writ petition and material on record.

3. Learned counsel for the petitioners submitted that the petitioners belongs to Hindu religion and have attained age of majority. They are presently living in live-in relationship out of love and intimacy. They are sui juris and have every right to live together. They are able to understand their interest. They want to solemnized their marriage but as soon petitioner No.1 has not obtained divorce from her husband, the petitioners could not enter into marital alliance. Their live-in relationship is strongly opposed by respondent No.4, who is husband of petitioner No.1. The petitioners are apprehending

danger to their live and liberty from respondent No.4. The petitioner No.1 has parted with her husband i.e. respondent No.4. She even moved an application before S.O. concerned seeking protection for herself as well as petitioner No.2 but no action has been taken by the police in the matter. She moved an application before S.P. Muzaffarnagar for protection through registered post on 8.2.2023, for the same relief. The date of birth of petitioner No.1 is mentioned as 1.2.2003 and that of petitioner No.2 is 14.5.2001 in their respective Adhar cards and thus, they have attained age of majority. Learned counsel for the petitioners cited a judgement of Apex Court in the case of **Nandakumar and another vs. State of Kerla and others, 2018 (2) RCR (Civil) 899**, in support of his contention.

4. Per contra, learned Standing counsel opposed the prayer made in present writ petition and submitted that as the petitioners have admitted that petitioner No.1 has married with respondent No.4 and their marriage has not been dissolved by any competent Court, therefore, her live-in relationship with petitioner No.2 cannot be accepted.

5. Sofaras the question of age of petitioner No.1 is concerned, this is admitted fact that he has not attained age of 21 years but has attained age of majority as provided under law i.e. 18 years. In the judgement of Nandakumar and another vs. State of Kerala (supra), Hon'ble Apex Court set aside the judgement and order of High Court and allowed the appeal filed by the appellant, who solemnize marriage with a girl of

19 years of age but had not attained age of 21 years on the date of marriage. However, had attained age of majority on the date of marriage. High Court had entrusted the custody of the women to her father. Against that order, the husband came before Hon'ble Supreme Court, wherein it Apex Court held that insofar as marriage of appellant No. 1 (who was less than 21 years of age on the date of marriage and was not of marriageable age) with Thushara is concerned, it cannot be said that merely because appellant No. 1 was less than 21 years of age, marriage between the parties is null and void. Appellant No. 1 as well as Thushara are Hindus. Such a marriage is not a void marriage under the [Hindu Marriage Act, 1955](#), and as per the provisions of [section 12](#), which can be attracted in such a case, at the most, the marriage would be a voidable marriage.

6. Hon'ble Apex Court further observed that "We need not go into this aspect in detail. For our purposes, it is sufficient to note that both appellant No. 1 and Thushara are major. Even if they were not competent to enter into wedlock (which position itself is disputed), they have right to live together even outside wedlock. It would not be out of place to mention that 'live-in relationship' is now recognized by the Legislature itself which has found its place under the provisions of the Protection of Women from [Domestic Violence Act, 2005](#)." Therefore, the contention of the respondent on this count is not sustainable. However, so far as the other aspects is concerned, this is admitted fact that the marriage of petitioner No.1 with her husband has not been dissolved as yet and in

paragraph No.5 and 6 of the petition it is stated that the petitioner No.1 was married with respondent No.4 but she had to live her matrimonial home due to brutal beating given to her by her husband and her in-laws. She left in year 2022. She was in love with the petitioner No.2 and since year 2022, they are living in live-in relationship and when these facts came to the knowledge of respondent No.4 and his family members, they became furious and started threatening petitioners. As soon as the petitioner No.1 will get divorce from her husband, the petitioners will solemnize their marriage.

7. A Division Bench of this Court in **Writ (C) No.18743 of 2020 (Asha Devi and Another vs. State of U.P. and Others)**, where the petitioner have prayed for the relief to 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, who were major and living as husband and wife. They sought protection from respondent No.4, the father of petitioner No.1 by issuing of mandamus to State respondents in this regard. The Division Bench of this Court held that 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. The facts of present case are similar to that cited in that writ petition (Asha Devi and another vs. State of UP and others).

8. In **Lata Singh v. State of U.P. and in Indra Sarma Vs. V. K.V. Sarma (2013) 15 SCC 755**, 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. This Court in Asha Devi case (supra) observed that 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, in spite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy. This Court in Asha Devi's case concluded as under:-

*"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'."*

9. With above observations, this Court held that whether the petitioners, who claimed themselves to be living together as husband and wife; cannot be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce so far. Thus, this Court dismissed the writ petition with these findings.

10. The petitioners have impleaded husband of petitioner No.1 as respondent No.4 in the writ petition. The facts of present case are squarely covered in the Division Bench judgement of this Court in Asha Devi (*supra*) where also the petitioners have pleaded that petitioner No.1 while residing with petitioner No.2 as wife and husband. She was major. She was being tortured and threatened by her husband Mahesh Chandra and his family members. There was no averment that she had obtained a decree of divorce from her husband. It was also not the case of the petitioner No.1 in that case she got married with petitioner No.2 and case of petitioners was that they were living together as husband and wife, which appears as it was a relationship in the nature of live-in relationship.

11. On the basis of foregoing discussions, as the petitioner No.1 is not found to have obtained divorce from her husband i.e. respondent No.4, she still will be treated as legally wedded wife of respondent No.4 and the petitioners have no legal right to seek protection on the facts of present case, in a writ petition filed under Article 226 of Constitution of India. 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. The writ petition fails and hereby, **dismissed**.

12. Therefore, the petitioners will be at liberty to seek remedy if any available under civil and criminal law with regard to allegations made against respondent No.4.

**Order Date :- 18.7.2023**  
Kamarjahan