



**A.F.R.
Reserved**

Civil Misc. Recall Application No.247150 of 2011

And

Criminal Misc. Application No. Nil of 2011

In

Civil Misc. Writ Petition No. 43896 of 2011

Ashish Sharma and another.	Petitioners
	Versus	
State of U.P. and others.	Respondents

Present:

(Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Sanjay Misra)

Appearance:

For the Applicant/ respondent no.4 : Smt. Seema Mishra

For the Opposite Parties/Writ Petitioners : Mr. Amit Jaiswal &
Mr. Manoj Kumar Gautam

Amitava Lala, J.— These are the applications of the respondent no.4 to recall the order passed by this Bench on 04.08.2011 in connection with marriage between petitioner nos. 1 and 2 and interference with their private life and to proceed under Section 340 of the Code of Criminal Procedure, 1973 (hereinafter in short called as ' Cr.P.C.'). Like few others, in this State also, even in 21st century so many factors are involved in connection with the life and security of the married couples. Casteism, religionism, 'honour' killings, forcible departure of the boy and girl from each other even by the parents or family members, threat, pressure and many other nature of transgress, infringes their life and personal liberty as guaranteed under Article 21 of the Constitution of India. As a result whereof, we have started believing that such actions are not in the garb of but in the wake of violation of Article 21.

This Court framed out a common order expressing its feelings, but only with a positive rider that where no First Information Report (hereinafter referred to as the 'FIR') has been lodged or inquiry or necessary police actions are taken by either of the parties, it is expected that no coercive

action will be taken against the newly wedded couples, who are otherwise entitled to choose the better half to marry and settle. Even the Supreme Court has proceeded to the extent of justifying the cause of living together in the judgment reported in **1976 (3) SCC 234 (Gian Devi Vs. Supdt., Nari Niketan, Delhi)**, and held as under :

“7. It is the case of the petitioner that she was born on June 5, 1994. As against that, the plea of Sheesh Pal Singh, father of the petitioner, is that she was born on April 20, 1956. Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter. The fact that the petitioner has been cited as a witness in a case is no valid ground for her detention in Nari Niketan against her wishes. Since the petitioner has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be held to be in accordance with law. We accordingly direct that the petitioner be set at liberty.”

In **2006 (5) SCC 475(Lata Singh Vs. State of U.P and another)** the Supreme Court has also held as follows :

“17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious

marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.”

The Supreme Court has further held in **AIR 2010 SC 3196 (S Khushboo Vs. Kanniammal & Another)**, 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 IPC. At this juncture, we may refer to the decision given by this Court in Lata Singh v. State of U.P. and Anr. (AIR 2006 SC 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 "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 Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. This Court had entertained a writ petition and granted relief by 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'.

In the judgment reported in **2011 (6) SCC 396 [Bhagwan Dass Vs. State (NCT of Delhi)]**, it has further been held by the the Supreme Court as under:-

“28. Before parting with this case we would like to state that `honour' killings have become commonplace in many parts of the country, particularly in Haryana, western U.P., and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in Lata Singh's case (supra) that there is nothing `honourable' in `honour' killings, and they are nothing but barbaric and brutal murders by bigoted, persons with feudal minds. In our opinion honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is

necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate 'honour' killings should know that the gallows await them."

However, such western culture has not been accepted by our society, but that does not necessarily mean that right of major boy and girl to choose their better half will be interfered with **in all possible manner**.

Following the ratio of the aforesaid judgements of the Supreme Court, a Division Bench of this Court presided over by one of us (Amitava Lala, J.) has delivered a judgement **dated 03.04.2012 in Civil Misc. Writ Petition No. 16299 of 2012 (Niresh Kumar Srivastava and another Vs. State of U.P. and others)** and held as follows:

"From the aforesaid three judgments, precisely we get three relevant points. Firstly, if one is sui juris, no fetter can be placed upon choice of the person with whom she is to stay nor any one can restrict her. Secondly, any person cannot give threats or commit or instigate the acts of violence and cannot harass the adult person who undergoes inter-caste or inter-religion marriage. Administration/ policy authorities can be directed to see to it so that the couple, upon being major, should not be harassed by any one. Thirdly, live-in relationship between two consenting adults of heterogenic sex does not amount to any offence. It will not be unnecessary to say that there are many States in our country where castism or religionism is so deep-rooted even in the 21st Century that one can go to the extent of honour killing upon being forgetful that their interference might cause unhappiness in the life of their children. Such type of activities are totally in violation of the preamble of the Constitution of India in connection with human dignity of an individual. The country is one and it is pluralistic in nature. No secular idea can be ignored. No person shall be deprived of his life and personal liberty except according to the procedure established by law as per Article 21 of the Constitution of India. Liberty and reasonable restriction are inbuilt in such Article.

Against this background, according to us, there should not be any deprivation of the interests of any adult particularly an adult girl in connection with her living. Administration/police authorities are directed to protect their interest to that extent.

It is made clear that the boy and the girl are not debarred from proceeding before the appropriate Court of law in case of any exigency. Generally, the police and the administration will be much more alert and sensitive in dealing with such type of issues. Repeated awareness

programme is needed to be made to uproot the social evil and minimise the incidents.”

Normally, in such type of writ petitions, we call upon the learned counsel appearing for the petitioners to identify the petitioners i.e. boy and girl having been present before the Court and verify the documents available before the Court or adopts the other methodology i.e. ossification test etc. apart from our own examination in the Court. After that identification and verification, the following orders are passed:

“Marriage is definitely wishes of a boy and girl to continue with their conjugal relationship provided they have attained the age of marriage, as required by law. We have been fortified with several writ petitions in which more or less identical reliefs are claimed for protection of their marital relationship, which is allegedly being interfered with and harassed by their parents or relatives, who are private respondents. The writ jurisdiction is not made to resolve such type of dispute between the two private parties. We otherwise strongly believe family law is no law. It is a social problem, which can only be uprooted socially and not by the intervention of the writ Court in the garb of violation of Article 21 of the Constitution of India unless it is established beyond doubt.

If there is any real grievance of married couple against their parents or relatives who are allegedly interfering with their conjugal rights which goes to such extent that there is threat of life, they are at liberty to lodge any criminal complaint or file F.I.R. whichever is required under the law to the police and in case of refusal, may make appropriate application before the appropriate court of criminal law by way of applications under Sections 155 or 156 of the Criminal Procedure Code. Similarly, in case the parents or relatives, find that illegally their son or daughter was eloped for the purpose of marriage although he or she is underage or not inclined or they are behaving violently, they are equally at liberty to take steps in a similar manner.

But, when neither of the actions are taken amongst each other, a fictitious application with certain vague allegations, particularly by the newly married couple, under writ jurisdiction of the High Court, appears to be circuitous way to get the seal and signature of the High Court upon their respective marriages without any identification of their age and other necessary aspects required to be done by the appropriate authority/authorities. It is well settled by now that every marriage is required to be registered by the appropriate registering authority upon due verification of the ages etc. of respective parties. We cannot also allow to develop the disputed questions of fact under the writ jurisdiction nor we can draw any

inference by the colourful presence of the newly wedded couple in the Court as per the respective advices. If we do so, it will be wrong presumption by using excessive power of the Court in this jurisdiction.

However, where no F.I.R. has been lodged or necessary police actions are taken by either of the parties, it is expected that no coercive action could be taken against each other.

In case the party/parties approaches/ approach the appropriate court of law or the authority concerned, raising his/her/their grievances, the same will be considered strictly in accordance with law.

If this order is obtained by fraud or suppression of material facts, then the law will take its own course independently.

Accordingly, the writ petition is treated to be disposed of, however, without any order as to costs. “

However, by inadvertent mistake in some of the orders observation regarding fraud or forgery has not been incorporated, but that will not vitiate the due process of law. Fraud or forgery frustrates the entire proceeding. But the fraud or forgery has to be established at first. Therefore, to establish the same, one has to proceed before the appropriate Court of law and only thereafter the person concerned can get relief. Mere description of fraud or forgery to recall the order cannot be held to be a fraudulent act on the part of the petitioners. The applicant may say that at the time of passing the order, he did not get any opportunity of hearing, therefore, his case has to be heard. But on the basis of affidavit filed in support of the recall application, we have granted such opportunity and have carefully gone through the application of the applicant. According to us, filing of such application supported by affidavit can, at best, be treated as oath versus oath, but not an absolute determination of fraud or forgery. The writ petition is supported by two valid documents necessary for the purpose of its disposal. The age of the girl is supported by a certificate of Board of High School and Intermediate Examination, U.P. of the year 2007, giving her date of birth as 20th August 1991, therefore, the girl seems to be a major. The age of the boy is supported by Voter Identity Card issued by Election Commission of India, giving his year of birth as 1986. Having so, the High Court cannot make a robbing inquiry about validity of such documents, place of marriage, residence, defects in father's name etc.. Scope of the writ petition is limited about the adult marital relationship only for their protection.

Proceedings under Section 195 is to be proceeded under Section 340 Cr.P.C. therefore, at the time of making application both the sections will be conjointly read. Sub-Section 3 of Section 195 Cr.P.C. speaks about the meaning of the 'Court', which means a Civil, Revenue or Criminal Court, and includes a Tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a 'Court' for the

purposes of this Section. The applicant has made out a case under Sections 193, 196, 199, 200, 463, 471 and 475 IPC, but no FIR has been lodged nor any complaint case was filed nor the applicant proceeded before the Criminal Court to obtain an order. Law is well settled by now that the term 'Court' indicates that there must be power to record evidence and to come to a judicial determination on the evidence so recorded. The words used in the provision are important. The Writ Court is not the Court of evidence. Thus, the Writ Court under no circumstances can be said to be the 'Court' under the provisions of Section 195 read with Section 340 Cr.P.C.

In totality, the applications are dismissed, however, without imposing any cost.

In any event, passing of this order will not prevent the applicant from proceeding before the appropriate Court/forum/authority independently in accordance with law.

(Justice Amitava Lala)

I agree.

(Justice Sanjay Misra)

Dt/ 29th May 2012

pks/

C.M. Recall Application No.247150 of2011

Hon'ble Amitava Lala,J.

Hon'ble Sanjay Misra, J.

Under the authority of the Hon'ble Chief Justice additional cause list has been printed for the purpose of delivery of judgement and the same has been delivered at 01.50 P.M. In the Chamber upon notice to the parties.

The application is dismissed, however, without imposing any cost.

Dt. 29.05.2012

pks/-

For judgement and order, see order of the date passed on the separate sheets (seven pages).

Dt. 29.05.2012

pks/

C.M. Application No.Nil of 2011

Hon'ble Amitava Lala,J.

Hon'ble Sanjay Misra, J.

In view of the order of the date passed on the Civil Misc. Recall Application No.247150 of 2011, filed in Civil Misc. Writ Petition No.43896 of 2011 (Ashish Sharma and another Vs. State of U.P. and Others), this application is dismissed, however, without imposing any cost.

Dt. 29.05.2012

pks/-

For judgement and order, see order of the date passed on the Civil Misc. Recall Application No.247150 of 2011, filed in Civil Misc. Writ Petition No.43896 of 2011 (Ashish Sharma and another Vs. State of U.P. & Others).

Dt. 29.05.2012

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