

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY ,THE 24TH DAY OF SEPTEMBER 2018 / 2ND ASWINA, 1940

WP(Cr1.).No. 372 of 2018

PETITIONER:

SREEJA S.
AGED 40 YEARS, D/O SREEDHARAN,
321 VETTUTHARA PUTHEN VEEDU,
ETHOTTUVA, WEST KALLADA,
KOLLAM DISTRICT, PIN-691500

BY ADVS.
SMT.K.K.PREETHA
SMT.FERHA AZEEZ
SRI.R.K.PRASANTH

RESPONDENTS:

- 1 THE COMMISSIONER OF POLICE
THIRUVANANTHAPURAM-695001
- 2 THE SUB INSPECTOR OF POLICE,
PARASSALA, THIRUVANANTHAPURAM-695122.
- 3 P.MOHAN NAIR,
MB NIVAS, KEEZHIKOLLA, VATTAVITA, CHENKAL (PART)
VATTAVILA, THIRUVANANTHAPURAM-695132.
- 4 BINDU,
W/O. P.MOHAN NAIR, MB NIVAS, KEEZHIKOLLA, VATTAVITA,
CHENKAL (PART) VATTAVILA, THIRUVANANTHAPURAM-695132
(RD AGENT, BALARAMAPURAM POST OFFICE)

OTHER PRESENT:

SR.GP. SRI. K.B.RAMANAND FOR R1 & R2

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
24.09.2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AMG

C.K. ABDUL REHIM, J.
&
R. NARAYANA PISHARADI, J.

W.P (CrI.) No. 372 OF 2018

DATED THIS THE 24th DAY OF SEPTEMBER, 2018

J U D G M E N T

Abdul Rehim, J:

Persons of same gender whether entitled to lead a 'live-in relationship' is a question which incidentally arises in this writ petition filed seeking a writ of Habeas Corpus.

2. The petitioner, a lady aged 40 years, is raising an allegation that her 'lesbian partner', Ms. Aruna, aged 24 years (hereinafter referred to as the 'alleged detenué') is under illegal confinement of respondents 3 & 4, who are her parents, against her free will. The petitioner seeks a writ of Habeas Corpus for commanding production of the corpus of the alleged detenué and to set her at liberty.

3. Brief averments are that, the petitioner is now residing at Kollam and the alleged detenué is in close relationship with her, that they are unable to separate. They intended to live together as life partners. On 13-08-2018 the alleged detenué left her parental home and joined the petitioner. Based on a complaint lodged by the 4th respondent about missing of the alleged detenué, the 2nd

respondent registered Ext.P2 F.I.R, under Section 57 of the Kerala Police Act, 2011. The police had taken the alleged detinue into custody and produced her before the Judicial First Class Magistrate-II, Neyyattinkara, on 14-08-2018. The learned Magistrate had set the alleged detinue at liberty. But, it is alleged that, the respondents 3 & 4 had forcibly taken the alleged detinue into custody after assaulting the petitioner, with respect to which the petitioner had lodged another complaint in the same police station, as per Ext.P4. The alleged detinue had informed the petitioner that her parents had admitted her in the Government Mental Hospital at Peroorkada. When the petitioner met the alleged detinue in the said hospital, she was ready and willing to come along with the petitioner. But the hospital authorities insisted for production of a court order for her release along with the petitioner. Alleging that the respondents 3 & 4 are keeping the alleged detinue under illegal confinement at the Mental Hospital, the petitioner is approaching this court seeking relief as mentioned above.

4. On receipt of notice from this court, the respondents 3 & 4 appeared and produced the alleged detinue on today. When we interacted, the alleged detinue said that she had completed the age of 23 years and is a Post Graduate in Economics, now

undergoing coaching for P.S.C test. She conceded about her relationship with the petitioner and about their decision to live together. She expressed her strong desire to go along with petitioner to her house at West Kallada, Kollam. She is not prepared to go back to her parental home along with the respondents 3 & 4. According to the alleged detinue, she is being illegally detained by her parents and was taken to the Mental Hospital, despite the fact that she is in perfect mental condition.

5. Prima facie, we are convinced that the alleged detinue is under confinement against her free will at her parental home, at the instance of the respondents 3 & 4. But, question is as to whether she can be permitted to go along with the petitioner to lead a 'live-in relationship', because both of them belong to the same gender, and could not solemnize a valid marriage between them. Learned counsel for the petitioner placed much reliance on a decision of the hon'ble Supreme Court in **Navtej Singh Johar V. Union of India ((2018) 1 SCC 791)**.

6. But, apart from the question whether two adult persons of the same gender can be permitted to be in relationship and can they be permitted to live together, a larger question arises as to whether the liberty of a person who had attained majority can be curtailed. In the decision of the hon'ble Supreme Court in **Sony**

Gerry V. Gerry Douglas (AIR 2018 SC 346) it was observed that;

“it needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/he is entitled to make her/his choice. The Courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the Courts should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation.”

7. With respect to permitting of 'live-in relationship' the hon'ble Supreme Court in **Nandakumar and another V. State of Kerala and others (AIR 2018 SC 2254)** observed that, even if the parties are not competent to enter into the wedlock, they have the right to live together even outside the 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.

8. In **Shafin Jahan V. Asokan (2018 (2) KLT 571 (SC))** the hon'ble apex court observed that, in cases of Habeas Corpus writ petitions, the role of the court is to see that the detinue is produced before it, to find about his or her independent

choice and see to it that the person is released from the illegal restraint. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It was found that, the social values and morals have their space, but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. The exercise of jurisdiction should not transgress into the area of determining the suitability of partners to a marital life. That decision rests exclusively with the individuals themselves. Neither the State nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on, whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedom must safeguard these freedoms.

9. This court had occasion to follow the above said principle while deciding the case **Mohammed Riyad V. State Police Chief (2018 (2) KLT 914)**. Going by the dictum remaining settled as above, we need not go into the question regarding legality of the

relationship of the petitioner with the alleged detenu. On the other hand, having found that the alleged detenu is a person who had attained majority, this court is bound to exercise the jurisdiction for issuance of a writ of Habeas Corpus, since it is proved that the person is under illegal confinement against her free will.

10. In **Navtej Singh Johar's case** (supra) it was held that;

“Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.”

The apex court further observed that,

“sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression”.

While examining validity of Section 377 of IPC on the anvil of Article 14 of the Constitution, the apex court observed that, the provision in its present form has resulted in an unwanted collateral

effect whereby even consensual sexual acts, which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is thus violative of Article 14 of the Constitution.

11. Based on principles enumerated as above, this court cannot find that the 'live-in relationship' between the petitioner and the alleged detinue will in any manner offend any provisions of law or it will become a crime in any manner. On the other hand, if the jurisdiction vested on this court is not exercised, it will amount to permitting a violation of the Constitutional right to perpetrate.

12. Under the above mentioned circumstances, we are inclined to exercise the jurisdiction vested under Article 226 of the Constitution of India to set the alleged detinue at liberty to go along with the petitioner, as desired by her.

Permitting the alleged detinue as above, the writ petition is hereby disposed of.

Sd/-
C. K. ABDUL REHIM
JUDGE

Sd/-
R. NARAYANA PISHARADI
JUDGE

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 JOINT PHOTOGRAPH OF THE PETITIONER AND THE DETENUE.
- EXHIBIT P2 TRUE COPY OF THE FIR IN CRIME NO.1437/2018 OF
PARASSALA POLICE STATION ALONG WITH THE FIS.
- EXHIBIT P3 TRUE COPY OF THE ORDER DATED 14.8.2018 OF THE
JUDICIAL FIRST CLASS MAGISTRATE COURT-II,
NEYYATTINKARA ALONG WITH THE STATEMENT OF THE
DETENUE.
- EXHIBIT P4 TRUE COPY OF THE COMPLAINT FILED BY THE PETITIONER
BEFORE THE NEYYATTINKARA POLICE STATION ON 14.8.2018.
- EXHIBIT P5 TRUE COPY OF SMS RECEIVED BY THE PETITIONER.
- EXHIBIT P6 TRUE COPY OF THE REQUEST MADE BY THE PETITIONER TO
THE HOSPITAL AUTHORITIES.

RESPONDENTS' EXHIBITS

NIL

AMG