AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA(MAT) No. 27 of 2024

Abdul Hameed Siddiqui S/o Late A.K. Siddiqui Aged About 43 Years R/o Near Masjid, Village Kirandul, Police Station Kirandul, District South Bastar Dantewada (C.G.)

---- Appellant

Versus

Kavita Gupta W/o Abdul Hameed Siddiqui Aged About 36 Years R/o C/o Sudarshan Gupta, Main Market, Ward No. 08, Kirandul, Tahsil Bacheli, District South Bastar Dantewada (C.G.)

---Respondent

For appellant – Shri Rajeev Kumar Dubey, Advocate.
For respondent – Shri Virendra Verma, Advocate.

Hon'ble Shri Justice Goutam Bhaduri &
Hon'ble Shri Justice Sanjay S. Agrawal
Judgment on Board

Per Goutam Bhaduri, J.
30/04/2024

Heard.

1. Present appeal is against the judgment dated 13/12/2023 passed by the Judge, Family Court, Dantewada wherein an application filed by the appellant claiming custody of their child which according to the appellant was begotten out of the relationship with non-applicant was claimed, was dismissed at the threshold.

2. The case of the appellant is that the appellant follows the muslim rituals and non-applicant is governed by the hindu law. The application would show that they were in live in relationship for three years, thereafter,

in the year 2021 without conversion, they got married. According to the averments, the non-applicant/respondent was his second wife as he was married earlier and from first wife he had three children. The appellant contended that the child was born out of their relation on 31/08/2021. All of a sudden, according to the appellant on 10/08/2023, he discovered that the non-applicant along with the child is missing. Thereafter, he enquired about the whereabouts and a habeas corpus petition was filed before the High Court bearing number WPHC No.25/2023. According to the averments of the petition, the non-applicant appeared alongwith her mother and father and stated that she was living with them as per her own wish. The appellant stated that they were in live in relationship and performed a interfaith marriage. The appellant stated that he is capable to take care of the minor child begotten from their relationship, the non-applicant resisted and he is not allowed to meet the child. The appellant stated that he is capable to maintain the child and also has handsome income. The application when was filed before the learned Family Court, Dantewada that was dismissed under the provisions of Order 7 Rule 11 CPC. Therefore, this appeal.

3. Learned counsel for the appellant would submit that they have performed marriage under the Special Marriage Act, 1954 (hereinafter referred to as ‘the Act of 1954’) and it was a interfaith marriage and under the mahomedan law a person is allowed to perform a second marriage. Therefore that marriage would be valid and the children begotten out of such marriage, the appellant would be the natural guardian, he is entitled to get the custody of the ward and the learned family court should not

have at the threshold dismissed the petition claiming custody of the child and prays that the order be set aside.

4. Per contra, learned counsel for the respondent would submit that there is no pleading in the petition that how the marriage is valid. It is stated that the non-applicant did not convert her religion. He would further submit that the claim of valid second marriage and to bring it within the Act of 1954 when the first wife is living second marriage is not permissible. Therefore under admitted facts children born out of live in relationship, the appellant cannot claim to be a legal guardian and the order of the court below is well merited, which do not call for any interference.

5. We have heard the learned counsel for the parties and perused the record.

6. Perusal of the application filed before the family court shows that the appellant stated that he is governed by the muslim law and the non-applicant is governed by hindu law. It was further pleaded that the appellant and the respondent were in live in relationship and thereafter the interfaith marriage was performed. The submission of the appellant before this court is that the marriage was performed under the Act of 1954 and it is also reflected from the pleading that without changing religion, interfaith marriage was performed. Obviously when without change of religion, the marriage in between hindu and muslim takes place, it would be governed by the provisions of the Act of 1954. The pleading of the application claiming custody shows the appellant pleaded that he is still governed by muslim law. There is no pleading as to how the second marriage of the like nature is saved by the custom and if we peruse the Article 13 of the

Constitution of India, it shows that unless a law is passed by ordinance, bye-law, rule, regulation, notification and the custom or usage having the territory in India will have a force of law, it cannot be considered as such. In absence of any pleading of such custom or usage of second marriage claiming to be protected under the mohamedan law, it cannot be used for the benefit of the appellant.

7. As per the appellant, his marriage was solemnized with the respondent as per the Muslim Law wherein 4 marriages of one male is permitted. The Hon'ble Supreme Court has held in ***Ahmedabad Women Action Group v. Union of India (1997) 3 SCC 573*** that personal laws (Hindu Law, Muslim Law, and Christian Law) are not part of the definition of Law under Article 13.

In view of the law laid down by the Hon'ble Supreme Court, the provisions relating to more than one marriage of a muslim male under their personal law cannot be invoked before any Court of law unless and until the same is pleaded and proved. Therefore, a muslim male who is already married cannot contract marriage again without proving his personal custom or getting divorced.

8. The pleading of the appellant would show that there is a admission that the non-applicant though was continued to be hindu and was second wife and from his first wife three children already exist. Even principle laid down in the marriages for mahomedan, the capacity of marriage is to be in between mahomedans and in the face of admission that one of the parties did not change her religion, it cannot cloth the live in relationship of such continuation to say that marriage was under the mahomedan rituals.

9. When one of the parties was hindu and did not change her religion, as per the averments of the petition that it was a interfaith marriage, it would be governed by the Act of 1954 and section 4 (a) of the Act of 1954 lays down a condition that marriage between two persons may be solemnized under the Act, if at the time of marriage neither party has a spouse living. Therefore, the contradictory statement which have been pleaded by the appellant before the family court itself goes to show that despite the fact he has a spouse living at the time of the second marriage, under the Act of 1954, he performed the second marriage which was *ab initio* void.

10. Further, it is trite that a major male of a religion other than of a major female can perform their marriage as per the provisions of the Special Marriage Act, 1954 and Section 4 of the said Act contains conditions for the same, which reads thus:-

> "Section 4 - Conditions relating to solemnization of special marriages.- Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—
>
> (a) neither party has a spouse living; .....…
>
> ……...…"

From bare perusal of above provision, it is crystal clear that to perform marriage under the Special Marriage Act, 1954, neither party must not have a spouse living. Even it can also not be said that the appellant was having live-in-relationship with the respondent in view of the finding recorded by the Hon'ble Supreme

Court in para 57 of ***Indra Sarma Vs V.K. V.Sarma - (2013) 15 SCC 755*** as under :-

> "57. Appellant, admittedly, entered into a live-in-relationship with the respondent knowing that he was married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy, AIR 1927 PC 185, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. ……."

Apart from that, the High Court of Punjab & Haryana has recently commented in ***Reena Devi v. State of Punjab, 2023 SCC OnLine P&H 2818*** that without obtaining a valid divorce decree from his earlier spouse and during subsistence of his earlier marriage, the male petitioner was living a lustful and adulterous life with the his live-in partner, which may constitute an offence punishable under Sections 494 and 495 of Penal Code, 1860, since such a relationship does not fall within the phrase of 'live-in-relationship' or 'relationship' within the nature of marriage.....".

11. Apart from this, we are conscious of the fact that the live in relationship which is been followed in certain sect of the society still continues with a stigma in the Indian culture. Live in relationship is an imported philosophy contrary to the general expectations of Indian tenets. No trick would be available to hide the spot. In Indian tradition each of citizen posses a sense of self that is unique and unlikely to be confused

with imported traditions. There cannot be mere inglorious object than to adopt live in relationship to destroy the interwoven culture in society and tradition.

12. The Supreme Court in the matter of **Indra Sarma vs V.K.V. Sarma** reported in **(2013) 15 SCC 755** has observed at para 63 which is as under:-

> "Such relationship... may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship……."

13. A live-in relationship is preferred over marriage because it provides a convenient escape when things fail to work between partners. If the couple wishes to break up, they enjoy the freedom to split unilaterally, irrespective of the consent of the other party and without having to go through the cumbersome legal formalities in the court. The security, social acceptance, progress and stability which the institution of marriage provides to a person is never provided by live-in-relationship In our country, non-solemnization of a relationship as marriage is regarded as social stigma. Social values, customs, traditions, and even legislation have attempted to ensure stability of marriage. It cannot be denied that problems occur in marriages and there may be unequal relationships in which one partner, most commonly women, is in a disadvantageous position. It is also true that on breaking down of relationships through marriage women suffer in far greater terms, especially in Indian context. The close inspection of society shows that the institution of marriage no

longer controls the people as it did in the past due to cultural influence of the Western Countries and this significant shifts and apathy towards matrimonial duties has probably given rise to the concept of Live-in Relationship.

14. However, it is crucial to understand and protect the women in such relationship, as they are most often the complainant and victim of violence by the inmate partners of live-in relationship. It is very easy for the married man to walk out of the live-in relationship and in such case the courts cannot shut their eyes to the vulnerable condition of the survivor of such distressful live-in relationship and children born out of such relationship.

15. In view of the contradictory statement on the face of petition seeking custody, the petition was not tenable before the learned Family Court. We are in agreement with the judgment dated 13/12/2023 passed by the Judge, Family Court, Dantewada. Accordingly, we are not inclined to disturb the finding of the learned Family Court.

Consequently, the appeal is dismissed.

Sd/-
(Goutam Bhaduri)
Judge

Sd/-
(Sanjay S. Agrawal)
Judge

gouri

Head Note

FA(MAT) No. 27 of 2024

Appellant - Abdul Hameed Siddiqui

Versus

Respondent - Kavita Gupta

1) Live in relationship which is followed in certain sect of the society still continues as a stigma in the Indian culture as live in relationship is an imported philosophy contrary to the general expectations of Indian Tenets.

   समाज के कुछ क्षेत्रों में अपनाई जाने वाली लिव इन रिलेशनशिप अभी भी भारतीय संस्कृति में कलंक के रूप में जारी है क्योंकि लिव इन रिलेशनशिप आयातित धारणा है, जो कि भारतीय रीति की सामान्य अपेक्षाओं के विपरीत है।

2) The provisions of personal law cannot be invoked before any court of law until and unless the same is pleaded and proved as custom.

   व्यक्तिगत कानून के प्रावधानों को किसी भी अदालत के समक्ष तब तक लागू नहीं किया जा सकता जब तक कि इसे प्रथा के रूप में पेश और साबित नहीं किया जाता है।

3) It is very easy for the married man to walk out of the live in relationship and in such case the court cannot shut their eyes to the vulnerable condition of the survivor of such distressful live in relationship and children born out of such relationship.

   एक विवाहित व्यक्ति के लिए लिव इन रिलेशनशिप से बाहर आना बहुत आसान है, और ऐसे मामलो में, उक्त कष्टप्रद लिव इन रिलेशनशिप से बचे व्यक्ति की वेदनीय स्थिति और उक्त रिश्ते से जन्म लिए सन्तानो के संबंध में न्यायालय अपनी ऑखें बंद नहीं कर सकती है।