

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Habeas Corpus Petition No. 8 of 2020

Madhu Bala

...Petitioner

Vs.

State of Uttarakhand and Others

...Respondent

Mr. Abhijay Negi, Advocate for the petitioner.

Mr. Sandeep Tandon, Deputy Advocate General along with Mrs. Mamta Joshi, Brief Holder for the State of Uttarakhand.

Mr. Jayvardhan Kandpal, Advocate for respondent nos. 4 and 5.

Hon'ble Sharad Kumar Sharma, J (Oral)

The matter is heard through video conferencing.

2. The petitioner had filed the present writ petition invoking the writ jurisdiction under Article 226 of the Constitution of India, seeking for issuance of a writ of habeas corpus on the ground that the detinue Meenakshi, who is a qualified lady and major, has been wrongfully confined by respondent nos. 4 and 5, who are the mother and brother respectively against her wishes, of the detinue. Though despite the fact that, she is a major and she has been enjoying a consensual relationship with the petitioner since 2016; and under the settled legal proposition as laid down by the different High Courts of the country, a consensual relationship between a common sex is not barred and it is held not to be an offence under the law. Hence, the continuance of a consensual relationship between the persons belonging to the same sex is not in debate in the present writ petition anymore at present.

3. Incidentally the question, which arises in this writ petition filed for seeking a writ of habeas corpus is to the effect that whether two adult persons of same gender can be permitted to be in a relationship and further whether they can be permitted to live together, which is a wider a question already raised before various High Courts of the country involving a consideration of a question as

to whether the liberty of a person, who had attained majority can be curtailed and one of the leading judgments on this aspect is that of as reported in **AIR 2018 SC 346 ‘Soni Gerry vs. Gerry Douglas’**, wherein, the Hon’ble Apex Court has observed that “it needs no special emphasis to state that attaining the age of majority in an individual’s life has its own significance. He or she is entitled to make his or her choice. The court can, so long as the choice remains, assume the role of *parnis patriae*. The daughter is entitled to enjoy her freedom as the law permits and the courts shall not assume the role of a super guardian being moved by any kind of sentiments of the mother or egotism of the father. We say so without any reservations.”

4. In view of the aforesaid dictum of the Hon’ble Apex Court it provides that even if the parties, who are living together though they are belonging to the same gender; they are not competent to enter into a wedlock, but still they have got a right to live together even outside the wedlock. It would further be not out of pretext to mention that a live-in relationship has now being recognized by the legislature itself, which has found its place under the provisions of protection of women from Domestic Violence Act.

5. The question is that, as to whether a person, who is alleged to be a detenue and produced before the court, if it is found by his or her independent choice and it is seen that the person seeking the release from the illegal confinement, which is being imposed by the private persons therein, if in the proceedings of a writ, it is essential to remember that the song of liberty is to be sung with sincerity and at the exclusive choice of an individual is appropriately respected and conferred its esteemed status as the constitution guarantees, it was found that the social values and morals they do have their space, but they are not above the constitutional guarantee of freedom assigned to a citizen of a country. This freedom is both a constitutional as well as a human right. Hence, the said freedom and the exercise of jurisdiction in a writ courts should not transgress into an area of determining the suitability of a partner to a marital life, that decision exclusively rests with the individual themselves that the State, society or even the court cannot intrude into the domain and that is the

strength provided by our constitution, which lies in its acceptance of plurality and diversity of the culture. Intimacy of marriage, including the choice of partner, which individual make, on whether or not to marry and whom to marry are the aspects which exclusively lies outside the control of the State or the Society. The court as an upholder of the constitutional freedom has to safeguard that such a relationship where there is a choice exclusively vested with a major person has to be honoured by the courts depending upon the statements recorded by the individual before the court.

6. In view of the above concept, this Court is in agreement that the consensual cohabitation between two adults of the same sex cannot in our understanding be illegal far or less a crime because its a fundamental right which is being guaranteed to the person under article 21 of the Constitution of India, which inheres within its ambit and it is wide enough in its amplitude to protect an inherent right of self determination with regards to one's identity and freedom of choice with regards to the sexual orientation of choice of the partner. In such type of circumstances it is exclusively the statement recorded of the detinue, who is said to be wrongfully/illegaly confined and who is said to be having a consensual or a lesbian relationship with the petitioner, which becomes of a prime importance, to be considered while parting with the judgment. Since initially the parties were not present, hence, the detinue was directed to appear in person in the custody of the respondent police official and, hence, she was directed to be produced on the date fixed.

7. However, when the writ petition was taken up at admission stage on 20.05.2020, before venturing into the merits of the matter, since the writ being a habeas corpus petition, this Court found it to be apt to call upon the detinue to appear in person before this Court in order to enable her to record her statement, as to whether she has been wrongfully detained against her wishes by the private respondent nos. 4 and 5, which has been alleged by the petitioner in the writ petition. The detinue appeared on the date fixed before this Court, i.e. on 27.05.2020. She has recorded the following statements. Excerpt from the order dated 27.05.2020 is quoted hereunder:

“The detenue Meenakshi has been brought and presented before this Court by Mr. Chandra Mohan Singh, Incharge Inspector, Kashipur and lady Constable 1079 Tulsi, Kotwali Bajpur.

The detenue Meenakshi has recorded her statement before the Police officials, who had brought her before the Court today as well as Deputy Advocate General; to the effect that she voluntarily on her own volition wants to continue her relationship with Madhu Bala, i.e. petitioner in the fashion, in which, it has been pleaded in the Writ Petition to have been continuing since 2016.

The petitioner is not present today in person. Respondent nos. 4 and 5, are also not present for the reason being that no notices were issued to them on the previous date.

Let notices be issued to respondent Nos. 4 and 5. Hence, the petitioner is directed to take steps for serving respondent Nos. 4 and 5 within three days from today.

Since the detenue, who is present, submits that she is under a pressure, which is being exerted by respondent Nos. 4 and 5 in league with respondent No. 3 to get herself married to a male according to wishes of respondent Nos. 4 and 5. The respondent No. 2 is directed to ensure that no untoward pressure is exerted by respondent Nos. 3, 4 and 5 to force her to marry any person against her wishes, till next date of listing.”

8. On her appearance before the Court, she had at first instance conceded about her relationship with the petitioner and expressed her decision to live together with the petitioner, she expressed her desire to go along with the petitioner, she stated that she is not prepared to go and live with respondent nos. 4 and 5 herein the writ petition, then she expressed that she has been illegally detained by her mother and brother. Prima-facie then I was convinced that Meenakshi, the detenue, is under illegal confinement against her freewill at her parental home, at the instance of private respondents.

9. But, since on the date fixed for appearance of the detenue, i.e. 27.05.2020, the respondent nos. 4 and 5, who are the mother and brother respectively, as they were not represented nor any notices were issued to them by this Court; no determination on merits could be made on the writ petition in the absence of private respondents, who are alleged to have wrongfully confined the detenue. Consequently, this Court on 27.05.2020 directed the petitioner to serve the notices on respondent nos. 4 and 5. The steps were taken and respondent nos. 4 and 5 had put in appearance through their Advocate, Mr. Jayvardhan Kandpal.

10. The matter was yet again taken up on 08.06.2020, in the presence of police officials, who had brought the detenu under protection, and since the proceedings were being conducted through the video conferencing, the detenu herself was called to appear in person before me along with the petitioners, at my residence from where the proceedings under video conferencing, were being held, in order to record her statement; as to what was her willingness? whether she wants to continue to reside in a consensual relationship with the petitioner or not? Whether there was any pressure exerted upon her by respondent nos. 4 and 5, against her wishes to marry someone else? Whether she has been wrongfully detained by respondent nos. 4 and 5; against her wishes? When the proceedings were conducted on 08.06.2020, at my residence, the detenu had appeared in person, and had recorded just a converse statement in the presence of the petitioner herself then what she has recorded by her earlier statement on 27.05.2020. In the statement thus recorded in the proceedings of 08.06.2020, she had made the following statements:

“In compliance of the order dated 20th May, 2020, the corpus was produced on 27th May, 2020, before this court, wherein, she had stated and expressed an apprehension of fear as against respondent nos. 4 and 5 and she further stated and expressed that she on her own volition wants to live with the petitioner. But, since on the said date, the private respondent nos. 4 and 5 were not noticed and they were not putting an appearance, the petitioner’s counsel was granted time to take steps for serving respondent nos. 4 and 5 and the matter was directed to be posted on 08th June, 2020, i.e. today.

Today, the matter was taken up today through video conferencing. The respondent Nos. 4 and 5, have been represented through Mr. Jay Vardhan Kandpal, Advocate, who participated in the video conferencing from the Court rooms itself. Since statement could not be recorded of the detenu and the petitioner from the Court premises through the video conferencing, the proceedings, thereafter, was conducted from my residence. I called upon the petitioner and the detenu to appear in person before me at my residence to record their statement. They have been produced by the S.H.O.

Today, the detenu Meenakshi had made a statement that she has previously recorded a statement under certain pressure on a mistaken notion on 27th May, 2020; to the effect that she wanted to reside with the petitioner. Today, she has recorded just a contrary statement and had resiled from her earlier statement. Whereas, the petitioner, too, who was present in person, has submitted that on account of the aforesaid peculiar circumstances, she has been placed in a

very embarrassing situation, wherein, she contends that the Writ Petition was as a consequence of the version extended by detenue herself about the wrongful confinement of her's by respondent Nos. 4 and 5.

Be that as it may. Since today the detenue Meenakshi has withdrawn her earlier statement, as recorded on 27th May, 2020 and has made a converse statement that she wants to reside with her parents and that there was no wrongful confinement of her's by them, it would be in the interest of justice that the statements of respondent Nos. 4 and 5 and the detenue herself to be placed on record by way of affidavit to be filed by them within a period of three days from today.

Put up this Writ Petition on 12th June, 2020, as a last case. Its proceedings would be held in the Court premises itself.

On the said date, the detenue, respondent Nos. 4 and 5, the petitioner, as well as the S.H.O., who had produced the corpus before this Court on the previous occasions or any other Police Official, who had faced the situation on the request made by the petitioner about the pressure being exerted on the detenue, would be present before this Court on the next date fixed to record their respective statements.”

11. In her statement as recorded on 08.06.2020, she had submitted that earlier the statement recorded by her, before the court on 27.05.2020 proceedings, expressing her willingness to continue with the consensual relationship with the petitioner, was given under a wrongful conception and under some mis-notion and, hence, she has withdrawn the said earlier statement and had recorded a fresh statement in presence of the counsel for the petitioner, and petitioner herself, who too was present before me, to the effect that she does not want to continue to live in a consensual relationship with the petitioner. She had further submitted that as far as the private respondent nos. 4 and 5 are concerned, who are the mother and brother respectively, they are not exerting any pressure of any nature upon her nor are pressuring her to do any act against her wishes. She further submitted that she is a major and she has got a constitutional right to take her own decision, but since there was a contradictory statement given by the detenue before this Court on 08.06.2020, which was contrary to the earlier statement of the detenue as recorded on 27.05.2020, this Court thought it to be appropriate to bring the statements of the detenue, as well as that of respondent nos. 4 & 5, on records of the writ petition by way of an affidavit and, accordingly, a direction was issued to the learned counsel for the respondent as well

as to the detenu herself, who was appearing in person on 08.06.2020, to file their respective affidavits.

12. On 11.06.2020, it is reported by the Registry that the detenu and respondent nos. 4 and 5, who are represented and identified by Mr. Jayvardhan Kandpal, Advocate, had filed their respective affidavits today. The detenu has been brought and produced by the S.H.O., Kashipur, Udham Singh Nagar, Mr. Chandra Mohan Singh and Lady Constable, Police Station Bajpur, Udham Singh Nagar, Ms. Sunita, in compliance of the order dated 08.06.2020.

13. In the Court proceedings today the detenu by way of reiteration, has made a statement that she is not under any pressure by anyone in any manner whatsoever, at the behest of respondent nos. 4 and 5 or from anyone else. She has further submitted that she is making the statement consciously and at her freewill, that she wants to lead her independent life and does not want to continue with the consensual relationship with the petitioner, which was alleged in the writ petition to be existing between the petitioner and the detenu Meenakshi since 2016.

14. In such an eventuality, where the statement which has been recorded today in the court proceedings and also as given by her affidavit, it has been recorded by the detenu herself that she is not under a wrongful confinement against her wishes by respondent nos. 4 and 5, hence, this Court is of the opinion that the writ petition by way of a writ of habeas corpus itself would not be tenable. However, as a measure of precaution considering the statements made in the affidavit filed by respondent nos. 4 and 5, wherein, they have expressly stated before the court, apart from submitting the affidavit, they had made a statement before this Court in the presence of their respective counsel, that they are not exerting any pressure on the detenu and they would never do so even in the future also, and that she, i.e. the detenu Meenakhi, is free to take her own decision and to carry her own life, since she being a major has been ensured with a constitutional right, to lead her independent life in the manner she

desires, no one can legally dictate terms to her including respondent nos. 4 and 5, as to the manner in which she has to lead her life.

15. In view of the aforesaid statements and affidavit on record, this habeas corpus petition is dismissed; because of the statement recorded by the detenu herself before this Court today, that she is not under pressure or a wrongful confinement of respondent nos. 4 and 5. Thus, there could not be any writ of habeas corpus.

16. Accordingly, the habeas corpus petition is dismissed.

(Sharad Kumar Sharma, J.)

12.06.2020

Pooja