

**Court No. - 84**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 315 of 2021

**Petitioner :-** Mohd. Ahmad And Another

**Respondent :-** State Of U.P. And 4 Others

**Counsel for Petitioner :-** Avinash Pandey

**Counsel for Respondent :-** G.A.

**Hon'ble Dr. Yogendra Kumar Srivastava,J.**

1. Heard Sri Avinash Pandey, learned counsel for the petitioners and Ms. Rachna Tiwari, learned Additional Government Advocate appearing for the State-respondents.

2. The undisputed facts as reflected from the pleadings on record are that the petitioner no.2, wife of the petitioner no.1, left her matrimonial home sometime in the month of June, 2019 on account of some serious differences with her husband (petitioner no.1) and an application for restitution of conjugal rights was filed by the petitioner no.1 which was registered as Case No. 772 of 2019 (Mohd. Ahmad vs. Arshi) and the same is stated to be pending before the court of the Principal Judge, Family Court, Saharanpur.

3. Counsel for the petitioners has sought to contend that subsequent thereto sometime in the month of November, 2020 an information was received by him suggesting that petitioner no.2 was being detained at her parental home and in regard to the same certain applications are also stated to have been moved by him before the respondent authorities.

4. Learned Additional Government Advocate submits that once it has been admitted that the petitioner no.2 (wife) left her matrimonial home sometime in the month of June, 2019 on account of serious differences with her husband (petitioner no.1), it is not a case of illegal detention and a writ of habeas corpus would not be entertainable. This would be moreso for the reason that an application seeking restitution of conjugal rights is stated to have been filed by the petitioner no.1 and the same is pending.

5. Learned counsel for the petitioners has not disputed the factual position with regard to the petitioner no.2 having left her matrimonial home in the month of June, 2019 and also that she has not returned back thereafter.

6. There is no material on record to suggest that the petitioner no.2 was forcibly taken away; rather the facts indicate that the petitioner no.2 left her matrimonial home on her own accord on account of some serious differences with her husband (petitioner no.1). The application seeking restitution of conjugal rights, filed by the petitioner no.1-husband, contains a clear narration of facts in this regard.

7. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain v State of U.P. and others**<sup>1</sup> and **Kanu Sanyal v**

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<sup>1</sup> 1964 AIR 1625

**District Magistrate Darjeeling<sup>2</sup>.**

8. The writ of habeas corpus has been held as a *festinum remedium* and accordingly the power would be exercisable in a clear case. The remedy of writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would therefore not be available as a matter of course. The observations made in the decision in **Mohammad Ikram Hussain** (supra) in this regard are as follows:-

"13. Exigence of the writ at the instance of a husband is very rare in English Law, and in India the writ of habeas corpus is probably never used by a husband to regain his wife and the alternative remedy under S. 100 of the Code of Criminal Procedure is always used. Then there is the remedy of civil suit for restitution of conjugal rights. Husbands take recourse to the latter when the detention does not amount to an offence and to the former if it does. In both these remedies all the issues of fact can be tried and the writ of habeas corpus is probably not demanded in similar cases if issues of fact have first to be established. This is because the writ of habeas corpus is *festinum remedium* and the power can only be exercised in a clear case. It is of course singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ."

9. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

10. In view of the other remedies available for the purpose

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<sup>2</sup> (1973) 2 SCC 674

under criminal and civil law, issuance of a writ of habeas corpus at the behest of a husband to regain his wife may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out.

11. The aforementioned legal position has been stated in recent decision of this Court in **Soniya and Another vs. State of U.P. and Others**<sup>3</sup> and subsequently reiterated in **Manjita Devi and another vs. State of U.P. and Others**<sup>4</sup>.

12. In the facts of the present case, the petitioner no.2 having left her matrimonial home on her own on account of a matrimonial discord, the present petition seeking a writ of habeas corpus at the behest of the petitioner no.1 (husband) would not be entertainable.

13. Proceedings for restitution of conjugal rights being pending between the parties before the Family Court, it is open to the petitioner no.1 to pursue the said remedy.

14. Subject to the aforesaid observation the petition stands dismissed.

**Order Date :- 5.8.2021**

Imroz/Nitendra

**(Dr. Y.K. Srivastava, J.)**

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<sup>3</sup> 2021 (145) ALR 773

<sup>4</sup> 2021 (2) AWC 1055