

(1997) 05 AHC CK 0016

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 12937 of 1992

Adya Shanker Tripathi and Another

APPELLANT

Vs

Smt. Priyambada Devi and Another

RESPONDENT

Date of Decision : 21-05-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 13, 482
Penal Code, 1860 (IPC) — Section 494, 79

Citation : (1997) 21 ACR 703

Hon'ble Judges : O.P. Garg, J

Bench : Single Bench

Advocate : S.D.N. Singh, for the Appellant; A.G.A., for the Respondent

Judgement

O.P. Garg, J.—This is an application u/s 482, Code of Criminal Procedure with the prayer that the complaint filed by Smt. Priyambada Tripathi, opposite party No. 1, giving rise to complaint case No. 2911 of 1989 u/s 494, I.P.C. pending in the court of Chief Judicial Magistrate, Mirzapur, be quashed.

2. Counter and rejoinder-affidavits have been exchanged.

3. Heard Sri S.D.N. Singh, learned Counsel for the applicants and Sri S.C. Dwivedi on behalf of opposite party No. 1 as well as the learned A.G.A.

4. It is admitted fact that Adya Shanker Tripathi, applicant No. 1, had married Smt. Priyambada Tripathi opposite party No. 1 (hereinafter referred to as opposite party) in the year 1971 and they lived together as husband and wife. The applicant-husband left India in the year 1978 in connection with employment as an Engineer in America. It is alleged that he came to India and made attempt to take the opposite party along with him to America but for want of proper visa, it could not be possible. It is further alleged that the opposite party, who is a postgraduate and holds a responsible post in State Bank of India at Varanasi drawing a handsome salary, was not herself willing to join the applicant-husband at California. The applicant-husband obtained a decree for dissolution of

marriage by moving an application in the Superior Court of California, Country of San Mateo on 8th August, 1986. After dissolution of the marriage with the opposite party, applicant No. 1 validly married Smt. Asha Tripathi applicant No. 2, on 24.12.1987 at California and since then both of them are staying there as husband and wife. It is further alleged that the opposite party with a view to black-mail the applicants has filed a false and frivolous complaint u/s 494, I.P.C. against the applicant in the Court of Chief Judicial Magistrate, Mirzapur. The applicants have been summoned and a direction has been issued for the personal appearance of the applicant before the Court.

5. It is an indubitable fact that there existed a validly contracted marriage between applicant No. 1 and the opposite party. The crux of the complaint filed by the opposite party u/s 494, I.P.C. is that during the subsistence of the first marriage, applicant No. 1 has contracted a second marriage with Smt. Asha Tripathi applicant No. 2. The contention on behalf of the applicants is that the second marriage was solemnized after the dissolution of the marriage between applicant No. 1 and the opposite party as a result of the decree passed by the California court.

6. u/s 494, I.P.C. following ingredients are required to be proved:

- (1) that the complainant had been married to the accused;
- (2) that the accused contracted a second marriage while the first marriage was still subsisting;
- (3) that both the marriages were valid and strictly according to law governing the parties.

7. Learned Counsel for the applicants urged that subsequent marriage in between the applicants was a valid marriage as it was contracted after obtaining a decree of divorce at California where the applicant No. 1 was residing. The main question for determination in the present case is whether the alleged decree for the dissolution of marriage passed by the California court, can be tested to have brought an end to the marital status of the applicant No. 1 and the opposite party or not?

8. Learned Counsel for the opposite party placed reliance on Y. Narsimha Rao and Ors. v. Y. Venkata Lakshmi and Anr. JT 1991 (3) SC 33, in which the Supreme Court dealt with the question of recognition of foreign judgment in the light of the provisions of Section 13 of the Code of Civil Procedure. It was held that under the provisions of Hindu Marriage Act, 1955, only the District Court within the local limits of whose original civil Jurisdiction (i) the marriage was solemnized, or (ii) the Respondent, at the time of presentation of the petition resides, or (iii) the parties to the marriage last resided together, or (iv) the Petitioner is residing at the time of the presentation of the petition, in a case where the Respondent is, at the time, residing outside the territories to which the Act extends, or has not been heard of as being alive for a period of seven years

or more by those persons who would naturally have heard of him if he were alive, has jurisdiction to entertain the petition. The Circuit Court of St. Louis County, Missouri had, therefore, no jurisdiction to entertain the petition according to the Hindu Marriage Act, under which admittedly the parties were married. It was further held by the Supreme Court that irretrievable breakdown of marriage is not one of the grounds recognised by the Act for dissolution of marriage, and therefore, the decree of divorce passed by the foreign court was on a ground unavailable under the Act. As regards the recognition of the foreign judgments, it was observed that u/s 13 of the Code of Civil Procedure, a foreign judgment is not conclusive as to any matter thereby directly adjudicated upon between the parties if (a) it has not been pronounced by a Court of competent Jurisdiction; (b) it has not been given on the merits of case; (c) it is founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) the proceedings are opposed to natural justice; (e) it is obtained by fraud; (f) it sustains a claim founded on a breach of any law in force in India.

9. In the instant case, admittedly, opposite party had never gone to America to live with applicant No. 1 at California. There is nothing on record to indicate as to what were the grounds taken by the applicant No. 1 in the divorce petition which he had filed in the Superior Court of California, County of San Mateo. There is also no evidence worth the name to indicate that the opposite party had the notice of the divorce petition. A photostat copy of the so-called divorce decree has been brought on record which is neither here nor there. Even if it be taken that applicant No. 1 had obtained a decree of divorce from a foreign court, it would stand vitiated for the reasons mentioned by the Supreme Court in Y. Narsimha Rao's case, referred to above.

10. Learned Counsel for the applicants placed reliance on *Lingari Obulamma v. Venkata Reddy and Ors.* AIR 1979 SC 818; *Smt. Priya Bala Ghosh Vs. Suresh Chandra Ghosh*, and *Bhaurad Shanker Lokhande and Anr. v. State of Maharashtra and Anr.* AIR 1965 SC 1584. In these cases, the question which was taken into consideration primarily was whether or not the second marriage contracted by the husband was a legally valid marriage? All these cases do not have any bearing on the controversy in hand particularly at this stage when the evidence in the case has yet to be recorded by the learned Magistrate.

11. Learned Counsel further urged that the applicants are protected by Section 79 of the Indian Penal Code which makes an exception to the criminal liability. Section 79 provides that nothing is an offence which is done by a person who is justified by law or who by reason of mistake of fact and not by reason of mistake of law in good faith believes himself to be justified in law in doing so. According to the learned Counsel, the aforesaid provision would constitute valid defence for the alleged offence of bigamy. This submission is wide off the mark as the simple question for consideration at this stage is whether the applicants have been rightly summoned by the Chief Judicial Magistrate, Mirzapur u/s 494, I.P.C. The

defence of the applicants accused cannot be taken into consideration at this stage. If the decree of divorce passed by a foreign court as set up by the applicants which prima Jade is illegal is not taken into consideration, the fact remains that applicant No. 1 has contracted a second marriage with applicant No. 2 during the subsistence of his first marriage with opposite party. This allegation by itself is sufficient to summon the applicants on the complaint of opposite party u/s 494, I.P.C. This Court exercising inherent power u/s 482, Code of Criminal Procedure cannot proceed to consider the version of the applicants given out in the present application vis-a-vis that of the complaint and enter into a debatable area to decide which of the version is true, such an enquiry is wholly impermissible at this stage.

12. In the result, I find that the learned Chief Judicial Magistrate, Mirzapur has rightly summoned the applicant u/s 494, I.P.C. on the complaint of opposite party. Since the applicants have failed to appear before the learned Magistrate, he, of necessity has to issue processes for procuring their personal attendance. No illegality or irregularity has been committed by the learned Magistrate in compelling the personal attendance of the applicants.

13. The application u/s 482, Code of Criminal Procedure fails and is accordingly dismissed.