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**(2007) 04 CAL CK 0019**  
**In the Calcutta High Court**  
**Case No : C.R.R. No. 3059 of 2006**

Binoy Kumar Gupta

APPELLANT

Vs

Leela Gupta and Another

RESPONDENT

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**Date of Decision :** 11-04-2007

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 125, 200, 202(1), 204, 204(2)  
Penal Code, 1860 (IPC) — Section 406, 409, 494

**Citation :** (2007) 4 CHN 491

**Hon'ble Judges :** P.N. Sinha, J

**Bench :** Single Bench

**Advocate :** S.G. Mukherjee and S. Banerjee, for the Appellant; A. Haque, for the Respondent

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## Judgement

P.N. Sinha, J.—This revisional application is directed against the order dated 15th June, 2006 passed by the learned Judicial Magistrate, 3rd Court, Alipore in complaint case No. C-3308 of 2005 thereby rejecting the application of the accused petitioner for dropping the complaint case due to non-filing of the list of prosecution witnesses in the complaint or by not mentioning names of witnesses for the complainant in the complaint petition filed by the O.P. No. 1.

2. Mr. Mukherjee, the learned Advocate for the accused petitioner submitted that the marriage between petitioner and O.P. No. 1 was solemnised in the year 1967. Since 1969 the husband and wife are living separately. The O.P. No. 1 wife filed an application against the husband petitioner in the year 2003 claiming maintenance u/s 125 of the Cr. PC. Thereafter, a civil suit was filed in the year 2004. The wife has filed the present complaint in the year 2005 against the husband petitioner for alleged offence u/s 494 of the Indian Penal Code (in short the IPC). In order to establish prima facie elements of offence u/s 494 of the IPC and to summon the accused for committing such offence, essential ceremonies of both the marriages must be brought into the petition of complaint as well as in the statement of the witnesses recorded u/s 200 of the Cr. PC. In the trial also to

establish the charge u/s 494 of the IPC strict proof of both the marriages is necessary. At the stage of issue of process against the husband for committing offence u/s 494 of the IPC there must be elements of offence and evidence of performance of essential ceremonies of the marriage including the second marriage and, unless such evidence comes before the learned Magistrate, process u/s 494 of the IPC cannot be issued. Besides that, in the complaint the provisions of Section 204(2) of the Cr. PC were not followed as list of the prosecution witnesses was not filed and the learned Magistrate could not have issued summons to the accused.

3. Mr. Mukherjee further submitted that the learned Magistrate acted illegally by issuing process when in the petition of complaint as well as in the statement of the sole witness namely, the complainant, recorded u/s 200 of the Cr. PC there was no evidence or materials disclosing performance of essential ceremonies of the alleged second marriage of the husband. Before passing of the decree in the civil suit the right or status of the parties cannot be claimed. A Court of Magistrate cannot decide the matrimonial status of the husband and the wife. The averments of the pleadings in the civil suit cannot be regarded as proof or establishment of materials of offence u/s 494 of the IPC. As the essential requirements of the alleged offence u/s 494 of the IPC were not at all established and as there was no material before the learned Magistrate in respect of alleged offence u/s 494 of the IPC, the order of the learned Magistrate issuing process against this petitioner was bad in law. The order of the learned Magistrate issuing process against the petitioner u/s 494 of the IPC should be set aside and the complaint case should be quashed. In support of his contention Mr. Mukherjee placed reliance on the decisions of the Hon'ble Supreme Court in Smt. Priya Bala Ghosh Vs. Suresh Chandra Ghosh, Kanwal Ram and Others Vs. The Himachal Pradesh Admn., ; Santi Deb Berma Vs. Smt. Kanchan Prava Devi, and Laxmi Devi (Smt) Vs. Satya Narayan and Others, .

4. On the contrary, Mr. A. Haque, the learned Advocate for the O.P. No. 1 submitted that O.P. No. 1 wife was married with the petitioner in the year 1967. One son was born to them out of their wedlock in the year 1968. In 1969 the husband petitioner went to Jamalpur for official work and since then he did not take care or any information of the wife and the minor son. The petitioner stopped coming to wife since May, 1969 and he started living with a different lady. Subsequently, the husband petitioner married the said lady. The O.P. wife receiving such information went to Jalpaiguri and came to the house of the husband where she found that lady in the house of the husband and, the husband introduced the said lady to the O.P. as his wife. The husband petitioner told the O.P. wife to go back to Calcutta and he assured her of sending money for her maintenance. There is no dispute that O.P. No. 1 is the wife of the accused petitioner. The accused petitioner himself identified the other lady as his wife before the O.P. No. 1 when she went to the husband's residence at North Bengal. In the civil proceeding there is an admission by the husband petitioner in respect of his second marriage. The elements of offence u/s 494 of the IPC was

prima facie established against the husband from the averments of the petition of complaint as well as from the statement of the complainant recorded u/s 200 of the Cr. PC.

5. Mr. Haque further contended that at the time of issuing process u/s 204 of the Cr. PC, the Magistrate is not expected to come to a prima facie finding whether the case would end in conviction of the accused. At the stage of issuing process the learned Magistrate on perusal of complaint and on consideration of the evidence recorded u/s 200 of the Cr. PC and on the basis of enquiry or investigation report, if any, u/s 202(1) of the Cr. PC has to consider whether prima facie materials of offence have been established or not, which is sufficient for proceeding further and to issue process upon the accused. Furnishing list of witnesses at the stage of Section 204 of the Cr. PC is not mandatory. List of witnesses may be supplied at a later stage after appearance of accused or at the stage of furnishing requisites in the Court of the learned Magistrate or at least before starting of trial. The decisions cited by the learned Advocate for the petitioner are not applicable at all as the said decisions were on consideration of evidence and materials on record after trial where the accused persons were convicted. The order of the learned Magistrate accordingly was correct, legal and proper and the learned Magistrate may be directed to proceed with the trial as expeditiously as possible.

6. I have duly considered the submissions made by the learned Advocates for the parties and carefully perused the contents of the revisional application and the decisions placed before me. The submission of Mr. Mukherjee, the learned Advocate for the petitioner regarding list of witnesses as mentioned in Sub-section (2) of Section 204 of the Cr. PC is not acceptable or tenable. Subsection (2) of Section 204 runs as follows:

No summons or warrant shall be issued against the accused under subsection (1) until a list of the prosecution witnesses has been filed.

Failure of the complainant to supply list of witnesses or giving names of witnesses in the petition of complaint cannot be regarded as a ground of dismissing the complaint or recalling process. There are conflicting judicial views in this matter and the reasonable view is that merely non-filing of list of witnesses is not sufficient to dismiss the complaint or to quash the order of issuing process. It is settled law that, if the Court finds that even a sole witness is trustworthy the prosecution case can be established on the basis of such sole witness. If the complainant relies on his own evidence and also the defence evidence, if any, it is not mandatory on him to annex a list of witnesses or to annex a list stating that he does not propose to examine any witness. It cannot be interpreted in the manner that in no case process shall be issued against the accused without a list of witnesses because, it may well be that the complainant himself is the only witness in the case. In such a case the Court should be so informed and the learned Magistrate would act accordingly. In this matter, therefore, merely non-furnishing or non-supplying list of witnesses is not a

ground to quash the order of issuing process or to dismiss the complaint.

7. The petition of complaint does not disclose performance of essential ceremonies of the alleged second marriage of the husband petitioner. It was disclosed in paragraph 6 of the complaint that after two decades since the husband went to Jamalpur in May, 1969, the complainant came to know that the husband was working as a teacher in the district of Jalpaiguri. The complainant wife then rushed to the C.B.P. High School at Charmurchi to meet her husband and the husband took away her to his residence. In the residence of the husband the complainant found a woman with children and she was shocked and bewildered. The complainant prayed for maintenance there and the husband assured her that he would send her money to the tune of Rs. 1,000/- per month for maintenance and told her to go to Calcutta. She came back to Calcutta but, the husband never sent the assured money, and thereafter, she sent lawyer's notice dated 31.12.02 to the husband and the husband came to Calcutta and gave her Rs. 1,000/- and some gifts to his daughter-in-law i.e. wife of the son. Thereafter, the husband did not send her money. The wife filed an application u/s 125 of the Cr. PC claiming maintenance. She also filed a suit being T.S. No. 44 of 2004 which is now pending before the learned Civil Judge (Junior Division), 5th Court, Alipore.

8. It has been alleged in the complaint that in the written showcases filed by the husband in the proceeding u/s 125 of the Cr. PC, the husband admitted his second marriage. There was no averment of performing the essential ceremonies of the second marriage of the husband and solemnisation of the second marriage by the husband petitioner. The statement of the complainant Leela Gupta recorded u/s 200 of the Cr. PC is also totally silent relating to solemnisation of the second marriage of the husband and performance of essential ceremonies in such second marriage. Her statement recorded u/s 200 of the Cr. PC only reveals that in 1997 she went to the school of her husband, the accused, and she was taken to the residence of the husband where she was introduced with a lady as the wife of accused. These matters or materials are not at all sufficient to establish prima facie elements of alleged offence u/s 494 of the IPC.

9. In order to establish prima facie case u/s 494 of the IPC there must be averment in the petition of complaint about solemnisation of the second marriage of either of the spouse and performance of essential ceremonies of the marriage according to the rites and customs of the spouses. In the statement of the complainant or witnesses of complainant recorded u/s 200 of the Cr. PC there must be elements or facts showing solemnisation of the second marriage of either of the spouse as well as performance of essential ceremonies of the marriage according to the rites and customs of the respective spouses. In absence of such essential features of the second marriage in the complaint as well as in statements u/s 200 of the Cr. PC, the process cannot be issued u/s 494 of the IPC against the accused.

10. The Supreme Court in *Priya Bala Ghosh v. Suresh Chandra Ghosh* (supra)

held that mere admission by accused that he had contracted second marriage is not sufficient. It is true that the decisions cited by Mr. Mukherjee are based on appeals where the Hon''ble Supreme Court had the opportunity to discuss evidence but, principles of law are well settled and such principles of law are equally applicable at the stage of Section 204 of the Cr. PC at the time of issuing process. Unless there are prima facie materials disclosing elements of Section 494 of the IPC in the complaint as well as in the statements of witnesses u/s 200 of the Cr. PC process cannot be issued. Mere statement in the complaint as well as in the statement u/s 200 of the Cr. PC that a particular lady was identified as wife of the accused is not sufficient to proceed further into such complaint and to issue process against the accused husband.

11. The Hon''ble Supreme Court in other decisions namely, Kanwal Ram v. Himachal Pradesh Administration (supra), Santi Deb Berma v. Kanchan Prava Devi (supra) and Laxmi Devi v. Satya Narayan (supra) reiterated the same view by observing that second marriage must be proved and non-proof of essential ceremonies do not establish elements of offence u/s 494 of the IPC. In Priya Bala Ghosh v. Suresh Chandra Ghosh (supra) the Supreme Court held that in order to establish offence u/s 494 of the IPC proof of solemnisation of second marriage in accordance with essential religious rites are essential and mere admission of the second marriage is not enough. In Lingari Obulamma Vs. L. Venkata Reddy and Others, , it was held by the Supreme Court that when there was absolutely no evidence to prove that any of the two essential ceremonies i.e. "Dattahoma" and "Saptapadi" had been performed at the time of second marriage and the existence of the custom in the community to put the "yarn thread" instead of "mangalsutra" was neither mentioned in complaint nor proved in evidence elements of offence u/s 494 of the IPC could not be established.

12. The principle of law discussed above concerning offence u/s 494 of the IPC makes it clear that neither in the complaint nor in the statement recorded u/s 200 of the Cr. PC there was disclosure of solemnisation of second marriage as well as performance essential ceremonies of the marriage according to the customs of the parties. There was no material at all for issue of process u/s 494 of the IPC against the accused petitioner. The complaint petition was without disclosure of essential elements of the offence u/s 494 of the IPC and accordingly order of the learned Magistrate issuing the process was bad in law and such order is set aside.

13. At the time of issuing process the learned Magistrate did not take pains to go through the petition of complaint properly to understand when the cause of action arose for initiation of the criminal proceeding. From the averments of para 6 of the petition of complaint and the statement of complainant u/s 200 of the Cr. PC it appears that after the husband left Calcutta for study at Jamalpur in the year 1969 the complainant did not receive any information of her husband. In the year 1997 she learnt from her sister that the accused husband has married for the second time and he was working as a teacher in C.B.P. High School at

Charmurchi. Receiving such information the complainant went to Jalpaiguri and also came to the residence of the husband and there she found a lady and the said lady was introduced to her by the husband as his wife. It is thus clear that in the year 1997 the complainant had the knowledge about the alleged second marriage of her husband. But she lodged the complaint only in the year 2005. Why there was eight years delay in lodging the complaint was not considered by the learned Magistrate at the time of issue of process.

14. In this connection, I intend to refer a decision of the Hon''ble Supreme Court in Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, . In the reported decision the complainant filed a complaint on 9.8.02 alleging that the appellants had committed offences punishable under Sections 406 and 409 of the IPC. The date of occurrence was indicated to be between 12.7.95 to 8.5.2002. The complainant who was working in another concern applied for a post in the company of the accused and was called to the interview on 14.7.95 and was asked to report at Bombay office on 1.8.95 for training. After completion of training the complainant was asked to report to the Patna Depot. He was given appointment from 9.9.95 by letter dated 1.9.95 wherein it was indicated that he was appointed as Field Officer and not Area Manager. After receiving the appointment letter complainant asked the officers of the accused company as to how he was appointed as Field Officer when he appeared at interview for the post of Area Manager. He was assured that the post of Area Manager will be issued in the first week of April, 1996 but no such letter was issued and he was not appointed as Area Manager. Thereafter, the complainant lodged a complaint and process was issued and the accused company moved the High Court for quashing the criminal proceeding u/s 482 of the Cr. PC. It was submitted before the High Court that complainant moved the Court not with clean hands and suppressed material facts. It was stated before the High Court that the complainant had earlier filed a Title Suit No. 178/02 before the learned Sub-Judge claiming his transfer order and he prayed for interim protection which was rejected. It was found that for the first time in 2002 he alleged breaches of agreement etc. However, the High Court rejected the prayer for quashing the proceeding and the appellant company moved the Supreme Court. Considering the entire situation the Supreme Court observed that the complainant had not come to Court with clean hands. There was no explanation whatsoever for the inaction between 1995 and 2001. In the present matter the averments of the complaint petition as well as the statement of complainant u/s 200 of the Cr. PC fail to reveal what the complainant was doing between 1997 to 2005 when she finally lodged the complaint. It appears that during these years she took money from her husband and some gifts and kept silence and finally, after eight years lodged the complaint. It establishes that the complainant came to Court not with clean hands.

15. The aforesaid discussion makes it clear that there was no sufficient ground for proceeding further into the complaint case and continuation of the criminal proceeding would be an abuse of the process of law. The complaint including the

criminal proceeding being case No. C-3308 of 2005 now pending in the Court of the learned Judicial Magistrate, 3rd Court, Alipore is hereby quashed.

16. Criminal Section is directed to forward a copy of this order to the learned Judicial Magistrate, 3rd Court, Alipore for information and necessary action.

LATER:

17. Let xerox certified copy of this order be given to the parties as expeditiously as possible from the date of making of such application on payment of proper fees and charges.