

(2012) 03 CAL CK 0053

In the Calcutta High Court

Case No : C.R.R. No. 11 of 2012 with C.R.A.N. No. 247 of 2012

Bipul Parua

APPELLANT

Vs

Sampa Parua

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 33

Criminal Procedure Code, 1973 (CrPC) — Section 125, 200, 204, 244, 245

Penal Code, 1860 (IPC) — Section 109, 194, 203, 323, 494

Citation : (2012) 4 CHN 123

Hon'ble Judges : Raghunath Bhattacharya, J

Bench : Single Bench

Advocate : Sekhar Basu, Sandipan Ganguly and Sanjoy Banerjee, for the Appellant; Pratike Bhattacharyya, Dhrubajyoti Ghosh, Subrata Bhattacharya and Somnath Maiti, for the Respondent

Judgement

Raghunath Bhattacharya, J.—The instant Criminal Motion has arisen against the order passed by the learned District and Sessions Judge, Purba Medinipur in connection with the Criminal Case No. 23 of 2008 rejecting the petition for discharge, filed by the petitioner Bipul Parua. Admittedly the petitioner, Bipul Parua is an accused in a Criminal Case u/s 494/109/323 IPC. The petitioner Bipul Parua filed a petition u/s 245 Cr.PC for discharging him on the ground that the marriage between them i.e. Sampa and Bipul was dissolved in the year 2007 in U.S.A. It is the specific submission of petitioner Bipul Parua that in view of the said dissolution of marriage a proceeding u/s 494 IPC is not attracted here. On hearing both sides learned Sessions Judge rejected the prayer.

2. Being aggrieved by and dissatisfied with the said order passed by the learned Sessions Judge present motion preferred on the ground whether the learned Court below was justified in passing the said order of discharge or not.

3. Upon considering, the materials on record and hearing the submissions made by the both sides i.e. Sekhar Bose on one side and Mr. P. Bhattacharyya on the

other side, let me first consider how far the District Judge was justified in passing the said order. It became more or less clear that the point which is to be considered in discharging the accused, is the unrebutted prosecution case, as made out from the prosecution evidence, adduced u/s 244 of Cr.PC. In other words, the unchallenged testimony of the prosecution witnesses as adduced u/s 244 is to be considered. If that testimony does not reveal ingredients of any offence u/s 494 against the accused person, he may well be discharged.

4. So far as the instant case as concerned as I find from the order of the learned Sessions Judge, three witnesses have deposed from the side of the prosecution and their cross-examination has been declined by the accused person.

5. It is needless to mention that during the course of the hearing of the revision application before the learned District Judge, petitioner preferred a revision before the Hon'ble Court and Hon'ble Court passed the following order:

It appears from the order dated 20.09.2011 that the learned District and Sessions Judge heard the matter in part and after having heard the matter in part on 20.09.2011 the learned Judge fixed the matter for further hearing on 11.11.2011 perhaps because of long vacation in between the dates. The learned Court has opined that when a specific date has been fixed and the matter was heard in part the question of dismissing the revisional application or sending the case record without concluding the hearing on 11.11.2011 would be improper and unjustified. Therefore, the Hon'ble Court directed the District Judge to complete the hearing and passed a reasoned order.

6. During the course of the argument the learned Advocate for the petitioner Bipul Parua submitted that by the order of the superior Court of California, County of Santa Clara, U.S.A. the divorce between the parties took place on 12.05.2007. So, at present the marriage is not subsisting between the parties. Accordingly the provisions u/s 494 is missing. At the very outset I like to mention some of the decisions.

7. As per the Smt. Satya Vs. Shri Teja Singh, "the validity of a foreign judgement rendered in a civil, proceeding must be determined in India on the terms of section 13 of the CPC. If the judgement falls under any of the clauses of section 13 it will cease to be conclusive as to any matter thereby adjudicated upon and will be open to collateral attack on the grounds mentioned in section 13."

8. In respect of another decision reported in Y. Narasimha Rao and Others Vs. Y. Venkata Lakshmi and Another, it was held that parties married in India and governed by the Hindu Marriage Act--the ground, on which decree passed not covered by the Act--besides, husband/appellant not a domicile but only technically satisfying the residence requirement of 90 days for assuming the jurisdiction of the Foreign Court--wife/respondent contesting the petition without submitting to the jurisdiction of the Foreign Court--it was held, that decree was unenforceable against the respondent.

9. It was held in Smt. Satya Vs. Shri Teja Singh, that "the case arises out of the proceedings for maintenance filed by the appellant/wife against her husband u/s 488 Cr.PC, 1898. The parties were Indian citizens and domiciled in India at the time of their marriage in India in 1955. Two children were born of the marriage. In 1959 respondent/husband left for U.S.A. for higher studies. After his period of 5 years study during which appellant/wife and minor children remained in India, in December, 1964 the respondent obtained decree of divorce from a Court in the State of Nevada on the basis to six-week-based domicile on the ground of separation from the wife for three years with no possibility of reconciliation."

10. On careful scrutiny of those judgements I am of the opinion that divorce granted by two Indian, citizens governed by Hindu Law and they got their decree of divorce in a Foreign Court is not a conclusive proof of their divorce but the ground and decree may well be looked, into, I am not in agreement with the submission of the learned Lawyer appearing for the opposite party that those decrees are not maintainable.

11. Mr. Bose, appearing for the petitioner assailed the order of the District Judge contending that in absence of any kind of proof that the marriage of the appellant with the opposite party, was performed with proper rituals it cannot be said that the marriage had been solemnized within the four corners of the Hindu Marriage Act, Only some evidences and a registration certificate cannot, in any way serve as a proof of valid marriage as per the Hindu Marriage Act, especially when there is no plea that marriage was solemnized in accordance with the customs which do not include Saptapadi. Learned Counsel referred to a decision of the Apex Court (Kanwal Ram & Ors. vs. Himachal Pradesh Administration) where it was held that sections 109, 194 and 494 of the IPC, 1860 and Hindu Marriage Act, 1955 respondent charged for bigamy and abatement acquitted by Trial Court charges affirmed by the Judicial Commissioner no witness had been proved performance of all compulsory ceremonies of marriage, held, marriage cannot be said to be performed.

12. In Bhaurao Shankar Lokhande vs. State of Maharashtra it was held that a marriage is not proved unless the essential ceremonies required for solemnization are proved to be performed. In another decision of the Apex Court as cited by the learned lawyer appearing for the husband that appellant/ wife filed a complaint against respondent/husband on the ground that he was her husband and that during the sustenance of first marriage he has conducted second marriage. Respondent i.e. the husband was prosecuted and convicted u/s 494. High Court acquitted respondent on the ground that there was no proof of valid second marriage. It was observed by the Apex Court that the essential ceremonies of the valid marriage at Dattahoma and Saptapadi and there is no evidence whatsoever that essential ceremonies were performed. There are several decisions on this point. In another decision it was observed by the Supreme Court that the only point erred before us is that this Saptapadi a fact has not been proved there is enough evidence of establish to factum of second

marriage. There are eye-witnesses who have seen the marriage. This is enough to bring out the charge. The proves relate to Saptapadi taken of seven steps, before sacred fire cannot be initiated upon if as of fact of marriage was established therefore. Court below are wrong, Learned Counsel for the respondent would urge that the Court below have correctly appreciated the legal position. It is Saptapadi which is established the factum of marriage being essentially solemnized. When proof of such a ceremony a case for bigamy cannot arise. Lastly I want to mention another decision reported in CRR 3059 of 2006 of our High Court where it was held that solemnization of second marriage u/s 494 (IPC) petitioner was initiated a criminal proceeding u/s 494 of IPC by the Magistrate on a complaint filed by the opposite party whether the proceeding initiated against the petitioner was right without disclosure of essential element of the offences u/s 494 of IPC It was held in, order to. establish prima facie case u/s 494 of the IPC there must be averment in the petition of complaint about solemnization 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 present case statement of the complainant or witness of the complainant silent on the elements or facts showing solemnization of the second marriage by the petitioner. Therefore, in absence of such essential features process could not be issued u/s 494 Cr.PC It has been alleged in the complaint that in the written show cause 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 respondent and solemnization of the second marriage by the husband/petitioner. The statement of the complainant Lila Gupta recorded u/s 200 of the Cr.PC is also totally silent relating to solemnization 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 Kolkata to 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 the accused. These matters or materials are not at all sufficient to establish prima facie elements of alleged offence u/s 494 of the IPC in order to establish prima facie case u/s 494 of the IPC there must be averment in the petition of complaint about solemnization 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 the complaint recorded u/s 200 of the Cr.PC. There must be elements or facts showing solemnization of the second marriage of either of the spouses 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 his statement u/s 200 of the Cr.PC the process cannot be issued u/s 494 of the IPC against the accused.

13. It was submitted that the husband admitted the second marriage but on careful scrutiny of the entire record I do not find any averment of performing the

essential ceremonies of the second marriage of the husband and solemnization, of the second marriage of the husband/petitioner. In order to establish a prima facie case u/s 494 of IPC. There must be averment in the petition of complaint about solemnization 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 spouse.

14. Supreme Court in Priya Bala Ghosh vs. Suresh Chandra Ghosh (Supra) held that mere admission by the accused that he had conducted second marriage is not sufficient. It is true that decision cited by the accused are based on appeals, where the order of the Supreme Court had the opportunity to discuss evidence, but principle of law are well settled and such principle 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 IPC in the complaint, as well as in the statement of the witness 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 the 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.

15. Learned Lawyer for Sampa Parua has filed a CRAN Application (C.R.A.N. No. 247 of 2012) praying for dismissal of the CRR No. 11 of 2012 on the ground that charge has already been framed, inter alia, u/s 494/323 and 494/109 of the IPC on 21.01.2012. Learned Lawyer appearing for Smt. Parua only submitted that he has filed a CRAN application and he has further pointed out that Court may go through it and after going through the said application it will be crystal clear for the Court to come to a conclusion that this proceeding is not maintainable. In this connection I like to point out that learned Lawyer appearing for Smt. Parua has only filed a CRAN application and only mention that Court should look into it without discussing the entire application in details. I have gone through the application and I do not find any merit in the said application and the said application in my humble opinion has no legs to stand upon. In view of aforesaid discussion there was no sufficient ground for proceeding further into the complaint case and continuation of the criminal proceeding would be abuse of the process of law. So, the complaint including the criminal proceeding being Case No. CR 23 of 2008 u/s 494/109/203 of the IPC now pending before the learned First Judicial Magistrate, Contai hereby quashed.

Urgent photostat certified copy, if applied for, be handed over to the parties as early as possible.