

**(1996) 07 BOM CK 0073**

**In the Bombay High Court**

**Case No :** Criminal Revision Application No. 98 of 1989

Dilip Laxman Bobade

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

**Date of Decision :** 05-07-1996

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 401

Hindu Marriage Act, 1955 — Section 17

Penal Code, 1860 (IPC) — Section 494, 511

**Citation :** (1996) 4 BomCR 651 : (1997) BomCR(Cri) 55 : (1997) 2 MhLj 473

**Hon'ble Judges :** M.B. Shah, C.J

**Bench :** Single Bench

**Advocate :** Mukesh Mody and H.H. Ponda, for the Appellant; D.S. Thakur, Assistant Public Prosecutor for respondent No. 1 and Rekha Safari, for the Respondent

**Final Decision :** Dismissed

## Judgement

M.B. Shah, C.J.—Being aggrieved and dissatisfied by the judgment and order dated 14th February, 1989 passed by the Additional Sessions Judge, Greater Bombay, convicting the petitioner (original accused No. 1) for the offence punishable u/s 494 read with section 511 of the Indian Penal Code, the petitioner has filed this revision application.

2. The complainant Sumitra Dilip Bobade has filed a complaint against the petitioner, his brother and mother for the offence punishable u/s 494 read with section 114 of the Indian Penal Code ("I.P.C.", for short), before the Metropolitan Magistrate's 17th Court, Mazagon, Bombay. It was alleged that complainant Sumitra was the legally wedded wife of the petitioner; the marriage has taken place at Bombay on 5th May, 1979 as per Hindu rites and ceremonies. After marriage, the complainant resided with accused No. 1 and his parents and other family members; after sometime, the complainant was often taunted by the accused on account of the fact that sufficient cash and ornaments were not given

by her parents; she was also harassed and treated in a poor manner; on 13th July, 1980, accused No. 1 threw a burning stove on the complainant whereby she sustained serious injuries and she was admitted at the Nair Hospital; she was persuaded by the petitioner not to involve him in the incident when the police recorded her statement and she obliged. After returning from the Hospital, she was completely neglected by all the accused. Finally, on 26th March, 1983, she was driven away from the matrimonial home and since then, she is residing with her parents. She had filed an application u/s 125 of the Code of Criminal Procedure for maintenance. The Court had awarded maintenance to her from accused No. 1. It is her say that while the marriage between her and accused No. 1 was subsisting, on 2nd April, 1984, accused No. 1 married a girl named Alka, daughter of Pandurang Shinde, of village Sonai, District Ahmednagar. It is also averred that the marriage ceremony took place at Paithan, District Aurangabad. All the accused had misrepresented to the relatives of Alka that the marriage of accused No. 1 with the complainant was not subsisting and that she was divorced. Accused Nos. 2 and 3 were all abettors of the commission of the offence of bigamy by accused No. 1 inasmuch as they arranged, participated and assisted in the second marriage of accused No. 1.

3. After recording the evidence, the learned Magistrate convicted accused No. 1 for the offence punishable u/s 494 of I.P.C. and sentenced him to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1,000.00 in default to suffer further rigorous imprisonment for six months. Accused Nos. 2 and 3 (the brother and mother of accused No. 1) were convicted for the offence punishable u/s 494 read with section 114 of the I.P.C. and were sentenced to pay a fine of Rs. 1,000.00 in default to undergo rigorous imprisonment for three months.

4. Against that judgment, the petitioner and the other two accused preferred Criminal Appeal No. 85 of 1987. The learned Additional Sessions Judge set aside the conviction and sentence of accused Nos. 2 and 3 but convicted accused No. 1 u/s 494 read with section 511 of I.P.C. instead of section 494 I.P.C. He was sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs. 1,000.00 in default to suffer rigorous imprisonment for one month. That judgment is challenged before this Court.

5. It is contended by the learned Counsel for the petitioner that there is no evidence to prove that the petitioner has married Alka. The only evidence lead by the prosecution is that of Alka who is treated by the prosecution as a hostile witness. It has been further contended that, in any set of circumstances, when the prosecution has failed to lead positive evidence with regard to the performance of second marriage, the accused cannot be convicted for an offence punishable u/s 494 read with section 511 of the I.P.C. and for this purpose, reliance is placed on the decision rendered by the Division Bench of the Calcutta High Court in the case of Subir Kumar Kundu alias Sambhu Vs. State of West Bengal, .

6. As against this, it has been pointed out by the learned Counsel for respondent

No. 2 that the learned Judge committed an error in partly allowing the appeal filed by the petitioner. The learned Counsel submitted that the petitioner ought to have been convicted for the offence punishable u/s 494 of I.P.C. in view of the clear-cut evidence of Alka and other evidence produced on record. She further submitted that in any set of circumstances, the conviction of the petitioner u/s 494 read with section 511 I.P.C. is justified in view of the decision rendered by this Court in the case of Ramabai Chavan Vs. Nivrutti Nimbhaji Chavan and Others, wherein while dealing with similar contention, the Court has held as under:-

"We have only to see whether the offences are punishable with imprisonment for life or imprisonment or whether there is an attempt to cause such offences to be committed and whether in pursuance of this attempt, the accused does any act towards the commission of any offence. From this point of view the arguments of Mr. Habibuddin that the offence of bigamous marriage is a special category of offence not admitting the offence of "attempt" within its fold cannot be accepted."

7. In the present case, for proving the offence, the prosecution has led the evidence of complainant Sumitra. At the outset, it is made clear that the marriage of Sumitra with accused No. 1 was not challenged by the accused. No doubt, at some stage, a contention was sought to be raised that the complainant has not proved her marriage with accused No. 1. But thereafter in the statement u/s 313 of the Code of Criminal Procedure, accused No. 1 has not denied his marriage with the complainant, but has admitted it. The learned Counsel for the petitioner has not raised any contention for this. Complainant has narrated her version as stated above. She has further stated that she received the information that accused No. 1 has married Alka at village Paithan, District Aurangabad.

8. For proving the second marriage of accused No. 1 with the girl named Alka Pandurang Shinde, the prosecution relied upon the evidence of Alka. Before framing of the charge, she was examined and cross-examined on 8th February, 1986 wherein she has stated that on Gudi Padwa day in the year 1984, she married accused No. 1 at Paithan; her marriage was solemnized according to the Hindu rites; accused Nos. 2 and 3 were present at the time of solemnization of the marriage with accused No. 1; after the marriage, she came to Bombay and resided with accused No. 1 at Tardeo, Bombay. During their cohabitation, accused No. 1 was insisting to sign a document mentioning that she was never married to accused No. 1 as he was already married. As she declined to sign the document, the accused threw her out of her matrimonial home. In cross-examination, she has stated that she had filed a complaint against accused Nos. 1 to 3 in the Metropolitan Magistrate's 15th Court, Mazagon, Bombay, for cheating and on that day, she has given evidence in that case. She has further stated that her marriage was solemnized with accused No. 1 in the temple of Lord Vithoba and Rukmini at Paithan; invitation cards were printed at the time of her marriage, with accused No. 1 and at the time of her marriage, her age was about 16 years. At the time of her marriage, her mother was present. She has

denied the suggestion that her mother had objection for her marriage with accused No. 1. Two to three days before her marriage, she was introduced to accused No. 1 by her maternal uncle. At the time of betrothal ceremony, her mother was also present. She was further cross-examined on 27th February, 1986 with regard to the marriage invitation cards. She has denied the suggestion that the complainant also attended her marriage. She has stated that her relations did not attend the said marriage. On 19th March, 1986, she was further cross-examined wherein she has, inter alia, denied the suggestion that at the time of solemnization of her marriage with accused No. 1 in a temple, she had filled in a form and affixed her signature on it. She has denied the suggestion that she was not married to accused No. 1 and that she was deposing falsely at the instance of complainant Sumitra. However, after the charge was framed, she was further cross-examined on 10th September, 1986 and on that day, she has given a go-bye to her previous evidence by stating that she was not knowing what ceremonies were performed for solemnization of marriage according to Hindu rites; at that time, she had not taken any round before the sacred fire; and that she was not knowing the name of the priest who performed the marriage ceremony between her and accused No. 1 at Paithan. Thereafter, she was declared as a hostile witness and in the cross-examination by the prosecution, she has admitted that a warrant was issued against her for not remaining present as a witness; that warrant was cancelled with the assistance of accused No. 1 and his advocate Shri Shukla; she had gone to the office of Advocate Shri Shukla and was instructed as to what she should reply during her cross-examination.

9. The prosecution also examined Govindrao Wamanrao Karkhane who was serving as the Manager of Shri Eknath Maharaj Sansthan Trust at Paithan, District Aurangabad. It is his say that he was serving as a manager; he was appointed by the Court, as the management of the Sansthan was under Court Receiver appointed by the District Court, Aurangabad; that the premises of the temple are let out for marriages and for other auspicious occasions. He has produced the duplicate carbon copy of the rent receipt written in his handwriting which was bearing his signature and the signature of one Mohan Pandurang Salve to prove that the temple premises were let out for marriage on 2nd April, 1984. That receipt indicates that the temple premises were given on rent for the marriage of witness Alka with Dilip Laxman Bobade (accused No. 1).

10. Considering the aforesaid evidence, the learned Metropolitan Magistrate arrived at the conclusion that the prosecution has proved the second marriage of accused No. 1. Therefore, the learned Magistrate convicted all the accused as stated above. The learned Magistrate also noted that Alka has filed a case in the Metropolitan Magistrate's 15th Court, Mazagaon, Bombay, against accused No. 1 for cheating on the allegation that she was deceived as accused No. 1 had not cancelled his first marriage with the complainant (Sumitra) and had married Alka. The said complaint was compounded by the parties and thereafter, witness Alka turned hostile in this case.

11. The finding of the learned Magistrate that the second marriage was duly performed in accordance with Hindu rites was set aside by the learned Additional Sessions Judge. He observed that a stray sentence in the evidence of Alka that the marriage was solemnized according to Hindu rites cannot be relied upon to hold that all the requirements laid down by the Supreme Court in various decisions have been fulfilled. Thereafter he relied upon the decision rendered by this Court in Ramabai's case (supra) and convicted accused No. 1 for the offence punishable u/s 494 read with section 511 I.P.C.

12. It has been contended by the learned Counsel for the petitioner that the petitioner could not have been convicted u/s 494 read with section 511 I.P.C. because the offence u/s 494 is not proved and that section 511 would not be applicable to an offence punishable under any special law such as Hindu Marriage Act. For this purpose, reliance is placed on the judgment rendered by the Division Bench of the Calcutta High Court in the case of Subir Kumar Kundu alias Sambhu Vs. State of West Bengal, , particularly paragraph 25 thereof, which reads as under:-

25. The conclusion, to our mind, is, therefore, inescapable that the offence of bigamy by Parsi or a Hindu is an offence created by and u/s 5 of the Parsi Marriage & Divorce Act or section 17 of the Hindu Marriage Act, as the case may be, and is also punishable only under either of those sections and not under sections 494 and 495 of the Penal Code, though the latter sections have stood engrafted and incorporated in the former sections as inseparable adjuncts. Section 511 of the Penal Code providing for punishment for attempt to commit an offence can apply, as its express terms manifest, only to an attempt to commit an offence "punishable by this Code", i.e. the Penal Code. As section 511 of the Penal Code cannot apply to any offence created by and punishable under any Special Law, such Special Law usually provides specifically for the offence of attempt to commit such offence, whenever the concerned Legislature intends to punish such attempt, e.g. section 78 of the Essential Commodities Act, 1955."

13. With respect, it is difficult to agree with the view taken by the Division Bench in Subir Kumar Kundu's case (supra). Accused is tried for the offence punishable u/s 494 of the I.P.C. and not under the provisions of the Hindu Marriage Act. It is difficult to accept the proposition that sections 494 and 495 of the I.P.C. would not be applicable in those cases where the act amounts to an offence punishable under the Hindu Marriage Act or under the Parsi Marriage and Divorce Act. Operation of section 494 of the I.P.C. cannot be excluded in cases where the Hindu Marriage Act or the Parsi Marriage and Divorce Act is applicable. On the contrary, section 17 of the Hindu Marriage Act specifically provides that any marriage between two Hindus solemnized after the commencement of the said Act is void if at the time of such marriage either party had a husband or a wife living. It also provides that the provisions of sections 494 and 495 of the I.P.C. shall apply accordingly. This does not mean that if later part of section 17 of the Hindu Marriage Act was not there, such a person could not be convicted for the

offence punishable u/s 494 I.P.C. The act of second marriage by a Hindu is punishable u/s 494 of the I.P.C. A marriage which is in violation of any provision of law would be void in terms of the expression used in section 494 of the I.P.C. The necessary ingredients of section 494 are: (1) having a husband or wife living; (2) marries in any case; (3) in which such marriage is void, and (4) by reason of its taking place during the life of such husband or wife. Section 511 of the I.P.C. only provides that if an offence is punishable by the Code, then section 511 would be applicable. A "second marriage" as contemplated is independently an offence punishable u/s 494 of the I.P.C. Hence, there is no reason to hold that operation of section 511 I.P.C. is excluded.

14. While dealing with a similar contention, the Division Bench of this Court has, in Ramabai Chavan Vs. Nivrutti Nimbhaji Chavan and Others, , held as follows:-

"What we get from section 511 I.P.C. is not the artificial classification contemplated by Mr. Habibuddin. On the other hand, section conveys that the I.P.C. itself classifies attempt to commit an offence as the substantive offence, for example, attempt to commit murder; attempt to commit suicide. Sections 121, 124, 125, 130 etc. etc. are such offences, though, they are treated as substantive offences by the Code itself. Leaving the category of such offences aside, we have to consider the offence of attempt envisaged by section 511 of the Indian Penal Code. The ingredients of this section, as are evident from the section itself, are (1) that an offence is punishable by this Code with imprisonment for life or imprisonment, (2) or to cause such an offence to be committed, (3) in attempting so, does any act towards the commission of the offence and (4) where no express provision is made by this Code for the punishment of such an attempt. It is only in view of this fourth ingredient that categories of offences defined in sections 121, 124, 125, 130, 161, 162, 163, 196, 198, 200, 307, 308 and 309 I.P.C. are to be left outside as they do not fall within the category of the attempts. Attempts u/s 511 I.P.C. are separately provided by the Code itself. There is no scope for further categorization as contemplated by Mr. Habibuddin. We have only to see whether the offences are punishable with imprisonment for life or imprisonment or whether there is an attempt to cause such offences to be committed and whether in pursuance of this attempt, the accused does any act towards the commission of any offence. From this point of view, the arguments of Mr. Habibuddin that the offence of bigamous marriage is a special category of offence not admitting the offence of "attempt" within its fold cannot be accepted."

15. In the present case, as stated above, it is established beyond reasonable doubt by the evidence of Alka that she had married accused No. 1; may be that it may not be strictly solemnized by taking seven steps around the sacred fire (saptapadi) as required under the Hindu law. However, her evidence establishes beyond doubt that the marriage ceremony was performed at Paithan in the temple. Her evidence is fully corroborated by P.W. 4 Govindrao Wamanrao Karkhane. His evidence has established that the marriage hall of the temple was

given on rent for the marriage. The names of the bride and bridegrooms are also mentioned in the rent receipt (Exhibit "8") produced by him. It is also established by the evidence of Alka that after the marriage, she cohabited with accused No. 1 and admittedly, she filed a complaint before the learned Magistrate accusing that accused No. 1 has cheated her by not disclosing that the marriage of accused No. 1 with the complainant was still in force.

16. In view of the aforesaid evidence and the law laid down by this Court, it cannot be said that the order passed by the learned Additional Sessions Judge is in any way erroneous which calls for any interference in this Revision Application. Hence the Revision Application is accordingly dismissed. Rule stands discharged.

17. Considering the fact, as deposed by the complainant, that she was driven out of her matrimonial home after causing her injury and that she is required to defend the case all throughout in various courts because of the attitude of the petitioner, it is ordered that the petitioner shall pay Rs. 10,000.00 as compensation to respondent No. 2.

18. At the request of the learned Counsel for the petitioner, operation of this order is stayed for a period of eight weeks from today.

19. Issuance of certified copy of this judgment is expedited.