
(1999) 10 RAJ CK 0027

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 1282 of 1995

Dr. Prem Mittal

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 01-10-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 494

Citation : (2000) 2 DMC 66 : (2000) 1 WLC 531

Hon'ble Judges : M.A.A. Khan, J

Bench : Single Bench

Advocate : R.K. Mathur, for the Appellant; G.S. Rathor, Public Prosecutor and N.A. Naqvi, for the Respondent

Judgement

M.A.A. Khan, J.—Heard the learned Counsel for the parties and perused the material available on the record of the lower Court.

2. Dr. Prem Chand Mittal, the petitioner was married with Smt. Saroj Garg respondent No. 1 on December 12, 1990 at Alwar according to rites and tenets of Hindu religion. Both were residents of Alwar and comfortably settled in life also; the petitioner as a Medical Officer in the Medical and Health Department and the respondent as Lecturer in College Education Department of the State of Rajasthan. On 5.12.1991 the couple was blessed with a daughter-Akshita.

3. On 26.8.1997 Smt. Saroj Garg filed a complaint against the petitioner and Smt. Sunita @ Baby and her father Dr. H.C. Goyal, respondent Nos. 3 and 4 respectively alleging therein that since after two days of the marriage the petitioner had started harassing and treating her with cruelty on account of demand for dowry that he used to take all emoluments in order to help and support of his brother's family that the petitioner had an affair with Sunita-respondent No. 3, and finally married with her on 10.2.1996 in connivance with respondent No. 4. On the basis of her statement recorded u/s 200 and those of her brother Vinod Kumar Garg and her sister's husband Sudhir Kumar recorded u/s 202, Cr. P.C., the learned Magistrate took cognizance of the offences under

Sections 498-A and 494, IPC and summoned the petitioner as accused of offences u/s 498-A and Section 494, Smt. Sunita of offence u/s 494 and Dr. H.C. Goyal of offence u/s 494 r.w. Section 109, IPC, vide his order dated 30.9.1997. The petitioner unsuccessfully challenged the order of the learned Magistrate before the Addl. Sessions Judge, Alwar by way of a revision petition u/s 397, Cr. P.C. The Addl. Sessions Judge, however, confirmed the said order in toto against the petitioner as well as against the respondent Nos. 3 and 4. Hence this petition u/s 482, Cr. P.C.

4. At the very out-set Mr. N.A. Naqvi, the learned Counsel for respondent No. . 2 raised a preliminary objection to the effect that since one validity and legality of the order of the learned Magistrate has already been examined by the learned Addl. Sessions Judge in exercise of the concurrent powers u/s 397, Cr. P.C. this petition u/s 482, Cr. P.C, which is the revision of the same order of the learned Magistrate once again and thus, in fact, a second revision petition in the garb of an application u/s 482, Cr. P.C, was not maintainable in view of the bar contained in Section 397(3), Cr. P.C.

5. In reply Mr. R.K. Mathur, the learned Counsel for the petitioner submitted that this petition does not at all seek a second revision of the same order of the learned Magistrate instead it seeks indulgence of this Court to prevent the abuse of the process of the Court of the learned Magistrate and to secure the ends of justice for the petitioner and respondent Nos. 3 and 4 who have been put on prosecution for offence u/s 494, IPC with absolutely no, prima facie, legal evidence to constitute such an offence against any of them. Inviting my attention to the suspension order of the petitioner dated 13.1.1999, made by the State Government in its department of Personnel, Mr. Mathur further submitted that since the petitioner has been suspended by his employer on the basis of the order of the Courts below regarding cognizance of offence u/s 494, IPC the commission of which was not prima facie disclosed by the evidence on record, the continuance of the said order in force against the petitioner would result not only in gross injustice to the petitioner but has also made it almost impossible for him to maintain himself and his dependents. Mr. Mathur thus submitted that it was a fit case wherein the Court should invoke its inherent powers u/s 482, Cr. P.C. to do justice to the oppressed petitioner and respondent Nos. 3 and 4.

6. It is well settled position of law that the powers of this Court u/s 482, Cr. P.C. are exceptional powers to be sparingly exercised with great care and caution only to prevent the abuse of the process of law Courts or to secure the ends of justice for the aggrieved person. With a view to feel satisfied as to whether the impugned order is based on no evidence at all and the continuance thereof is likely to lead to miscarriage of justice and result in great injustice to the petitioner, I heard the learned Counsel for the parties at sufficient length and also examined the material available on the record of the learned Magistrate. After that exercise I feel satisfied that the facts and circumstances of the case and the position of evidence relating to the alleged commission of the offence u/s

494, Cr.P.C. necessitate that this Court should interfere in the matter u/s 482, Cr.P.C. in so far as the accusation or offence u/s 494,1.P.C. against the petitioner and respondent Nos. 3 and 4 is concerned.

7. At the stage of taking cognizance of an offence and summoning a person as an accused thereof it is required that the facts constituting the commission of the alleged offence be brought on the record of the case. At that stage of the proceedings the Court has simply to feel satisfied that there was prima facie sufficient evidence disclosing the commission of the alleged offence and justifying the issue of process and summoning the person complained of as accused thereunder. Prima facie evidence in that sense of the matter means legally admissible evidence and not inadmissible evidence and inferences drawn from such inadmissible evidence. Where a person has been accused of having committed the offence of Bigamy punishable u/s 494,1.P.C. it is required that the facts constituting the offence u/s 494,1.P.C. be proved by legal evidence to establish prima facie case justifying the summoning of the person as accused for offence u/s 494,1.P.C. Therefore, prima facie evidence to prove the second marriage by him has to be brought on the record of the case. In order to prove the second marriage, the performance of the essential ceremonies requisite to constitute a legal and valid marriage according to the rites and tenets of the religion professed by the parties or to the legal custom prevalent in the section of society they belong to, has to be proved. If no evidence is brought on record to prove the second marriage in the way stated above, there would be no prima facie evidence in support of the second marriage and the person or persons, who are being accused of having been involved in or concerned with the performance of second marriage, cannot be summoned as accused thereof in a given case.

8. The point presently before me appears to have been considered by the Apex Court in some cases. In the case of Kanwal Ram and Others Vs. The Himachal Pradesh Admn., the Supreme Court held that:

"In a Bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it, must be proved. Admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or Bigamy case."

"Where, therefore, in prosecution for offences under Sections 494/109,1.P.C. the evidence of the witness called to prove the marriage ceremonies, showed that the essential ceremonies had not been performed the conviction of the accused persons on statement of the alleged bridegroom that he had sexual relationship with the alleged bride and on admission of the accused in a written statement that the parties married after the first marriage was dissolved, was not justified."

9. In the case of Smt Priya Bala Ghosh v. Suresh Chand Ghosh AIR 1971 SC 1153, the decision in Kanwal Ram's case (supra) was again considered and reiterating the principles laid down therein Their Lordships observed in para 17 as under:

"In *Kanwal Ram v. The Himachal Pradesh Admn.* (supra), this Court again reiterated the principles laid down in the earlier decision referred to above that in a prosecution for Bigamy the second marriage has to be proved as a fact and it must also be proved that the necessary ceremonies had been performed. Another proposition laid down by this decision, which answers the second contention of the learned Counsel for the appellant, is that admission of marriage for the purpose of proving an offence of Bigamy or adultery. On the evidence it was held in the said decision that the witnesses have not proved that the essential ceremonies had been performed."

10. In the case of *Surjit Kaur Vs. Garja Singh and Others*, which was a case u/s 17 of the Hindu Marriage Act, 1955, the Apex Court held that even in case of customary marriage it was necessary that custom, permitting the second marriage, should not only be pleaded but also the nature of the ceremonies performed be proved. Evidence in support of the existence of the second marriage be brought on the record of the case. Mere proof of the two members of opposite sexes living as husband and wife would not by itself confer upon them the status of husband and wife. In that case Their Lordship quoted with approval the following observations made by them in their earlier decision in the case of *Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another*,

"Prima facie, the expresion "whoever....marries" mustmean "whoever....marries validly" or "whoever....marries and whose marriage is a valid one". If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife."

11. It is thus well settled in law that in order to accuse a person of having committed the offence of Bigamy punishable u/s 494,1.P.C. it has to be specifically pleaded and prima facie proved that he has contracted a second marriage, after performing the essential ceremonies required for constituting a marriage as per rites and tenets of the religion practised by the parties concerned or according to the customs prevalent in their caste, community or society. Desertion of the first wife by the husband and his living with another woman would not by itself be sufficient to establish his second marriage with the other woman for the purposes of Section 494,1.P.C. In order to attract that provision for summoning the husband u/s 204, C.P.C. as an accused thereunder prima facie evidence on the requisite ceremonies performed at the time making the alleged second marriage is required to be brought on the record of the case.

12. Coming now to the instant case the sole and whole evidence on the point of the alleged second marriage of the petitioner with respondent No. 3 is simply

hearsay which even does not refer to the performance of any sort of ceremonies at the relevant occasion. The total evidence on the point consists of the assertion of Smt. Saroj Garg, the complainant-respondent in her statement recorded u/s 200, Cr. P.C. and those of her brother Vinod Kumar and sister's husband Sudhir Kumar recorded u/s 202, Cr. P.C. The complainant herself stated that from her brother Vinod Kumar she came to know that the petitioner had married with Sunita Respondent No. 3. In his turn Vinod Kumar stated that he came to know of that fact through Sudhir Kumar. Sudhir Kumar, in his statement, stated \\ that he had come to know that the petitioner had married with Sunita. None of these three witnesses stated that they themselves had seen the petitioner and respondent No. 3 performing marriage. There is absolutely no evidence on the point of performance of any sort of ceremonies requisite for making a marriage. Sudhir Kumar did not even tell the source of his knowledge of the alleged fact. Reference to the birth of a female child to respondent No. 3 by her marriage with the petitioner was similarly not based on their direct knowledge of the second marriage of the petitioner with respondent No. 3. There was thus no prima facie evidence showing the performance of the second marriage by the petitioner with respondent No. 3. There was thus no prima facie evidence on the constitution of the offence u/s 494, I.P.C. or the record of the case so as to justify the taking of cognizance of that offence and summoning the petitioner and respondent Nos. 3 and 4 as accused thereunder. The order of taking cognizance of the offence and summoning the petitioner and respondent Nos. 3 and 4 was thus inherently bad in law and since such an order was not at all justified on the evidence on record, it amounted to abuse of the process of the Court of the Magistrate. Therefore, in order to procure the ends of justice for the petitioner and respondent No. 3 Sunita and respondent No. 4 Dr. H.C. Goyal it is necessary and in the interest of justice to set aside that part of the order of the learned Magistrate.

13. In the result, this petition is partly allowed. The order of the learned Magistrate dated 30.9.1997 in so far as it relates to the taking of cognizance of offence u/s 494, I.P.C. and summoning the petitioner and respondent No. 3 Sunita and respondent No. 4 Dr. H.C. Goyal as accused thereunder, and the order of the learned Addl. Sessions Judge dated 31.8.1998, confirming such order of the Magistrate, are set aside and all proceedings like framing of charge for that offence against them, based on that part of the order of the Magistrate are hereby quashed.

14. The case for offence u/s 498A, I.P.C. shall proceed as against petitioner only. Respondent No. 3 Sunita stands discharged of offence u/s 494 and respondent No. 4 Dr. H.C. Goyal of offence u/s 494 read with Section 109, I.P.C. Proceedings against them shall stand cancelled and dropped.

15. Copy of the order shall be forwarded to the Secretary, Medical and Health Department for information.