
(2013) 02 DEL CK 0400
In the Delhi High Court
Case No : Crl. M.C. No. 1058/2009

Natasha Kohli

APPELLANT

Vs

Man Mohan Kohli

RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Citation : (2013) 02 DEL CK 0400

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Judgement

Sunil Gaur, J.—Petitioner is the wife of respondent. They had married in Delhi in November, 1994 according to Hindu rites and ceremonies. In January, 2007 respondent had purportedly learnt that petitioner's marriage with Mr. Boccagna in Florida, USA is still subsisting, which led to filing of a criminal complaint under Sections 494/ 495/ 420 of the IPC (Annexure P-6) by respondent against petitioner, which was registered as CC No. 13/3/8. Petitioner has been summoned in the above said complaint vide impugned order of 7th March, 2009 (Annexure P-9) to face the proceedings under Sections 494/ 495 of the IPC. In this petition, petitioner-accused seeks quashing of aforesaid criminal complaint (Annexure P-6) and the summoning order (Annexure P-9) on the ground that judgment of 28th April, 2008 (Annexure P-8) of the foreign Court annulling petitioner's first marriage ab initio has been over looked by the trial court.

2. Learned counsel for petitioner while relying upon decisions in Mohanmurari Vs. Smt. Kusum Kumar i, ; Sunder Lal Soni Vs. Smt. Namita Jain, & Banshidhar Jha Vs. Chhabi Chatterjee, had contended that petitioner's first marriage was voidable and upon it being annulled, it has to be treated as void ab initio and the invalidity of petitioner's first marriage relates back to the date of marriage. To contend that a deeming fiction created by Sub-Section 2 of Section 16 of Hindu Marriage Act recognizes the fact that once a marriage is declared void u/s 11 or annulled u/s 12 of Hindu Marriage Act, it relates back to the date of marriage rather being a termination from the date of decree and in support of this

contention, reliance is placed upon decisions in Maharani Kusumkumari and Another Vs. Smt Kusumkumari Jadeja and Another, ; Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others, ; Rasala Surya Prakasarao and others Vs. Rasala Venkateswararao and others, ; Gurnam Kaur (Smt) and Another Vs. Puran Singh and Others, and Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others, . To assert that according to Indian as well as American Law which governs the marriage between the respondent and her ex-husband Mr. Boccagna, the voidable marriage can be annulled ab initio and being judgment in rem, it is binding on all and sundry, reliance is placed by petitioner's counsel upon decisions in Farnham Vs. Cora M. Farnham 227 N.Y 155; Metcalfe Vs. Cutler 52 N.Y.s 2d 71; Sleicher Vs. Sleicher 251 N.Y. 366; Patricia Vs. New York employees 437 N.Y.S. 2d 497 (Supreme Court New York) and Matter of Moncrief 235 N.Y. 390.

3. According to petitioner's counsel, doctrine of equitable estoppel contemplates that in matrimonial cases, like the instant one, where the parties have held themselves out as a married couple for numerous years and have believed that their marriage is valid until the day when one of the spouse discovers the invalidity, in such a case Courts have estopped the spouse from raising the question of validity of the marriage. In support of this contention, reliance is placed upon decisions in Lambertini Vs. Lambertini, 655 SO.2d 142 (Fla.3d Dist. Ct. App. 1995) and Keith Farnham Vs. Donna Farnham 2009n App. LEXIS 883. For contending that respondent is not the aggrieved person for the purpose of Section 494 or Section 495 of the IPC, petitioner's counsel places reliance upon decisions in Mr. Herculano Coelho Vs. Mrs. Antonia Pobrinha Diase Faleiro and State, ; and Ravinder Singh Dhillon Vs. Mukhtiar Singh, .

4. Petitioner's counsel had also relied upon decision in Kochu Muhmmad Kunju Ismail Vs. Mohmmad Kadeja Umma, to contend that if a person charged with bigamy believed that he was free to marry again, then the question whether the belief was unreasonable is irrelevant. Finally, it was contended on behalf of petitioner that even if assuming without admitting the concealment, still the case of petitioner falls within the exception to Section 494 of the IPC and so, no offence u/s 494 of IPC has been committed by petitioner. Thus, quashing of criminal complaint in question is sought by petitioner's counsel while relying upon decisions in State of Haryana and others Vs. Ch. Bhajan Lal and others, ; Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, and R.P. Kapur Vs. The State of Punjab, to assert that this Court has ample powers u/s 482 Cr.P.C. to quash the proceedings arising out of complaint in question.

5. To refute the contentions advanced on behalf of petitioner and the decisions cited, respondent's counsel relies upon decisions in J.P. Sharma Vs. Vinod Kumar Jain and Others, Central Bureau of Investigation Vs. K.M. Sharan, ; Chand Dhawan Vs. Jawanhar Lal & ors. 1921 Cri.L.J. 1956; Vipin Gupta and Another Vs. State of Rajasthan and Another, ; Smt.; Early B. Mccullen Vs. Anna F. Muccullen 147 N.Y.S. 1069; P. Prabhakaran Vs. P. Jayarajan, ; Smt. Padi and Others Vs.

Union of India (UOI), ; Subhash Babu Vs. State of A.P. and Another, and M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., to submit that reliability or veracity of allegations made in the complaint cannot be gone into in exercise of powers u/s 482 of the Cr.P.C. and as to whether case of petitioner falls within any of the exceptions, is within the domain of trial court to see and cannot be looked into while exercising inherent powers u/s 482 of the Cr.P.C.

6. Learned counsel for respondent had contended that petitioner's marriage with respondent while her first marriage was still subsisting, would not validate the second marriage upon subsequent annulment of former marriage. Attention of this Court was drawn to Section 16 of the Matrimonial Causes Act to point out that an annulment may or may not affect the parties to the said marriage and it has no effect on third parties who has vested rights. According to respondent's counsel, the expression "void" u/s 494 of IPC has been used in the wider sense i.e. till a Hindu marriage is dissolved, none of the spouse can contract second marriage. While relying upon afore-noted decisions, it was contended on behalf of respondent that a Hindu marrying another woman, during the life time of first wife, would render the second marriage void and that complaint by the spouse of second marriage is maintainable and ought to be proceeded with, as ex parte foreign judgment cannot be presumed to be on merits with aid of Section 114 of Evidence Act. Thus, the dismissal of this petition is sought by respondent's counsel.

7. Upon considering the submissions advanced and the decisions cited, as referred to above and the material on record, this Court is of the considered opinion that on the strength of a photocopy of a foreign judgment, which is not attested/certified as per Section 86 of the Indian Evidence Act, proceedings arising out of the impugned complaint, cannot be quashed in the absence of duly certified copy of the foreign judgment heavily relied upon by petitioner's counsel. Otherwise also, whether the petitioner is entitled to protection of any exception to Sections 494/ 495 of the IPC, is a matter which cannot be pre-judged at the initial stage and the same is required to be gone into at trial after the foreign court judgment is admitted into evidence.

8. In the landmark decision of Apex Court in Y. Narasimha Rao and Others Vs. Y. Venkata Lakshmi and Another, , it has ruled that photostat copies of foreign judgments are not per se inadmissible in evidence. It is inadmissible if it has not been further certified by representative of our Central government in the United States as required u/s 86 of the Indian Evidence Act, 1872. The pertinent observations made in Narasimha Rao (supra) are as under:-

23. The High Court, as stated earlier, set aside the order of the learned Magistrate only on the ground that the photostat copy of the decree was not admissible in evidence. The High Court is not correct in its reasoning. u/s 74(1) (iii) of the Indian Evidence Act (hereinafter referred to as the "Act") documents forming the acts or records of the acts of public judicial officers of a foreign country are public documents. u/s 76 read with Section 77 of the Act, certified

copies of such documents may be produced in proof of their contents. However, u/s 86 of the Act there is a presumption with regard to the genuineness and accuracy of such certified copy only if it is also certified by the representative of our Central Government in or for that country that the manner in which it has been certified is commonly in use in that country for such certification.

24. Section 63(1) and (2) read with Section 65(e) and (f) of the Act permits certified copies and copies made from the original by mechanical process to be tendered as secondary evidence. A photostat copy is prepared by a mechanical process which in itself ensures the accuracy of the original. The present photostat copies of the judicial record of the court of St. Louis is certified for the Circuit Clerk by the Deputy Clerk who is a public officer having the custody of the document within the meaning of Section 76 of the Act and also in the manner required by the provisions of the said section. Hence the photostat copy per se is not inadmissible in evidence. It is inadmissible because it has not further been certified by the representative of our Central Government in the United States as required by Section 86 of the Act. The expression "certified copy" of a foreign judgment in Section 14 of the Code has to be read consistent with the requirements of Section 86 of the Act.

25. While, therefore, holding that the document is not admissible in evidence for want of the certificate u/s 86 of the Act and not because it is a photostat copy of the original as held by the High Court, we uphold the order of the High Court also on a more substantial and larger ground as stated in paragraph 22 above. Accordingly, we dismiss the appeal and direct the learned Magistrate to proceed with the matter pending before him according to law as expeditiously as possible, preferably within four months from now as the prosecution is already a decade old.

9. Whether complaint under Sections 494 or 495 of the IPC is maintainable by the spouse of second marriage is no longer res integra, as Apex Court in A. Subash Babu Vs. State of A.P. and Another, has on this aspect observed as under:-

30. If the woman with whom the second marriage is performed by concealment of the former marriage is entitled to file a complaint for commission of offence u/s 495 IPC, there is no reason why she would not be entitled to file a complaint u/s 494 IPC more particularly when Section 495 IPC is an extension and part and parcel of Section 494 IPC.

31. For all these reasons, it is held that the woman with whom a second marriage is contracted by suppressing the fact of former marriage would be entitled to maintain a complaint against her husband under Sections 494 and 495 IPC.

32. The argument that the learned Magistrate could not have taken cognizance of the offence punishable under Sections 494 and 495 IPC on the basis of the police report i.e. charge-sheet, as those offences are non-cognizable and therefore, the

relief claimed in the petition filed before the High Court u/s 482 of the Code should have been granted is devoid of merits.

10. Regarding the impact of foreign judgment and decree being a triable issue, the stand of petitioner in the civil proceedings, as disclosed in reply of 18th January, 2011 in CM (Main) No. 684/2010 speaks for itself and it reads as under:-

Thus the Written Statement as originally filed as well as the amended Written Statement containing the factum of the annulment of the marriage of the Respondent with Mr. Kai Boccagna ab initio, raised triable issues for which evidence was required to be led and therefore, could not tantamount to "Admissions" within the meaning of Or.12, R. 6 of the CPC.

11. In the aforesaid reply, petitioner has again reiterated as under:-

In any case it is imperative to point out that the Petition for decree of Nullity is still pending disposal and the matter is now listed for Petitioner's evidence on 22nd January, 2011 before the Ld. Trial Court. In light of the above, the aforesaid issues, which are triable in nature and go into the root of the matter ought to be determined by the Ld. Trial Court and the Petitioner ought not be permitted to avoid the trial under wholly untenable and unsustainable grounds particularly in light of the nature of false and malicious allegations leveled by him against respondent.

12. In the light of categorical stand by petitioner in civil proceedings, as noted hereinabove, petitioner cannot be allowed to take diametrically opposite stand in this petition to wriggle out of the afore-noted stand in the civil proceedings. Infact, not only the admissibility of the foreign court judgment and decree is required to be established before the trial court but even its import and impact has to be gauged in the light of the dictum of Apex Court in M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., after it is admitted into evidence, which the trial court would do after evidence in respect thereof is led.

13. Consequently, finding no justification to invoke inherent jurisdiction of this Court u/s 482 of the Cr.P.C., I dismiss this petition while refraining to comment upon the merits lest it may prejudice the trial. Needless to say, both the sides would be well within their rights to urge the pleas taken herein with case law relied upon by them before the trial Court who would consider them after the foreign Court judgment and decree heavily relied upon by petitioner is formally proved in evidence. This petition is accordingly disposed of while vacating interim order of 6th August, 2009 with direction to trial Court to expedite the proceedings of this case.