

(1987) 03 KL CK 0001

In the High Court Of Kerala

Case No : Criminal M.C. No. 284 of 1985

Parappurath Abdulla and Others

APPELLANT

Vs

Noorjahan Beegam and Another

RESPONDENT

Date of Decision : 17-03-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 366, 494

Citation : (1987) 03 KL CK 0001

Hon'ble Judges : Shamsuddin, J

Bench : Single Bench

Advocate : P.A. Mohammed T, K.R. Linan and Johnson P. John, for the Appellant; Dharmadan and G. Krishnakumari, for the Respondent

Final Decision : Allowed

Judgement

Shamsuddin, J.—The Petitioners are accused in C.C. No. 3 of 1985 on the file of the Chief Judicial Magistrate's Court, Quilon. The above CrI. M.C. has been filed praying to call for the records relating to all proceedings in C.C. No. 3 of 1985 on the file of the C.J.M. Court, Quilon and to quash the same.

2. In this application, the Petitioners averred that the first Petitioner contracted the marriage with the first Respondent on 17th October, 1975 according to Islamic Law and they were residing together at Azhikode in Cannanore District and while they were so leading the married life two children were born to them out of that wedlock. While so without the permission and consent of the first Petitioner the first Respondent left the first Petitioner's house at the instigation of her brothers and Ors. . Thereafter though the first Petitioner requested her to return and reside with him along with the children she refused to do so. In the circumstances, the first Petitioner filed a criminal complaint against the first Respondent's brothers before the C.J.M. Court, Quilon and at his request, the Court issued a search warrant. The first Respondent appeared before the Court and submitted that she was not detained by her brothers as alleged in the

complaint and she was free. In the light of the submission made by the first Respondent, the complaint was dismissed on 6th December 1980. In 1981 the first Petitioner sent a registered notice through lawyer requesting the first Respondent to come and stay with him along with the children. But in spite of the request she refused to come and stay with him. On account of the persistence of the first Petitioner not to join and live with him, he was forced to contract a second marriage with the second Petitioner on 17th February, 1984, according to Muslim Law.

3. In this Crl. M.C. filed u/s 482 Code of Criminal Procedure the Petitioners contended that the complaint will not disclose any offence punishable u/s 494 I.P.C.

4. The argument advanced by the learned Counsel for the Petitioners in this case is that under the Muslim Law a second marriage is not prohibited or forbidden during the subsistence of the first marriage. He brought my attention to Mulla's Principles of Mohamedan Law, Section 255 which reads as follows:

A Mahomadan may have as many as four wives at the same time but not more.

The learned Counsel also drew my attention to the observations contained in the ruling of a Division Bench of the Punjab High Court in Mst. Payari Vs. Faqir Chand Alakha and Others, . In the above decision, it was observed as follows:

If a Muslim after marrying one woman marries three more during the lifetime of the first, he would obviously be not guilty u/s 494 of the Indian Penal Code. But in the case of persons on whom monogamy is enjoined by their personal law, such as Christians and now Hindus and Sikhs as well, they would not be at liberty to go through a second marriage during the life of the first wife or husband without committing the offence u/s 494 of the Indian Penal Code.

Putting the same thing in Anr. form, the expression referred to above merely means that if the second marriage during the life time of the first spouse is not prohibited by the personal law of the party concerned the person remarrying would not be guilty of bigamy. It is only where the personal law of the party concerned prohibits taking a wife during the life time of the first one that the person would be guilty of the offence u/s 494 of the Indian Penal Code.

In this connection it may be convenient to quote the provisions contained in Section 494 I.P.C. which reads as follows:

494. Marrying again during life-time of husband or wife Who ever, having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The expression "marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife" is the subject-matter of

interpretation by various High Courts.

5. The Calcutta High Court in the decision in Swapna Mukherjee Vs. Basanta Ranjan Mukherjee and Others, took the view that unless the second marriage with the person concerned is valid according to law, he would not be guilty of offence of bigamy even though he had gone through a formal ceremony recognised by law. The Punjab High Court in the above referred ruling dissented from the view expressed by the Calcutta High Court and held that the expression "marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife" merely means that the person who married a second time during the life of his or her first spouse would be punished u/s 494 of the Indian Penal Code only if such second marriage is not recognised by the personal law by which he or she is governed. This has been the view taken by the other Courts in India as well. The law was laid down as far back as the year 1876 in Curbaksh Singh v. Sham Singh 19 Pun. Re. 1876, where dealing with the matter, their Lordships held that if, the first marriage is valid, it would be bigamy to marry again, notwithstanding any special circumstances which independently of the bigamous character of the marriage may constitute a legal disability in the parties or make the form of marriage resorted to inapplicable to their case.

6. The Lahore High Court in AIR 1928 844 (Lahore) , held that the word "void" occurring in Section 494 of the Indian Penal Code was not used in the technical sense in which it is used in the Mohamedan Law and the Penal Code makes no distinction between a void and an invalid marriage. In AIR 1929 713 (Lahore) decided by Tek Chand and Agha Raidar, JJ. similar argument was raised that the conviction of Sant Ram, a Jat, u/s 366 I.P.C. on the finding that he had abducted a Brahmin woman with intent to marry was bad since there could no valid marriage between a Jat and a Brahmin woman. This argument was repelled by their Lordships in these words:

This contention is, however, devoid of any force, for it is settled law that in Section 366 the word "marry" implies, as in Section 494, going through a form of marriage, whether the same is in fact valid or not.

The decisions in AIR 1929 718 (Lahore) were followed in Emperor v. Mt. Soni AIR 1936 Nag. 13 held that the word "marry" in Section 494 means going through a form of marriage whether the marriage should prove in fact legal and valid or illegal and invalid. In Government of Bombay v. Ganga ILR 4 Bom 330 the Bombay High Court dealt with a case of a Hindu wife who after getting herself converted to Islam married a Muslim. Their Lordships while holding that the conversion of a Hindu woman did not ipso facto dissolve her marriage with her first husband and consequently she could not during the lifetime of her first husband enter into any other valid marriage, convicted her u/s 494 of the Indian Penal Code accepting the State Appeal. In R. v. Robinson (1938) 1 All E.R. 301, their Lordships of the Court of Criminal Appeal held that the validity of the second marriage was immaterial, and the accused was rightly convicted. In that

case the accused who was then a married man, in September, 1937 accompanied a woman to Scotland and there in the presence of witnesses both of them declared themselves to be man and wife. Such a marriage by declaration is only valid in Scotland if one of the parties had been resident there for a period of 21 days. That condition was not fulfilled in the case which was before the Court of Criminal Appeal. It was contended that the second marriage ceremony being invalid the offence of bigamy had not been committed. That contention was repelled with the following observation:

In the course of the argument in the Court below, reference was made to the case *R. v. Allen* (1872) 1 C.G.R. (367) where the law was very clearly explained after the case had been argued before a Court consisting of no fewer than fifteen Judges. The recorder, after his attention had been directed to the case used these words:

I think the judgment of the Court in *Crown Cases Reserved* delivered by Cockburn C.J., is very clear in expressing the guide which I ought to adopt in deciding this point. He says at page 375 of the case, the words "shall marry another person" may well be taken to mean shall go through the form and ceremony of marriage with another person.

Their Lordships then relied upon the following observations of Lord Denman, C.J., in *R. v. Drayton* (1843) 1 Car and Kir 144:

I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the life-time of the other. Whether therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify....

7. Whatever be the pristine Islamic Law and very strict conditions laid down by it in regard to plurality of wives, as per the law as applied in India a Muslim can marry as many as four wives at the same time, and therefore it cannot be held that the personal law by which the parties are governed does not permit, the first Petitioner to marry a second wife. In the case on hand the husband has a case that the first Respondent was persistent in not joining him in spite of repeated efforts to compel her to join him and stay with him and that she refused to do so, without any valid justification.

8. Learned Counsel for the first Respondent submitted that the Petitioner was illtreating her and that was the reason for her refusal to live with him. I do not want to go into this disputed question. Suffice it to say that so long as the personal law by which the parties are governed does not prohibit a second marriage, it cannot be said that an offence of bigamy is committed.

9. In the circumstances, that the averments in the complaint does not constitute

an offence u/s 494 I.P.C. and therefore the Petitioner's contention that the proceeding before the lower Court is only an abuse of process of Court, cannot be said to be unjustified.

In the result, Crl. M.C. is allowed and the proceedings before the lower Court is quashed.