

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH**

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

Mat.Appeal.No. 1135 of 2015

**(ARISING FROM ORDER DATED 28-09-2015 IN IA No.907/2014 IN OP (HMA)
No.116/2013 OF THE FAMILY COURT, KOLLAM)**

APPELLANT/PETITIONER IN IA/RESPONDENT IN OP (HMA)

**DEEPTI RAJAN
D/O. VENETIA RAJAN, PRAKASH MANDIRAM, VENKULAM P.O
EDAVA, THIRUVANANTHAPURAM DISTRICT
NOW RESIDING AT BLOCK NO.109-04-166
BISHAN STREET 12, SINGAPORE 570 101
REPRESENTED BY THE POWER OF ATTORNEY HOLDER, SINDU PRAKASH
D/O. P. DIVAKARAN, AGED 51 YEARS, TC 5/2550-1, VISHAK
KRISHNA GARDENS, GOLF LINKS ROAD, KOWDIAR
THIRUVANANTHAPURAM 695 003.**

**BY ADVS.SRI.C.P.SUDHAKARA PRASAD (SR.)
SRI.S.RAMESH
SRI.NAVEEN.T
SMT.POOJA SURENDRAN**

RESPONDENT/RESPONDENT IN IA/PETITIONER IN OP (HMA):

**RAJASEKHAR R.,
'LEKSHMI', VIKAS NAGAR,
PATTATHANAM P.O., KOLLAM.**

**BY ADVS. SRI.N.SUKUMARAN (SR.)
SRI.S.SHYAM
SRI.N.K.KARNIS**

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 18-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

APPENDIX

APPELLANT'S ANNEXURES

- | | |
|--------------|---|
| ANNEXURE-A1- | TRUE COPY OF THE CERTIFICATE OF MARRIAGE ISSUED BY THE REPUBLIC OF SINGAPORE DATED 21-01-2009. |
| ANNEXURE-A2- | TRUE COPY OF THE PETITION, OP (HMA) No.116/2013 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, KOLLAM. |
| ANNEXURE-A3- | TRUE COPY OF THE POWER OF ATTORNEY DATED 30-01-2014 EXECUTED BY THE APPELLANT IN FAVOUR OF HER AUNTY, SMT. SINDU PRAKASH. |
| ANNEXURE-A4- | TRUE COPY OF THE AFFIDAVIT AND PETITION, IA No.907/2014 IN OP (HMA) No.116/2013 FILED BY THE APPELLANT BEFORE THE FAMILY COURT, KOLLAM. |
| ANNEXURE-A5- | TRUE COPY OF THE BIRTH CERTIFICATE OF THE APPELLANT DATED 14-05-1984 EVIDENCING THAT SHE WAS BORN IN SINGAPORE ON 23-04-1984. |
| ANNEXURE-A6- | TRUE COPY OF THE RELEVANT PAGE OF THE PASSPORT OF THE APPELLANT ISSUED BY THE REPUBLIC OF SINGAPORE DATED 08-04-2013. |

RESPONDENT'S EXHIBITS

NIL

True copy

P.A. To Judge

AMG

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

Mat. Appeal No. 1135 OF 2015

DATED THIS THE 18th DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

The above Matrimonial Appeal, instituted under Section 19 (1) of the Family Courts Act, 1984 is against an order passed by the Family Court, Kollam in IA No 907/2014 in OP (HMA) No.116/2013. The appellant herein is the respondent before the Family Court and the petitioner in the interim application. The case before the court below was instituted by the respondent herein and he is the respondent in IA No.907/2014.

2. Original petition before the Family Court was filed seeking for dissolution of the marriage solemnized between the parties on 06-04-2009 at Kollam, under Section 13 (1) (ia) of the Hindu Marriage Act, 1955. Allegations in brief are that, the appellant herein had deserted the respondent from 27-12-2012 onwards and treated him with cruelty by

way of physical and mental torture. The appellant herein entered appearance through her power of attorney holder and filed IA No.907/2014 before the court below, seeking dismissal of the case on the ground that it is not maintainable before the Family Court, Kollam. Contentions are that, the parties were living as husband and wife at Singapore, even prior to the marriage which was solemnized at Kollam on 06-04-2009. It is contended that their marriage was already solemnized and registered before the Deputy Registrar of Marriages at the Registry of Marriages, Singapore, on 21-01-2009. A 'Marriage Certificate' was issued to that effect. It is pointed out that the above fact was conceded in the original petition itself. Contention is that the marriage registered at Singapore is legally valid and was allowed to subsist all along. Hence it is contended that the original petition filed before the Family Court is not maintainable and that court has no jurisdiction to entertain such a petition, because the marriage conducted at Kollam on 06-04-2009 was only for the

purpose of satisfying of the relatives in India; and hence it is a voidable marriage. According to the appellant, there cannot be two marriages for a couple. A couple who got married legally from one country cannot solemnize their marriage again in a different country by suppressing the material fact that they are husband and wife, is the contention. It is contended that the effect that the marriage solemnized at Kollam on 06-04-2009 is in clear violation of Section 5 (i) of the Hindu Marriage Act, 1954. Hence the Registration Certificate obtained from Kollam Corporation under the Kerala Hindu Marriages Registration Rules, is by way of suppressing the fact that they were already married on 21-01-2009 at Singapore and acquired legal status of husband and wife. It is pointed out that the Hindu Marriage Act only allows the respondent to register their marriage already solemnized at Singapore and not to solemnize any marriage in India. It is also contended that, if at all a divorce is granted in the original petition, the parties will remain legally as husband and wife, since the original

marriage solemnized and registered at Singapore is surviving. A further contention is that the parties are permanent residents of Singapore and it prevents them from filing a divorce petition under the Hindu Marriage Act, 1955, because provisions of the said Act will apply only to Hindus domiciled within the territories to which the Act applies. Hence the Family Court was requested to hear the point of jurisdiction and maintainability as a preliminary issue.

3. The respondent herein filed objections to the interlocutory application by refuting the allegation that the parties have lived together as husband and wife at Singapore. It is contended that there was only a formal registration of the marriage at Singapore, which was done only for the sake of Visa and employment; and this fact was rightly pointed out in the original petition. It is contended that the marriage solemnized at Kollam on 06-04-2009 was performed with all religious rites under the custom prevalent in India, and it was registered as required under

the statutory provisions. Since the marriage was solemnized and consummated in India, contention that the marriage was solemnized at Singapore, is not true and correct. It is contended that the marriage solemnized at Kollam on 06-04-2009 is the only marriage of the couple which is legally valid. According to the respondent, no legal marriage was solemnized and consummated nor they have lived together as husband and wife, before the legally valid marriage solemnized on 06-04-2009 at Kollam. Since both the parties are governed by provisions of the Hindu code, they were competent to enter into a legal marriage. All the allegations raised to the contrary are denied. It is also denied that the respondent has got citizenship or domicile in Singapore. Hence the contention that the courts in India has no territorial jurisdiction is also refuted. According to the respondent, a formal and name sake registration of the marriage, which took place at Singapore, cannot be taken as a hindrance for the performance of a legal marriage, fully in tune with all the requisites under the the Hindu Marriage

Act. It is contended that Section 5 (i) of the Act is intended and mandates only a stipulation to avoid bigamy. The provisions speaks for monogamy and is intended to prohibit polyandry in India. Hence the Family Court has jurisdiction to entertain the original petition and it is maintainable before that court, is the contention.

4. The Family Court disposed the interim application through the order impugned herein holding that the original petition is maintainable. It is observed that, the factum of marriage which was conducted at Kollam on 06-04-2009, is not in dispute. The question as to whether the parties have entered into a valid marriage at Singapore and as to whether they were living together as husband and wife, are matters to be considered after taking evidence. The court below observed that, whether such a marriage was solemnized at Singapore and whether the subsequent marriage was conducted by suppressing the said fact, are questions upon which the Family Court has got authority and jurisdiction to deal with, in the application filed seeking

for dissolution of the marriage, which was solemnized within the jurisdiction of the said court, under the provisions of the Hindu Marriage Act. It is further observed that, even if it is a voidable marriage, it could not be ignored and it has to be dissolved, for which the Family Court alone has got jurisdiction. Hence it is found that the original petition is maintainable.

5. Contentions of Sri. C.P. Sudhakara Prasad, learned Senior Counsel appearing on behalf of the appellant is mainly that, the original petition is not maintainable before the court below because no valid marriage was established on 06-04-2009, at Kollam. He seeks support from the provisions under Section 5 (i) and Section 11 of the Hindu Marriage Act. Contention is that, the marriage solemnized at Kollam is a void marriage under Section 11 because it had contravened Section 5 (i) of the Act. It is pertinent to note that, contention of the appellant before the Family Court was that the marriage solemnized at Kollam is voidable. Learned Senior counsel argued that the

marriage will become void 'ab initio' because it contravenes Section 5 (i). Since the marriage is void 'ab initio' the Family Court cannot consider the question of dissolution of the said marriage, in a petition filed under Section 13 (1), is the contention. Hence it is contended that the original petition will become non-maintainable before the Family Court.

6. Eventhough the appellant had also raised a dispute regarding jurisdiction of the Family Court, on the grounds of citizenship and domicile, learned Senior Counsel conceded that such contentions are not pursued, presumably based on the objections filed contending that the respondent is a citizen of India. More over, a question regarding jurisdiction need to be decided based on pleadings in the original petition, which will prima facie constitute the requisite ingredients for dissolution of a marriage solemnized at Kollam under the Hindu Marriage Act. As long as the factum of marriage solemnized at Kollam is not in dispute, there cannot be any successful challenge

on the question of jurisdiction.

7. Crucial question mooted for decision is with respect to maintainability of the original petition, which is challenged on the ground that there is no valid marriage taken place at Kollam on 06-04-2009, which can be dissolved by the Family Court. In this regard it is beneficial to have a scanning of relevant provisions of the Hindu Marriage Act. Section 5 stipulates that a Hindu marriage can be solemnized between any two Hindus, if the conditions enumerated thereunder are satisfied. Sub section (i) of Section 5 stipulates that, either party should not have a spouse living at the time of the marriage. Section 11 provides that any marriage solemnized after commencement of the Act shall be null and void and may on a petition presented by either party thereto against the other party be so declared by a decree of nullity, if it contravenes any one of the conditions prescribed in clauses (i), (iv) and (v) of Section 5. Therefore it is evident that if any marriage had contravened the condition stipulated in

Section 5 (i), it will become null and void and on a petition presented by either of the parties thereto it can be declared as null, by way of a decree of the court.

8. In the case at hand, whether the marriage solemnized at Kollam on 06-04-2009 had contravened Section 5 (i), is the question. Contravention of the condition under Section 5 (i) can be found, if either of the party has a spouse living at the time of the marriage. Learned Senior Counsel Sri. N. Sukumaran, appearing for the respondent had raised a contention that, a formal and name sake registration of a marriage between the parties at Singapore will not in any manner prohibit solemnization of a customary marriage, and it will not be violating the conditions stipulated under Section 5 (i). The provision is intended and mandates only for avoidance of bigamy and the legislative intention underlying such provision is only to preserve monogamy; and it is intended only to prohibit polyandry, is the contention. It is contended that the expression, “spouse living at the time of the marriage” can

only be construed as a spouse other than the person with whom the marriage is to be solemnized. But Sri. Sudhakara Prasad argued that, such an interpretation cannot be accepted going by the letter of the statute. It mandates that neither of the parties should have a spouse living at the time of the marriage. Dehors the question as to whether the respondent has become a spouse of the appellant by virtue of the marriage registered in the country of Singapore, interpretation of Section 5 (i) assumes importance, based on which the issue involved need to be adjudicated. Hence we are inclined to proceed for consideration of the issue regarding interpretation of Section 5 (i).

9. The legislative intention underlying in incorporation of Section 5 (i) in the Hindu Marriage Act can indisputably be with an objective to preserve monogamy, which is essentially the voluntary union for life of one man with one woman, to the exclusion of all others. It is enacted that, neither party should have a spouse living at the time of the marriage. The expression 'spouse' as such is not defined

under the Act. Hence the meaning of the term 'spouse' used in Section 5 (i) need to be construed as a lawfully married husband or wife. Before a valid marriage could be solemnized both the parties must be either single or divorced or a widow or a widower. Then only they are competent to enter into a valid marriage. In a decision of the High Court of Allahabad in **Birendra Bikram Singh and others V. Kamala Devi (AIR 1995 Allahabad 243)** it is observed that, if at the time of performance of the marriage one or other of the parties had a spouse living and the earlier marriage had not already been set aside, then the later marriage is no marriage at all, it being in contravention of the condition laid under Section 5 (i) and it will become void 'ab initio'. In a decision of the hon'ble Supreme Court in **M.M. Malhotra V. Union of India and others (AIR 2006 SC 80)** it is held that marriages covered by Section 11 of the Hindu Marriage Act are void ipso jure, that is void from the very inception, and have to be ignored as not existing in law at all, if and when such a

question arises. Although the Section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The apex court, after comparing the provisions with Section 16 (2), further held that while dealing with the cases covered by Section 12 (2) a decree of nullity is an essential condition. It is held that while the legislature had considered it advisable to uphold legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. Therefore it is evident from the settled legal precedents that a marriage covered under Section 11, which would not satisfy the condition stipulated under Section 5 (i) would become void 'ab initio'.

10. The term, “spouse living at the time of marriage” need to be interpreted only as a spouse other than the party with whom the marriage is to be solemnized, is the contention on behalf of the respondent. While appreciating

that said contention, a harmonious construction of Section 5 & 11 with Section 17 of the Act would be of more beneficial. Section 17 of the Hindu Marriage Act provides that, any marriage between two Hindus solemnized after commencement of the Act, is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of Indian Penal Code shall apply accordingly (emphasis supplied). In this regard, provisions of Indian Penal Code under Sections 494 and 495 assumes importance. In Section 494 punishment to be imposed for an offence of marrying again during the life time of husband or wife, is provided. It reads that;

“whoever, 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”.

So also, in Section 495 punishment for the same offence with concealment of former marriage from the person with whom the subsequent marriage is contracted, is provided.

The Section reads as follows;

“whoever commits the offence defined in the last preceding Section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine”.

11. It is evident from the above provisions that, Section 494 and 495 of Indian Penal Code would apply only in the case of a void marriage, if on the date of such marriage either party had a husband or wife living. In other words, the provisions of IPC would indicate that an offence would be made out only when the second marriage is void for the reason that it has taken place during the life time of the original husband or wife. Section 494 and 495 of Indian Penal Code comes under Chapter XX, which deals with offences relating to marriage. Section 198 of the Code of Criminal Procedure deals with prosecution for offences against marriage. It provides that no court shall take cognizance of an offence punishable under Chapter XX of

Indian Penal Code, except upon a complaint made by some person aggrieved by the offence. The persons aggrieved are specified under sub section (1) & (2) of Section 198. The persons enumerated therein include the wife with respect to an offence punishable under Sections 494 and 495 and the husband of a woman with respect to offence punishable under Sections 497 and 498. Evidently, cognizance of an offence under Section 494 or 495 can be taken only on the basis of a complaint made by the wife (the original wife) who is aggrieved by virtue of a void marriage solemnized by her husband while she is alive and while the legal marriage between herself and the husband is surviving. Therefore it is evident that the criminal law which provides punishment with respect to contracting of a void marriage, by virtue of violation of Section 5 (i), can be initiated only by a former wife who is living under a legally valid marital relationship. Hence an offence with respect to contracting a void marriage under Section 5 (i) will be attracted only if the second marriage is contracted with a person other than the

spouse living in the first marriage.

12. It is held by the hon'ble Supreme Court in **Gopal Lal V. State of Rajasthan (1979) SCC 170** that the essential ingredients of the offence under Section 494 IPC are:

- (i) that the accused spouse had contracted the first marriage
- (ii) that while the first marriage was subsisting the spouse concerned had contracted a second marriage, and
- (iii) that both the marriages must be valid in the sense that the necessary ceremonies required by the personal law governing the parties had been duly performed.

In **Bhaurao Shankar Lokhande V. State of Maharashtra (AIR 1965 SC 1564)** the apex court held that Section 7 of the Hindu Marriage Act requires that the marriage must be properly solemnized in the sense that the necessary ceremonies required by law or by custom must be duly performed. Once these ceremonies are proved to have been performed, the marriage becomes properly solemnized and if contracted while the first marriage is still subsisting

the provisions of Section 494 will apply automatically. The voidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494, because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act.

13. The above said rulings have reiterated the position that the voidness of the marriage will become established or any offence under Section 494 will be constituted only if a spouse is living with respect to either of the parties at the time of solemnization of marriage. From the discussions and explanations as mentioned above, the terms “spouse living at the time of marriage” contained in Section 5 (i) can only be interpreted as a spouse other than the one with whom the marriage is to be solemnized and is a spouse with whom a marital tie has been established in an earlier marriage. Therefore this court is of the considered opinion that voidness of the marriage for the reason of violation of the stipulations in Section 5 (i) and its nullity,

will be attracted only in a case where the marriage is solemnized when an earlier spouse in an earlier marriage living.

14. But, a question may arise as to which is the valid marriage when two marriages are solemnized between the same spouses, either within the same country or within different countries. There may be occasions arising with respect to a decision on the question of validity of the date of marriage. If a valid marriage is established between the spouses on a particular date, a second marriage between the same parties will become insignificant for the purpose of establishment of a legal relationship under the marital tie. In certain cases, even if a second marriage between the same parties are solemnized, the date of such solemnization will be of no consequence or significance, because of the existing marital relationship established legally, on an earlier point of time. In such situation, the subsequent marriage become void at the option of any one of the parties to the marriage. In other words, any one of the spouse may

be entitled to take a contention that the other party cannot seek for a dissolution based on the marriage solemnized subsequently, because the marital relationship has already came into existence on a prior date, based on the marriage contracted earlier. But any such contention, if taken in a case instituted seeking for dissolution of a marriage, would not form an issue of law alone, which will fall within the purview of Order XIV Rule 2 (2) of Code of Civil Procedure, based on the decision on which the suit itself can be decided.

15. Therefore the findings rendered by the Family Court in the order impugned to the effect that, whether the parties have entered into a valid marriage at Singapore and as to whether they were already in a legal status of husband and wife are matters to be considered after taking evidence, is perfectly legal and correct. The Family Court had also taken note of the fact that there is no dispute with respect to solemnization of the marriage between the parties on 06-04-2009 at Kollam and also with respect to registration

of the said marriage at the Corporation of Kollam. The court below had rightly observed that the said court has authority to deal with the application for dissolution of the marriage filed with respect to the marriage solemnized within its jurisdiction, under provisions of the Hindu Marriage Act. Whether it is voidable marriage or not, is a question which need to be decided only in a proper proceedings instituted seeking such relief. Hence this court is of the considered opinion that there is no illegality or error committed by the court below in holding that OP (HMA) 116/2013 is maintainable before the said court.

16. Under the above mentioned circumstances, this court do not find any circumstances existing for interference with the order appealed against. Consequently the appeal fails and the same is hereby dismissed.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

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P.A. to Judge