

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 23RD DAY OF FEBRUARY 2015/4TH PHALGUNA, 1936

WP(C).NO. 4559 OF 2015 (S)

PETITIONER(S) :

VENUGOPAL.K AGED 42 YEARS
S/O.SREEDHARAN NAIR, KUTTICHIRA HOUSE, P.O.ERAVU
THRISSUR-680620.

BY ADV. SRI.RAJIT

RESPONDENT(S) :

1. UNION OF INDIA
REPRESENTED BY SECRETARY, MINISTRY OF HOME AFFAIRS
NEW DELHI-695001.

2. STATE OF KERALA
REPRESENTED BY CHIEF SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM-695001.

3. SECRETARY
MINISTRY OF HOME AFFAIRS, SECRETARIAT
THIRUVANANTHAPURAM, 695001.

4. DIRECTOR GENERAL OF POLICE
POLICE HEAD QUARTERS, THIRUVANANTHAPURAM-695001.

5. SUPERINTENDENT OF POLICE
THRISSUR, COLLECTORATE, AYYANTHOLE
THRISSUR-680001.

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6. CIRCLE INSPECTOR OF POLICE
VALAPPAD POLICE STATION, THRISSUR-680121.

7. SUB INSPECTOR OF POLICE VATANAPPILLY
VATANAPPILLY POLICE STATION, THRISSUR-680620.

8. ABDUL KAREEM, AGED 39 YEARS
S/O.MUTHUNNI, ARAKKEVEETIL HOUSE, KUTTAMUGHAM DESOM
VATANAPPILLY VILLAGE, CHAVAKKAD TALUK
THRISSUR DISTRICT-686802.

R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R BY GOVERNMENT PLEADER SMT. GIRIJA GOPAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
12.02.2015, THE COURT ON 23-02-2015 DELIVERED THE FOLLOWING:

WP(C) .NO. 4559 OF 2015 (S)

APPENDIX

PETITIONER(S) ' EXHIBITS:

EXHIBIT-P1: TRUE COPY OF THE FIR IN CRIME NO.1994/2014 REGISTERED BY THE VATANAPPALLY.

EXHIBIT-P2: TRUE COPY OF THE ENGLISH TRANSLATION OF EXT.P1.

EXHIBIT-P3: TRUE COPY OF THE LETTER NO.B1-35223/2014 DTD.29.9.2014 AND ITS ENGLISH TRANSLATION.

EXHIBIT-P4: TRUE COPY OF THE COMMUNICATION ISSUED BY THE CHIEF REGISTRAR TO THE PETITIONER AND ITS ENGLISH TRANSLATION.

EXHIBIT-P5: TRUE COPY OF THE INFORMATION GIVEN TO THE PETITIONER FROM THE DIRECTOR OF THE KERALA INSTITUTE OF LOCAL ADMINISTRATION DTD.22.9.2014 AND ITS ENGLISH TRANSLATION.

RESPONDENT(S) ' EXHIBITS:

NIL

TRUE COPY

“CR”

ASHOK BHUSHAN, Ag. C.J.

and

A.M. SHAFFIQUE, J.

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W.P(C) No.4559 of 2015

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Dated this the 23rd day of February, 2015

J U D G M E N T

Ashok Bhushan, Ag. C.J.

This Writ Petition, filed as a public interest litigation, seeks a direction to register case under Section 494 of the Indian Penal Code against all citizens who commit the offence of bigamy irrespective of their personal law.

2. Brief facts of the case as stated in the Writ Petition are: Petitioner claimed to be an Indian male running a footwear business. He claimed to be actively engaged in promoting social welfare. The reason for filing the Writ Petition as has been stated in paragraph 7 of the Writ Petition are: A lady called Afitha married one Abdul Kareem on 30.04.2014. According to the said lady,

Abul Kareem married her as per the Muslim customary rites after convincing her that his first wife was a mental patient and he would look after the said Afitha properly. It is further stated that after the marriage Abdul Kareem took the lady to his house and on the next day the husband after taking 5 sovereigns of gold ornaments dropped the lady in her relative's house and thereafter did not bother to take care of the said lady. The said lady has lodged a complaint against her husband on which Crime No.1994 of 2014 was registered for the offences punishable under Sections 406, 417, 420 and 498A IPC. It is stated in the Writ Petition that there are various circumstances where such culpable bigamous marriages have been resorted to harass and dupe innocent ladies in the name of personal law. Petitioner claims to have submitted an application for obtaining information under the Right to Information Act regarding registration of marriages of

Muslim male who has already one wife living. Petitioner's case is that he has received answers from the Director of Panchayaths where it is stated that in the memorandum to be submitted for registration there is a column regarding previous marital status and the same has to be filled up by the person who is submitting the application. Every marriage is valid based on the marriage laws applicable to the parties as per Muslim personal law, a Muslim person is permitted to conduct four marriages at a time and there being no clarity in the rules with regard to registration of such marriages a clarification has been sought for from the Government. In the above background petitioner has come up with this Writ Petition with the following reliefs:

"(a) issue a Writ of Mandamus or any appropriate writ or direction commanding the respondents to register cases under Sec.494 IPC against all citizens, who commit the offence of bigamy, irrespective of their personal law.

(b) Issue a Writ of Mandamus or any appropriate writ order or direction commanding the 7th

respondent to register a case under Sec.494 IPC against the 8th respondent.

(c) Declare that the offence of Sec.494 will be attracted against all classes of citizens who conduct a bigamous marriage irrespective of their personal law."

3. Learned counsel for the petitioner, Advocate Rajit, submitted that Section 494 IPC does not distinguish a Hindu/Muslim/Christian in so far as the committal of the offence is concerned. It is submitted that under Section 494 IPC no distinction can be made between Hindu/Muslim/Christian in so far as the offence of bigamy is concerned. It is clear that under Section 494 IPC there is no concept of any personal law and the section envisages punishment to everyone whosoever conduct a bigamous marriage. It is submitted that he does not rely on the provisions of Article 44 of the Constitution of India which contains the directive principles of State policy enjoining the State to endeavour to secure for the citizens a uniform civil code throughout the territory of India.

4. We have considered the submissions of the learned counsel for the petitioner and perused the records.

5. Section 494 IPC is contained in Chapter XX pertaining to (of offences relating to marriage). Section 494 is quoted below:

"494. 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."

Section 494 begins with the words, "whoever having a husband or wife living, marries....". The Section does not in any manner draw a distinction between a man or woman of one community or another. The Indian Penal Code is a general penal code for India. Thus there cannot be any dispute to the submission as advanced by the learned counsel for the petitioner that Section 494 IPC does not distinguish in so far as the offence of

bigamy is concerned by a Hindu/Muslim/Christian.

6. Crucial words in Section 494 are “marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife.” Section 494 thus provides that any husband or wife who has already married in the event of conducting a second marriage he/she shall be punished with imprisonment in the event “such marriage is void by reason of its taking place during the life of such husband or wife.” The above words refers to the second marriage, on conduct of which the offence under Section 494 IPC arises. The offence shall arise when such marriage (second marriage in the event of husband or wife living) is void on account of the husband or wife living. The converse is that in the event the second marriage is not void, the offence under Section 494 shall not arise. For eg., under the Hindu Marriage Act, 1955, Section 5 of the Hindu Marriage Act provides for condition for Hindu marriage.

Section 5 is quoted as below:

"5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of marriage;

(ii) at the time of the marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity.

(iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

7. Under Section 11 void marriage has been defined. Provisions says that any marriage solemnized after the commencement of Act contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5, such marriage will be null and void. Thus any marriage performed by a Hindu after enforcement of the Hindu Marriage Act, 1955 where a spouse is living is void marriage. Thus any person contracting such marriage shall be punishable under Section 494 IPC. Section 17 of the Hindu Marriage Act provides for punishment on bigamy which is to the following effect:

"17. Punishment of bigamy.-Any marriage between two Hindus solemnized after the commencement of this 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 the Indian Penal Code (45 of 1860) shall apply accordingly."

8. Now we come to the marriage performed by a Muslim which has been made an issue in this Writ Petition seeking a direction to register an offence under

Section 494 IPC in the event of a Muslim man performs a second marriage.

9. Muslim personal law allowed a Mohammadan to take four wives together. The challenge to Section 494 on the ground that it is ultra vires was repelled by the Allahabad High Court in **Kamala Kumari v. Mohan Lal** (II [1984] DMC 279 (Allahabad)). It was argued before the court that the provisions of Section 494 are discriminatory on the ground of Religion. It was argued that although under the Muslim Law a person can have number of wives who will not be prosecuted for bigamy but a Hindu who takes the second wife, is prosecuted for bigamy is a clear case of discrimination. Repelling the above argument, the High Court observed as follows:

"The crux always is whether the classification has been based on any good and real relation or the discrimination is arbitrary. The Constitution provided for the amendment of personal laws as well. I may refer to the concurrent list contained in the Constitution. At serial No.5 marriage and divorce, infants and minors;

adoption; wills, intestacy and succession; joint family and petition have all been included in concurrent list and the Union of India as well as the State both are, therefore, empowered to make any law concerning these matters. Section 17 of the Hindu Marriage Act introduces the principles of monogamy. It is noteworthy that Art.44 of the Constitution provides that the State shall endeavour to secure for the citizens a uniform Civil Code. Christian, Parsis, Jews and Nayers happened to be already monogamous. If a similar provision for monogamy has been made for Hindus also, legislation is to be deemed for the benefit of class of persons to whom the Hindu Marriage Act is applicable and the argument that it is in fact directed against that class, making a discrimination, cannot hold water."

10. There may be cases where a Muslim male or female can be prosecuted for offence under Section 494 IPC also. In a case where a Muslim male marries a fifth wife, he can very well be prosecuted under Section 494 IPC since the 5th marriage will be void, personal law being having permitted only four wives to be taken together. Similarly a Muslim female contracting a second marriage can be proceeded with for offence under Section 494 IPC. Thus submission of the learned

counsel for the petitioner that offence under Section 494 IPC is discriminatory between Hindu/Muslim/Christian is not acceptable. The sine qua non for giving rise to an offence under Section 494 is whether the second marriage performed by a husband or wife when the spouse is living is void or not. In this context judgment of the Apex Court in **Dr.Srajmani Stella Kujur v. Durga Charan Hansdah and Another** ([2001] 3 SCC 13) is relevant to be mentioned. In the above case wife had filed a complaint that her marriage was performed at Delhi in accordance with the Hindu rites and customs and the husband solemnized another marriage with accused No.2. Parties belonged to Scheduled Tribe. The Apex Court held that in the absence of specific pleadings, evidence and proof of alleged custom making the second marriage void, no offence under Section 494 IPC can possibly be made out against the respondent. It was

held by the Apex Court that the fact of second marriage being void is *sin qua non* for the applicability of Section 494 IPC. The following was laid down in paragraph 14:

"14. Nowhere in the complaint the appellant has referred to any alleged custom having the force of law which prohibits the solemnisation of second marriage by the respondent and the consequences thereof. It may be emphasised that mere pleading of a custom stressing for monogamy by itself was not sufficient unless it was further pleaded that second marriage was void by reason of its taking place during the life of such husband or wife. In order to prove the second marriage being void, the appellant was under an obligation to show the existence of a custom which made such marriage null, ineffectual, having no force of law or binding effect, incapable of being enforced in law or non est. The fact of second marriage being void is a sine qua non for the applicability of S.494 IPC. It is settled position of law that for fastening the criminal liability, the prosecution or the complainant is obliged to prove the (SIC) appellant herself appears to be not clear in her stand inasmuch as in her statement in the court recorded on 24th October, 1992 she has stated that "I am a Hindu by religion". The complaint was dismissed by the Trial Court holding, "there is no mention of any such custom in the complaint nor there is evidence of such custom. In the absence of pleadings and evidence reference to Book alone is not sufficient", the High Court

vide the judgment impugned in this appeal held that in the absence of notification in terms of sub-section (2) of S.2 of the Act no case for prosecution for the offence of bigamy was made out against the respondent because the alleged second marriage cannot be termed to be void either under the Act or any alleged custom having the force of law."

11. To the same effect there is another judgment of the Supreme **Court in Lilly Thomas v. Union of India** (2000[6] SCC 224) wherein the following was observed in paragraph 23:

"23. We have already seen above that under the Hindu Marriage Act, one of the essential ingredients of a valid Hindu marriage is that neither party should have a spouse living at the time of marriage. If the marriage takes place in spite of the fact that a party to that marriage had a spouse living, such marriage would be void under S.11 of the Hindu Marriage Act. Such a marriage is also described as void under S.17 of the Hindu Marriage Act under which an offence of bigamy has been created. This offence has been created by reference. By providing in S.17 that provisions of S.494 and 495 would be applicable to such a marriage, the legislature has bodily lifted the provisions of S.494 and 495 IPC and placed them in S.17 of the Hindu Marriage Act. This is a well known legislative device. The important

words used in S.494 are "MARRIES IN ANY CASE IN WHICH SUCH MARRIAGE IS VOID BY REASON OF ITS TAKING PLACE DURING THE LIFE OF SUCH HUSBAND OR WIFE". These words indicate that before an offence under S.494 can be said to have been constituted, the second marriage should be shown to be void in a case where such a marriage would be void by reason of its taking place in the lifetime of such husband or wife. The words "husband or wife" are also important in the sense that they indicate the personal law applicable to them which would continue to be applicable to them so long as the marriage subsists and they remain "husband and wife"."

12. One of the prayers made in the Writ Petition is a direction to the 7th respondent to register case under Section 494 of the Indian Penal Code against 8th respondent. Section 198(1) of the Code of Criminal Procedure provides as follows:

"198. Prosecution for offences against marriage.- (1) *No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:*

provided that-

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and

manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court make a complaint on his her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under section 494 or 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister or, with the leave of the Court, by an other person related to her by blood, marriage or adoption."

The above prayer of the petitioner thus cannot be entertained in view of the specific bar as stated in Section 198(1) of the Code.

13. In view of the forgoing discussion we are of the view that Section 494 does not discriminate between an offender belonging to Hindu/Muslim/Christian male or female belonging to any cast or creed and can be proceeded with under Section 494 of the Indian Penal Code provided ingredients of Section 494 are made out. We thus are of the view that the petitioner is not

entitled to any of the reliefs as prayed for in the Writ
Petition.

Writ Petition is dismissed.

ASHOK BHUSHAN, Ag. C.J.

A.M. SHAFFIQUE, JUDGE.

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