

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2390 OF 1999**

Smt. Mandakini Bai, wife of Balwant Singh, aged about 28 years, caste Rajput, Rathore, Resident of Jhaphal, P.S. Lormi, District Bilaspur.

---- Appellant

Versus

1. Balwant Singh, son of Khetau Ram, aged about 39 years, Resident of Semariya, P.S. Lormi, Tahsil Lormi, District Bilaspur.
2. Ram Swaroop, son of Milauva, aged 45 years, Resident of Venkata Navagaon, P.S. Lormi, District Bilaspur.
3. Smt. Kirti Bai, wife of Ram Swaroop, aged about 39 years, Resident of Venkata Nagaon, P.S. Lormi, District Bilaspur.

---Respondents

For Appellant	:	None.
For Respondents	:	None.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****16/06/2016**

1. Smt. Mandakini Bai has preferred this appeal under Section 372 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") against the judgment of acquittal after obtaining leave to appeal under Section 378(4) of the Cr.P.C.
2. Complainant-Smt. Mandakini Bai filed a complaint under Section 494 read with Section 114 of the Indian Penal Code (in short 'I.P.C.') alleging that accused Balwant Singh during

subsistence of first marriage with the appellant, he has performed second marriage with Smt. Neera Bai and the respondents No. 2 & 3 abated the commission of second marriage and thereby they have committed aforesaid offence.

3. The trial Magistrate, upon appreciation of the oral and documentary evidence on record, on 14/10/1998 allowed the complaint and convicted the respondent-Balwant Singh for the offence under Section 494 of the I.P.C. and respondents- Ram Swaroop and Smt. Kirti Bai for the offence punishable under Section 494 read with Section 114 of the I.P.C. and sentenced them to undergo rigorous imprisonment for 1 year and fine of Rs.1,000/- each, in default of payment of fine amount, they are required to undergo rigorous imprisonment for three months.

4. Feeling aggrieved against the judgment of conviction and order of sentence, the respondents preferred an appeal before the Court of Session. The Court of Session by its impugned judgment dated 02/02/1999, allowed the appeal and set aside the conviction and sentence awarded by the trial Court. Against which, this appeal has been preferred.

5. This appeal is of the year 1999 and no one appeared to contest the appeal filed against acquittal.

6. I have gone through the record and scanned the

evidence.

7. The appellate Court has clearly recorded a finding that the witnesses of second marriage namely Phool Chand, Laxman and Bhagwat have not been examined and witness Shyam Singh is interested witness, therefore, the finding is not reliable and the fact of second marriage has not been proved.

8. In order to have comprehension of the challenge made to the judgment of conviction and sentence, it would be profitable to notice Section 494 of the I.P.C., which runs thus:

“494. Marrying again during lifetime of husband or wife.-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.

Exception.-This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.”

9. A bare and close perusal of Section 494 of the I.P.C. would reveal that following essential ingredients of the offence

under Section 494 of the I.P.C.:

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

10. At this stage, it would be pertinent to mention that the offence under Section 494 of the I.P.C. would be attracted only if the second marriage becomes void by reason that it had taken place during the subsistence of the first marriage and in the lifetime of one of the spouse.

11. At this stage, it is profitable to notice Section 17 of the of the Hindu Marriage Act, 1955 (in short 'Act, 1955'), which reads thus:

“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.”

12. Section 17 of the Act, 1955 clearly provides that the second marriage must be according to ceremonies required by law and if the marriage is void, its voidness will only lead to the

consequence from such marriage. The combined effect of Section 17 of the Act, 1955 and Section 494 of the I.P.C. has been considered by their Lordships of the Supreme Court in **Bhaurao Shankar Lokhande and another v. The State of Maharashtra and another**¹, and has been held as under:

“4.Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a provisions of Ss. 494 and 495, I.P.C. shall apply accordingly. The marriage between two Hindus is void in view of S. 17 if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be ‘solemnized’ that marriage will not be void by virtue of S. 17 of the Act and S. 494, I.P.C. will not apply to such parties to the marriage as had a spouse living.

5. The word ‘solemnize’ means, in connection with a marriage, to celebrate the marriage with proper ceremonies and in due form, according to the Shorter Oxford Dictionary, It follows, therefore, that unless the marriage is ‘celebrated or performed with proper ceremonies and due from’ it cannot be said to be ‘solemnized’. It is, therefore, essential for the purpose of S. 17 of the Act, that the marriage to which S. 494, I.P.C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.”

13. Thereafter, in **Kanwal Ram and others v. The Himachal Pradesh Administration**², their Lordships of the Supreme Court

¹ AIR 1965 SC 1564

² AIR 1966 SC 614

clearly held that the essential ceremonies of the second marriage must be constituted and proved and admission of the marriage by the accused is not an evidence of it for the purpose of proving the marriage, and held as under:

“7. The learned Judicial Commissioner, however, thought that apart from the evidence about the marriage ceremonies earlier mentioned there was other evidence which would prove the second marriage. He first referred to a statement by the appellant Kanwal Rain that he had sexual relationship with Kubja. We are entirely unable to agree that this, even if true, would at all prove his marriage with Kubja. Then the learned Judicial Commissioner relied on a statement filed by Kubja, Hira Nand and Hiroo in answer to an application for restitution of conjugal rights filed by Sadh Ram against Kubja and others, in which it was stated that Kubja married Kanwal Ram after her marriage with Sadh Ram had been dissolved. Now the statement admitting the second marriage by these persons is certainly not evidence of 'the marriage so far as Kanwal Ram and Seesia are concerned; they did not make it. Nor do we think, it is evidence of the marriage even against Kubja. First, treated as an admission, the entire document has to be read as a whole and that would prove the dissolution of the first marriage of Kubja which would make the second marriage innocent. Secondly, it is clear that in law such admission is not evidence of the fact of the second marriage having, taken place. In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it, must be proved : *Empress v. Pitambur Singh*, ILR 5 Cal 566 (FB), *Empress of India v. Kallu*, ILR 5 All 233, Archbold Criminal Pleading Evidence and Practice (35th ed.) Art. 3796. In *Kallu's case*, ILR 5 All 233 and in *Morris v. Miller*, (1767) 4 Burr 2057: 98 ER 73, it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case: see also Archbold Criminal Pleading Evidence and Practice (35th ed.) Art. 3781. We are unable therefore, to think that the written statement of Kubja affords any assistance

towards proving her marriage with Kanwal Ram.”

14. In **Smt. Priya Bala Ghosh v. Subhash Chandra Ghosh**³, their Lordships of the Supreme Court clearly held that it is essential that the second marriage should have been celebrated with proper ceremonies and in due form and the prosecution has to prove that the alleged second marriage has been duly performed in accordance with religious rites available to the form of marriage gone through by the parties and the admission of the accused cannot be in law treated as an evidence of the second marriage having been taken place. It has been held as under:

“16. From the above quotations it is clear that if the alleged second marriage is not a valid one according to law applicable to the parties, it will not be void by reason of its taking place during the life of the husband or the wife of the person marrying so as to attract Section 494 I.P.C. Again in order to hold that the second marriage has been solemnized so as to attract Section 17 of the Act, it is essential that the second marriage should have been celebrated with proper ceremonies and in due form.

17. In the said decision this Court further considered the question whether it has been established that with respect to the alleged second marriage the essential ceremonies for valid marriage have been performed. After referring to the passage in Mulla's Hindu Law, 12th Edn. At page 615 dealing with the essential ceremonies which have to be performed for a valid marriage, this Court, on the evidence held that the prosecution had neither established that the essential ceremonies had been performed nor that the performance of the essential ceremony is had been abrogated by the custom governing the community to which the parties belonged. In this view it was held that the prosecution in that case had failed to establish that the alleged second marriage had been

³ 1971 (1) SCC 864

performed in accordance with the requirement of Section 7 of the Act. The effect of the decision, in our opinion, is that the prosecution has to prove that the alleged second marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through by the parties and that the said marriage must be a valid one according to law applicable to the parties.

23. Further as pointed out by this Court in *Kanwal Ram's case* (supra), the admission in Ex. 2 cannot in law be treated as evidence of the second marriage having taken place in an adultery or bigamy case: and that in such cases it must be proved by the prosecution that the second marriage as a fact has taken place after the performance of the essential ceremonies.”

15. Thereafter, their Lordships of the Supreme Court, following the decision of **Bhaurao Shankar case** (supra), **Kanwal Ram case** (supra) and **Smt. Priya Bala case** (supra). In **Gopal Lal v. State of Rajasthan**⁴, clearly held that where a spouse contracts a second marriage while the first marriage subsists, the spouse will be held guilty of bigamy under Section 494 of the I.P.C. if it is proved in the sense that the necessary ceremony, required by law or custom, has been actually performed. In **Laxmi Devi (Smt.) v. Satya Narayan and others**⁵, also, their Lordships of the Supreme Court held that in the absence of proof of such a ceremony, the factum of second marriage cannot be held to have been made out.

16. Thus, it has clearly been held that in order to prove the offence of bigamy under Section 494 of the I.P.C. the prosecution

4 (1979) 2 SCC 170

5 (1994) 5 SCC 545

is required to prove the fact of second marriage strictly and unless the prosecution is able to prove the fact of second marriage, as required under the law, the accused, in view of the authoritative pronouncements laid down by their Lordships of the Supreme Court in above-noted cases, cannot be held guilty for the offence under Section 494 of the I.P.C.

17. After having examined the essential ingredients of the offence and considering the facts of the case, I find that the complainant has failed to prove the fact of second marriage of respondent No. 1 with Smt. Neera Bai. The finding recorded by First Appellate Court is a finding based on evidence, I do not find any merit in this criminal appeal and same is dismissed accordingly.

(Sanjay K. Agrawal)
Judge