

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 553 OF 2015

1. Gajanan Sadashiv Hivarkar,
Age : 45 years, Occ : Agri. & Dairy business,
R/o : Tenbhurne, Taluka Khamgaon,
District Buldhana.
2. Vimal Supaji Nhavkar,
Age : Major, Occ : Household,
R/o : As above.
3. Narayan Sadashiv Hivarkar,
Age : 55 years, Occ : Agri. & Dairy Business,
R/o : As above.
4. Kaveri Narayan Hivarkar,
Age : 48 years, Occ : Household,
R/o : As above.
5. Shankar Pundalik Lahudkar,
Age : Major, Occ : not known
R/o : Aavar, Taluka Khamgaon,
Disttict Buldhana.
6. Sau. Janabai Shankar Lahudkar,
Age : Major, Occ : Household
R/o : As above.
7. Onkar Pundlik Lahudkar,
Age : Major, Occ : Not known
R/o : As above,
8. Shantabai Onkar Lahudkar,
Age : Major, Occ : Household

R/o : As above.

9. Vanabai More,
Age : Major, Occ : Not known
R/o : As above.
10. Supaji Pandu Nhavakar
Age : Major, Occ : Not known
R/o : Manlur Navghare,
Taluka Chikhali,
District Buldhana.
11. Murlidhar Supaji Nhavakar,
Age : Major, Occ : Not known
R/o : As above.
12. Krushnaji Supaji Lahudkar,
Age : Major, Occ : Not known
R/o : As above.
13. Tai Supaji Nhavakar,
Age : Major, Occ : Not known
R/o : As above.

Petitioners

VERSUS

1. The State of Maharashtra.
2. Rekha @ Shradha Gajanan Hivarkar,
Age : 36 years, Occ : Not known,
R/o : Behind Motha Maruti Mandir,
Nandurbar, Taluka & Dist. Nandurbar.

Respondents

Mr. S.S. Gangakhedkar, Advocate for the Petitioners.
Mr. S.N. Kendre, APP for Respondent No.1/State.
Mr. R.S. Shinde, Advocate h/f Mr. A.G. Magare, Advocate for
Respondent No.2.

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(CORAM : RAVINDRA V. GHUGE, J.)**DATE : 15/06/2016****ORAL JUDGMENT :**

1. The petitioner is aggrieved by the order dated 17.03.2012 passed by the learned Judicial Magistrate First Class, Nandurbar, thereby issuing process against accused No.1 to 15 out of whom 13 are before this Court. The petitioners are also aggrieved by the judgment of the learned Sessions Judge at Nandurbar dated 11.11.2014 by which the Revision Petition filed by the petitioners has been dismissed.

2. Rule. Rule made returnable forthwith and heard finally by the consent of the parties. The contentions of the petitioners can be summarized as follows :-

(A) A statement is made across the bar that this petition is restricted only to the extent of petitioner Nos. 5 to 13.

(B) On 16.05.1998 the petitioner No.1 got married to respondent No.2 as per Hindu custom and rituals. A girl child is born out of the

wedlock.

(C) On 27.02.2001 the petitioner No.1 married petitioner No.2.

(D) Respondent No.2, who is the first wife of the first petitioner, filed a complaint with the learned Judicial Magistrate First Class, Nandurbar alleging commission of offences punishable under Section 494 r/w Section 109 of the Indian Penal Code.

(E) It was alleged that petitioner Nos.1 & 2 have got married on 27.02.2001 in the presence of the other petitioners, despite the marriage of petitioner No.1 with respondent No.2 subsisting.

(F) On 10.10.2011 the learned Judicial Magistrate First Class passed an order under Section 202 of the Code of Criminal Procedure and directed the Police Inspector of the concerned Police Station to investigate into the matter.

(G) On 17.03.2012, the learned Judicial Magistrate First Class, after receiving the Police report under Section 202 and after

considering the complaint and the material on record, issued process against all the petitioners.

(H) The petitioner preferred Criminal Revision Application No. 20 of 2012 before the learned Sessions Judge, Nandurbar challenging the issuance of process.

(I) By the impugned judgment, the Criminal Revision Application was dismissed and the order of issuance of process was maintained.

(J) The complaint filed by respondent No.2 does not disclose any offence against the petitioners.

(K) No case has been made out against the petitioners under Sections 107 and 109 so as to punish them for the offence committed under Section 494 of the Indian Penal Code.

(L) Merely because petitioner No. 5 to 13 have attended the second marriage would not make them liable for punishment since they have

neither abetted nor aided the commission of offence.

(M) Reliance is placed upon by the judgment of this Court in the matter of ***Malan W/o Rama and others Vs. State of Bombay and another, AIR (1960) Bombay 393***, and the order of this Court in the matter of ***Prakash Limbaji Dhole Vs. State of Maharashtra and another, 2014 (2) Bom.C.R. (Criminal) 208***.

(N) Specific reliance is placed upon paragraph Nos.7, 8 & 9 of the judgment in the case of Malan w/o Rama (supra) and paragraph No. 8 of the judgment in the case of Prakash Limbaji Dhole (supra),

(O) As no case has been made out which would attract Section 107, none of these petitioners would be convicted or punished for any offence under the Indian Penal Code.

3. The learned Advocate appearing on behalf of respondent No.2 has supported the impugned orders. His submissions can be

summarized as follows :-

(A) The petitioners are neither locals nor such villagers who can be termed to be merely guests attending the ceremony of marriage.

(B) Each of the petitioner Nos. 3 to 13 are close relatives of petitioner No.1 husband and petitioner No. 2 second wife.

(C) All the petitioners are aware that petitioner No.1 was married to respondent No.2 and they have a child out of the said wedlock.

(D) The petitioners are aware that no proceedings of dissolution of marriage between the petitioner and the second respondent have culminated into a divorce.

(E) All the petitioners are adults and capable of understanding that the second marriage without dissolution of the first marriage and during the lifetime of the first wife, is illegal and, therefore, an offence.

(F) A specific contention has been set out in the complaint filed by respondent No.2 and the close relationship between petitioner No.1 and the other petitioners has been specifically disclosed.

(G) The roles played by the petitioners is specifically mentioned in the complaint.

(H) The judgments cited are delivered after a complete trial and after the accused are convicted of the offence under Section 494 r/w other provisions of the Indian Penal Code.

(I) In the instant case, process has been issued and it can not be presumed at this stage that none of the petitioners have abetted and aided the marriage of petitioner No.1 with petitioner No.2.

4. The learned APP has supported the impugned orders and submits that no grounds have been made out in this petition for quashing and setting aside the issuance of process.

5. I have considered the submissions of the learned Advocates.

6. In so far as the reports cited by the petitioners are concerned, it can not be ignored that the complete trial in the Criminal proceedings was concluded before the learned Additional Session Judge, Satara. In the Malan Rama case (supra), the accused are convicted for the offence committed under Section 495 r/w Section 114 of the Indian Penal Code and are sentenced to suffer rigorous imprisonment for One day and fine of Rs.10/- (ten rupees).

7. The observations of this Court in the Malan Rama case in paragraph Nos.7,8, and 9 read as under :-

“(7) Section 107 defines abetment. It is well known that an act of abetment may take place in one of three ways: (1) Instigation, (2) Conspiracy, or (3) Intentional aid. Having regard to the charge in the present case, there is no doubt whatsoever that the prosecution did not allege that any of the aforesaid accused had instigated the commission of the offence of bigamy. This was conceded by the learned Government Pleader. The learned Government Pleader, however, urged that, on the facts aforesaid, the prosecution had established that there was a conspiracy by all the aforesaid accused persons to commit the offence of bigamy. I do not think I can agree with this submission. In the first instance no conspiracy

was alleged in the charge. The charge was that the aforesaid accused had abetted the void marriage, knowing it to be void, by celebrating the same. Therefore, the charge which the aforesaid accused person were called upon to meet was that they had taken part in the celebration of the marriage. There was no allegation whatsoever that, prior to the celebration of the marriage, these accused had entered into a conspiracy for the purpose of celebrating the marriage in question. From the judgments delivered by the learned trial Magistrate and the learned appellate Judge also, there is no doubt whatsoever that the charge which was pressed against the aforesaid accused was that they had participated in a void marriage. Moreover, the aforesaid facts, which I have mentioned and which have been found against the accused, do not leave any doubt that there was no conspiracy prior to the celebration of the marriage between the accused. Therefore, in my opinion, the charge which was levelled against the accused was not one that they had entered into a conspiracy for celebrating a void marriage. Under the circumstances, the principal question which required to be decided in the present case in whether the facts brought home against the accused as aforesaid constitute an intentional aid within the meaning of Section 107 I. P. C.

(8) For the purpose of determining this question, in my opinion, it is better, first of all, to concentrate on the first three general facts found against all the accused persons. Those general facts are that they knew that the accused No.1 was celebrating a void marriage and was committing the offence of bigamy; that they remained present at the time of the celebration of that void marriage and, during the performance thereof, they threw holy rice on the couple. There is very good authority for the proposition that mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid. This

proposition is not being disputed by the learned Government Pleader. In fact, this proposition was laid down by this Court as early as in Empress v. Umi, ILR 6 Bom 126. The learned Government Pleader, however contended that though this is so, there may be some cases in which persons may occupy a position of influence and rank so that their presence may mean encouragement to commit the crime and he contended that, when such is the case, persons holding the position of rank and influence should be regarded as abettors. For this purpose, the learned Government Pleader relied upon a passage from Messrs. Ratanlal and Dhirajlal's Law of Crimes 19th Edition, at page 230. The passage is as follows:

"Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and to be aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement....."

This passage is based upon the case in Queen-Empress V. Lakshami. Crim Rev. Appln. No. 51 of 1886: Rat Un Cri Cas 303. So far as this ruling is concerned, the aforesaid remarks are obiter. In this case, the learned Judges actually came to the conclusion that the woman who had been convicted of the offence of abetment did not hold a special position and her mere knowledge of what was done or was about to be done could not be held to be an abetment. Therefore, the observations which were made in this case do not give any help in deciding the present case. In my opinion even if one agrees with the submission of the learned Government Pleader that, under certain circumstance, where persons present hold position of influence or rank their presence

should be construed as an encouragement of the criminal act, in the present case, it is impossible to hold that the aforesaid accused persons held such a position vis a vis accused No. 1 that their presence should be taken as having encouraged the accused No. 1 in committing the offence of bigamy. so far as some of the accused persons are concerned. the Learned Government Pleader had to concede that their acts do not come within the principle which is enunciated above. Accused No.5 is the brother of the bridegroom accused Nos. 6 to 8 are his bhaubands, and accused No.13 is the brother of the bride. It is conceded by the Learned Government Pleader that so far as these accused persons are concerned, they cannot be said to be occupying a position of rank or influence, and their presence cannot be said to have encouraged accused No. 1 in the performance of the void marriage. The learned Government Pleader, however, contended that the acts of accused Nos. 1 to 4, 9, 11 and 12 stood on a different footing. The accused Nos. 2 and 3 are the parents of the bridegroom and the accused No. 4 is his uncle. Accused No. 9 is the police patil of the village at which the marriage was celebrated and accused Nos. 11 and 12 are the parents of the bride. It was contended that these persons occupied a position of rank and influence and, therefore, their presence must be taken to have encouraged accused No. 1 in the performance of the void marriage. This aspect of the case does not appear to have been discussed before any of the lower Courts, and none of the lower Courts has applied its mind on this subject. The matter is one of presumption arising from certain relationship existing between the parties. In my opinion, the matter is one which is dependent upon the evidence in each case. The admitted fact is that these persons are related as aforesaid and that they remained present at the aforesaid void marriage. There is nothing else on the record of the case which would show that their presence amounted to encouragement and that if

these persons had not remained present at the time of the marriage, the offence of bigamy probably would not have taken place and the accused No. 1 would have acted in a manner different from what he did at the time of the performance of the aforesaid marriage. Sometimes elders do remain present even at marriages which they disapprove. they may do so out of sentiments or social considerations. Under the aforesaid circumstances, have regard to the fact that I am dealing with this matter in a revision application, and the fact that this aspect of the case has not been considered by the lower Courts. I am not prepared to hold that the aforesaid accused should be held to have encouraged the performance of the void marriage simply from the fact that they remained present at the marriage.

(9) The next point is whether the fact that the aforesaid accused person threw holy rice on the couple should be regarded as an act of abetment. The evidence discloses that this act of throwing rice was done by the aforesaid persons during the time when the 'antarpatt' was held and the 'managalastakes' were being recited. The question as to whether this act amounts to an abetment or not depends upon a consideration of explanation 2 to Section 107 I. P. C. That Explanation says that whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and, thereby facilitates the commission thereof, is said to aid the doing of that act. Therefore, in order that the aforesaid act of throwing rice may be said to be an act of abetment, it is necessary to enquire whether the act of throwing rice as done in order to facilitate the commission of bigamy and, thereby bigamy and, thereby bigamy was facilitated. It is not shown that this act is one of the necessary acts which has got to be performed in the celebration of a marriage. It is true that the ceremony which was undertaken by accused No. 1 was a void ceremony and anything which

was done on the aforesaid day did not amount to marriage in law. But in order that an offence under Section 494 may be committed it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife. It is not shown to me that the throwing of rice on the couple was a necessary part of the ceremony in the performance of a valid marriage. It appears that this thing is ordinarily done by all the spectators who remain present at a marriage, and the act is more consistent with the presence of the aforesaid persons at the time of the celebration of the marriage rather than actual participation in the acts which ultimately lead to the formation of the marriage contract. In my opinion, the aforesaid act in itself does not lead to the necessary conclusion that the act was done to facilitate the performance of the marriage, much less could it be said that thereby the performance of the marriage was facilitated. Under the aforesaid circumstances. I have come to the conclusion that the acts which have been brought home against all the accused persons, except accused No. 3 and 9, whose further case will be considered hereafter, do not necessarily amount to an act of abetment. In my opinion, the acts which have been brought home against the aforesaid accused Nos. 2, 4, 5 to 8, and 11 to 13 are not acts of abetment within the meaning of Section 107 I. P. C., and therefore, these persons were wrongly convicted under Section 114 I. P. C.”

8. It is, therefore, apparent that the Court had concluded that some elders remained presence for such marriage, which is

performed by 'antarpāt', 'mangalashtakes' and 'sprinkling rice', would not mean that they abetted and aided the illegal marriage.

9. In the Prakash Limbaji Dhole judgment, this Court noted in paragraph No.8 that there was no direct evidence with regard to the offence. It was, however, concluded that if there are sufficient grounds and if there is some material before the Magistrate, process can be issued after the material is evaluated and subjected to meticulous scrutiny.

10. In the instant case, the proximity in relationship between the petitioners and petitioner No.1 can not be ignored. Accused No.1 and 2 (second wife) is the married couple. Accused No. 6 and 7 are the elder Uncle and Aunt (Mama and Mami) of petitioner No.1. Accused No. 8 and 9 are the younger Uncle and Aunt of the petitioner No.1. Accused No.10 is the maternal Aunt of the petitioner No.1 (Mother's Sister). Accused No.11 and 12 are the mother and father of the second accused (second wife). Accused No.13 and 14 are the brothers of the accused second wife. Accused No.15 is the sister of accused

No.2 second wife.

11. It also can not be ignored that this marriage ceremony was arranged in the residence of accused No.1. It was a closed door ceremony and apparently no outsider was invited probably with the intention of keeping or maintaining secrecy of the second marriage. There is no material at this stage on record to indicate that it was a public ceremony. The contention of the complainant in paragraph No.5 would, therefore, indicate that the marriage was solemnized in secrecy within the four walls of the residence of the petitioner No.1. Prima facie, it, therefore, appears that the intention of the petitioners was to maintain secrecy about the second marriage and ensure that the complainant /first wife would not get to know the solemnization of the second marriage.

12. The complainant has specifically averred in her complaint from paragraph No.5 onwards as regards the roles played by the petitioners and their participation in the marriage conducted in secrecy. The Trial Court has considered these aspects and has issued

process against the accused. The instant case, in my view, falls under the second explanation to Section 107 of the Indian Penal Code. The possibility that some of the petitioners could be convicted cannot be ruled out at this stage, but it also can not be presumed that no case has been made out against the petitioners in the light of the specific contentions set out in the complaint and the manner in which the marriage is solemnised in secrecy within the four walls of the house of the accused husband.

13. The reports cited would therefore be of no assistance to the petitioners for the reasons recorded hereinabove.

14. Considering the above, I do not find that the issuance of process and the judgment of the learned Sessions Judge Nandurbar could be termed as being perverse or erroneous.

15. This petition being devoid of merit is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)