

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr.M.P. No. 679 of 2012

- Laxmichand Kamde, aged about 41 (40) years, S/o Devkaran Kamde,
R/o Police Line, Qr. No. P.O. 12, Raipur (Chhattisgarh)

---- Petitioner

Versus

- Smt. Yogita Kamde, aged about 37 Years, W/o Laxmichand Kamde,
R/o Bhim Nagar, Gondiya (Maharashtra).

---- Respondent

For the Petitioner	: Shri Prakash Tiwari, Advocate
For Respondent	: Shri Ashok Soni, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

ORDER

05.09.2017

(1) Heard.

(2) Petition under Section 482 of Cr.P.C. has been brought with a prayer to set aside the order dated 25.07.2012 passed by the 5th Additional Sessions Judge, Raipur in Criminal Revision No. 199/12.

(3) It is submitted by counsel for the petitioner that marriage of petitioner with

respondent was solemnized on 04.06.2000. Cause of dispute between them is that the respondent voluntarily left her matrimonial house to her paternal home on 11.04.2004. Petitioner had filed a suit under Section 13 of Hindu Marriage Act, 1955 (henceforth "Act, 1955") before the Family Court, Raipur. The said Court, vide its Judgment dated 13.10.2006 passed in Case No. 105-A/05, decreed the suit *ex parte* in favour of petitioner and the marriage between the petitioner and respondent was dissolved.

(4) It is submitted by counsel for the petitioner that the respondent filled an application under Order 9 Rule 13 of C.P.C. read with Section 10 of Family Court Acts, before the trial Court on 06.11.2006. No prayer was made by her for any prohibitory order against the petitioner. Petitioner on the basis of existing divorce with respondent, got remarried on 14.03.2008. Subsequently, learned Family Court, Durg allowed the application of respondent and the *ex parte* Judgment and decree dated 13.10.06 was set aside and thereafter the divorce petition was also dismissed by order dated 01.08.2011.

(5) Respondent filed a complaint before the Court of Judicial Magistrate First Court, Raipur for prosecution of petitioner for offence under Section 494 of IPC, in which, the trial Magistrate passed the order dated 08.06.2012 and dismissed the complaint case filed by the respondent. Respondent preferred Criminal Revision No. 199/12, which had been allowed by the impugned order dated 25.07.2012 and complaint case was registered against the petitioner.

(6) Counsel for the petitioner has made submissions that the *ex parte* decree of divorce was in force, merely by presentation of an application under Order 9 Rule 13 of Section 10 of Family Courts Act by the respondent, it cannot be presumed that the *ex parte* decree passed is no longer in

existence. He placed reliance upon the Judgment of Supreme Court in the matter of **Gopal Divedi Vs. Prabha Divedi** reported in **2002 10 SSC 216** in which, the Supreme Court has held that *ex parte* decree of divorce was granted on 06.07.1990, thereafter the husband was remarried with another woman on 25.05.1993, in the meanwhile on prayer made by first wife *ex parte* decree was set aside on 31.03.1994 on this basis that the first wife filed a complaint against the petitioner on 28.03.1995. In that case, Supreme Court found that the exercise of conducting trial to be futile and quashed the criminal proceeding.

(7) Reliance has also been placed in the case of **Sundar babu & Ors. Vs. State of Tamilnadu** reported in **2009 (14)SCC 244** relying on the judgment of Allahabad High Court in the case of **S. P. Srivastava Vs. Prem Latat Srivastava** reported in **1980 AIR Allahabad 336**, in which, it has been held that Section 15 of the Hindu Marriage Act, 1955 puts bar to the second marriage during the period of limitation provided for filing appeal and in case the appeal is filed then until its final disposal. There has to be a case to be covered under Section 15 of the Act of 1955. Petitioner also relied upon the judgment of the Division Bench of the Madhya Pradesh High Court in the matter of **Mohan Murari Vs. Kusum Kumari** reported in **AIR, 1965 MP194** in which it was held that marriage between the petitioner and respondent having been annulled the status of husband and wife each other seized to exist, in such case anyone of the party wants to preserve the *status quo* he or she should apply for prohibitory order for restraining the other party from remarrying.

(8) Counsel for the respondent has submitted that the facts in the case of **Krish Gopal Divedi** (Supra) are different from the facts of the present case.

The petitioner had noticed that application to set aside the *ex parte* decree had been filed by the respondent on 06.11.06 and it was after passing on more than one year the petitioner has remarried and committed the offence of bigamy. The order of Family Court setting aside the *ex parte* decree on 24.07.2008 has restored the status of petitioner and respondent as husband and wife and thereafter dismissal of divorce petition represented by the petitioner on 01.08.2011 has further confirmed the continuation of the status of the petitioner and respondent as husband and wife and, therefore, for these reasons the complaint filed by respondent against the petitioner is maintainable in law.

(9) Heard counsel for both the parties and perused all the documents on records.

(10) Section 494 of the Indian Penal Code provides as under :-

“ 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 a punishable offence. It is similarly provides in Section 17 of Hindu Marriage Act, 1955.”

(11) It is undisputed fact that the petitioner obtained *ex parte* decree against the respondent by judgment and decree dated 13.10.06 from the Family Court. Although an application under Order 9 Rule 13 of CPC read with Section 10 of Family Court Act, 1984 was filed before the Family Court on 06.11.06 but no prayer was made to pass any prohibitory order against the petitioner to restrain him from remarrying, consequent to that petitioner remarried on 14.03.2008 and it was after the performance of this second

marriage, the learned Family Court has passed order setting aside the Order dated 13.10.2006 and thereafter the divorce petition was also dismissed on 01.08.2011.

(12) Legal restraint for remarrying is provided under Section 15 of the Hindu Marriage Act, 1955:-

“Divorced persons when may marry again.- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.”

(13) It is crystal clear from the reading of Section 15 of Hindu Marriage Act, 1955, that the legal restraint is applicable only in case when a decree is appealed against, this Section does not provide in any manner when an application is moved for setting aside *ex parte* decree. Petitioner has not performed second marriage within the period of limitation to file an appeal. There is no such provision in Hindu Marriage Act, 1955 or in any other Act to create such effect that filing of an application for setting aside *ex parte* decree of divorce shall be regarded as the suspension of the decree for dissolution of marriage and there is no any other provision under the Act of 1955 that the decree of divorce shall not be regarded as final in any other condition except as provided under Section 15 of Hindu Marriage Act, 1955.

It was held in **Mohan Murari Vs. Kushumkumari** (Supra)

“9... In this State of the law, there was no legal incompetency in the respondent wife for contracting a re-marriage once her marriage with the appellant had been annulled by a decree of nullity. The marriage between the appellant and the respondent having been annulled, their

status as husband and wife of each other had ceased to exist. If the appellant wanted the status quo to be preserved till the final decision of the appeals, he should have applied for a prohibitory order restraining the respondent from marrying again till the appeals filed by him had been decided. But, in the absence of any such order, the respondent was no more the wife of the appellant and there was no provision in law which created any impediment to her re-marriage. No provision of Section 5 of the Act which laid down the conditions of a valid Hindu marriage was violated. The re-marriage was thus a valid marriage. It was neither void nor voidable. It could not be annulled or dissolved for the reason that it was contracted during the pendency of the appeals, nor could it be affected by the ultimate decision of the appeals, even if it went in favour of the appellant. Unfortunately, for the appellant, the law has made no provision for such a contingency, just as it has made in Section 15 in the case of a decree of divorce.”

(14) As laid down by the High Court of M. P in the above referred case (supra), it appears that there is a lacuna in the law which needs rectification, which may be done if the legislative takes notice of this fact. In the case in hand it is concluded that the relevant date on which petitioner remarried, that is on 14.3.08 the *ex parte* decree of divorce was in existence and the marriage between petitioner and respondent was not in existence in accordance with law. Hence, the act of remarrying on the said date can not be regarded as covered by the definition of Section 494 of IPC or Section 17 of Act of 1955. Certainly a situation has been created, after the *ex parte* decree of divorce is set aside and subsequently divorce petition has been dismissed, but the situation under which the second marriage was performed by the petitioner can not be regarded as unlawful at the outset.

Respondent may seek relief against the petitioner in other manner in accordance with law but the prosecution of petitioner on the basis of complaint by respondent is certainly misuse or abuse of the process of law. Hence, for the reasons aforesaid and on the basis of legal position as discussed above, this petition deserves to be allowed.

(15) Accordingly, this petition is allowed. The criminal proceeding against petitioner by the impugned order dated 25.07.2012 in criminal revision No. 199/12 is hereby set aside.

(16) No order as to costs.

Sd/-
(Rajendra Chandra Singh Samant)
Judge