

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1850 OF 2017

1. Deepak Laxminarayan Varma, Age 42 years,
Occ.Unemployed;
2. Smt.Ramdulari Laxminarayan Varma
@ Ramdulari Ramakuber Shrma, Age 62 years,
Occ.House wife,
Both R/o.249/D-45, Someshwar CHS, Sector-2,
Charkop, Kandivali (W), Mumbai-67.
3. Mrs.Sunita Santosh Gangawane, Age 41 years,
Occ.House wife,
4. Mrs.Santosh Vasant Gangawane, Age 47 years,
Occ.Business,
Both R/o.B/303, Shri Chintamani Hsg.Soc;
Industrial Colony, M.G.Road, Goregaon (W),
Mumbai-62.
5. Ms.Sangeeta Laxminarayan Varma, Age 43 years,
Occ.Business, R/o.B/09, Poppy CHS,
Ram Nagar, Borivali (W), Mumbai-92. Petitioners

versus

1. The State of Maharashtra.
2. Mrs.Kiran Deepak Varma
@ Kiran Khimanand Pandey,
24/A, Milton CHS, Kulupwadi Road,
Off.W.E.Highway, Borivali (East),
Mumbai-400 066. Respondents

Mr.S.J.Shirke I/by Sagar Bhandare for petitioners.
Mr.Santosh Vhatkar I/by Santosh Vhatkar & Associates for
respondent no.2.
Mr.P.H.Gaikwad, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the Judgment : 5th July 2018
Date of pronouncing the Judgment : 7th January 2019

JUDGMENT :

1. The petitioners have invoked Article 227 of Constitution of India and Section 482 of Code of Criminal Procedure, 1973 (Cr.P.C) for challenging the order issuing process dated 17th April 2015 passed in CC No.427/SW/2013 and order dated 21st March 2017 passed by Additional Sessions Judge in Criminal Revision Application No.84 of 2015.
2. The respondent no.2 had initiated the impugned proceedings by filing a complaint before the Court of Additional Chief Metropolitan Magistrate, Borivali, at Mumbai, for offences under Sections 494, 495, 107, 109, 112, 114, 120-B, 192, 200, 406, 415, 417, 418, 419, 420, 463, 464, 465 r/w 34 of Indian Penal Code (IPC).
3. Brief facts as alleged in the complaint are as follows.
4. The complainant got acquainted with petitioner no.1 and subsequently they got married on 11th February 2005 as per Hindu Vedic rites. The complainant was harassed by the accused. She was thrown out of matrimonial home. The petitioner no.1 filed divorce petition before the Family Court, at Bandra, Mumbai. The said petition was dismissed on 27th January 2012. The complainant forwarded letter dated 21st May 2012 for restoration of conjugal rights. Prior to the marriage of complainant, the petitioner no.1 was already married to Smt.Sunit Deepak Varma, which was not disclosed to the complainant. After the marriage with the complainant, petitioner no.1 again got married for the third time

with one Neelu Sharma. After the said wedlock daughter namely Disha was born. The complainant obtained medical certificate with regards to delivery of Neelu Sharma giving birth to a female child on 27th August 2010. The petitioner no.1 thereby committed the offence under Section 494 of IPC. The complainant also obtained extract of birth register from the Registrar of Birth, Nagar Nigam, Varanasi, Uttar Pradesh. The complainant initiated proceedings under Protection of Women from Domestic Violence Act. The petitioner no.1 is not naturally handicapped and the deformity in his physis was due to improper operation. He had forged documents while obtaining handicap certificate. The complainant lodged first information report with Borivali Police Station on 22nd January 2013 vide CR No.31 of 2013 for offences under Sections 498A, 406, 506-II, 494 along with Section 34 of IPC. However, since the offence u/s 494(4) of IPC was to be tried separately, the complainant intended to forward appropriate application to avoid double jeopardy. During the course of investigation the third wife of petitioner no.1 was called for recording statement by Borivali Police Station wherein she stated that the father of her daughter namely Disha is petitioner.

5. Learned Metropolitan Magistrate, 26th Court, Borivali, Mumbai directed Borivali Police Station to conduct inquiry and submit report under Section 202 of Cr.P.C. Thereafter inquiry was conducted by police and report was submitted u/s 202 of Cr.P.C on 27th February 2015. Learned Magistrate thereafter issued process against the accused for the aforesaid offences. The petitioners preferred Criminal Revision Application No.84 of 2015 before the Sessions Court challenging the order of process. The said revision application was dismissed by order dated 21st March 2017.

6. Learned advocate for petitioners submitted that the complaint was initiated with mala fide intentions to cause harassment to the petitioners. The respondent no.2 has launched several proceedings to cause harassment to the petitioners. There is no evidence to establish the offences alleged in the complaint. There is no proof of marriage between the petitioner no.1 and Neelu Sharma. Without proof of marriage, the charge of bigamy does not attract. The order passed by learned Magistrate issuing process indicates non application of mind as the essential ingredients of Section 494 of IPC are not made out. The allegations with regards to third marriage are general and vague and the same are based on surmises and conjectures. The evidence is not enough to proceed against the petitioners. The petitioner nos.2 to 5 are relatives of petitioner no.1 against whom no specific allegations of abetment have been made out. Learned Magistrate has issued process without application of mind as the complaint does not make out a case of bigamy. There is no averment of performing the essential ceremonies in accordance with custom or religion of parties. The police report tendered pursuant to the directions of Court did not show that there was performance of marriage between petitioner no.1 and Neelu Sharma; and therefore, there was no material to charge the accused for offence of bigamy. In the absence of any evidence, the petitioner nos.2 to 5 are dragged in the proceedings for aiding and abetting the bigamous marriage. Reading the complaint as it is, it does not spell out the required ingredients to constitute the alleged offences. If the marriage is not valid, it is not a marriage in the eye of law. Mere fact that a man and woman are living together as husband and wife, does not give them status of husband and wife. Unless there is proof of solemnization of

valid subsequent marriage during the subsistence of earlier marriage, the case u/s 494 of IPC cannot be made out. To constitute an offence u/s 494 of IPC, it has to be established that the accused must have contracted the first marriage while the first marriage was subsisting, the second spouse must have contracted the second marriage and both the marriages must be valid in the sense that necessary ceremonies required by the personal law governing the parties had been performed. The Sessions Court has rejected the revision application erroneously. There is no averment in the complaint about the involvement of the accused-petitioner nos.2 to 5. the complaint is silent as to when and whether the marriage was performed. The Court ought to have examined the authenticity of the allegations in the complaint. The report submitted by police u/s 202 of Cr.P.C did not disclose any evidence with regards to the contravention of the aforesaid provisions. The complainant has made repeated complaints with regards to the bigamy.

7. Learned advocate for petitioner relied upon following decisions :

(a) Priya Bala Ghosh Vs. Suresh Chandra Ghosi (AIR-1971-SC-1153);

(b) Binoy Kumar Gupta Vs. Leela Gupta and another (2007(4)-CHN-491);

(c) Dr.Prem Mittal Vs. State of Rajasthan and others (II(2000)DMC-754);

(d) Binoy Kumar Gupta Vs. Leela Gupta and anr (2007(4)-CHN-491);

(e) Kulwant Singh and others Vs. Surjit Kaur (2002-CrLJ-3443);

- (f) Seema Rani Vs. Gurpreet Kaur (Punjab-Haryana High Court in Cri.Misc.No.M-21862 of 2009, decided on 10-11-2009);
- (g) Smt.Dhara Dei Vs. Prafulla Swain and others (1984-II-OLR-621);
- (h) Kanwal Ram and others Vs. The Himachal Pradesh Administration (AIR-1966-SC-614);
- (i) Bhaurao Shankar Lokhande and another Vs. The State of Maharashtra and another (1965(2)-Cri.L.J.-544);
- (j) Modi Bala Krishna Ramaraju Vs. Bodi Thirupathamma @ Tirumala Devi and others (1975-CRI.L.J.-208).

8. Learned advocate for respondent no.2 submitted that prima facie case is made out against the accused. The averments in the complaint, report submitted by police u/s 202 of Cr.P.C, the evidence collected by the police, statements recorded during the course of inquiry and the material on record, make out the case for offences alleged in the complaint. This is not the stage to scrutinize and appreciate the evidence. There are documents which establish existence of marriage between the petitioner no.1 and Neelu Sharma. It is further submitted that there is no infirmity in the order issuing process as well as order of the Sessions Court dismissing the revision application. The process was issued by the Trial Court on 17th April 2015. Smt.Neelu Sharma is residing with the petitioners and she gave birth to two children of petitioner no.1. The accused are delaying the trial. They were avoiding service of summons. This Court had expedited the trial. The Sessions Court has rightly rejected the revision application by assigning reasons. It is further submitted that the complaint discloses the offence against the accused. It is submitted that the petitioner no.1 has solemnized the third marriage. The said fact is fortified by photographs. The

petitioner nos.1 and 2 were aware that the marriage between the petitioner no.1 and respondent no.2 was solemnized in 2005 and during the subsistence of said marriage respondent no.2 in connivance with other accused, had performed marriage with Neelu Sharma. The documents relating to birth of the children born to Neelu Sharma indicate the name of petitioner no.1 as the father of children who were born to Neelu Sharma. The petitioner no.1 had filed a divorce petition which was dismissed on 27th January 2012. Respondent no.2 thereafter forwarded a letter to petitioner no.1 for restitution of conjugal rights.

9. It is further submitted that there are several documents which indicate that Smt.Neelu Sharma is the wife of petitioner no.1. Reliance is placed on the certificate issued by Priya Maternity and Nursing Home, Varanasi, Uttar Pradesh, which mentions that Mrs.Neelu Varma, w/o Deepak Varma has given birth to a female child on 27th August 2010. She was admitted in the hospital on 27th August 2018 and discharged on 31st August 2010. The complainant has also obtained the birth certificate issued by Deputy Registrar (Birth and Death), Varanasi with regards to birth of Disha Verma born to Neelu Verma which mentions the name of petitioner no.1 as father. It is further submitted that ration card issued in the name of petitioner no.5 reflects address of 9B, Poppy CHS, Ram Nagar, Birivali (West), Mumbai. It contains names of petitioner no.1, Neelu and Nisha. The status of Neelu is shown as sister-in-law of petitioner no.5 (wife of petitioner no.1) and Disha as niece. Subsequently the names of Deepak, Neelu and Disha were deleted from ration card on 26th April 2011. It is submitted that petitioner no.5 was aware and had knowledge about the marriage between petitioner no.1 and

Smt. Neelu Sharma which is borne out by the aforesaid documents. She had aided and abetted petitioner no.1 in performing marriage with Neelu. Reliance is also placed on pan card of Neelu Deepak Varma, which shows that petitioner no.1 is her husband. The birth certificate issued by Municipal Corporation of Greater Bombay was also placed for consideration with regard to registration of birth of child born on 19th September 2014 to Neelu Deepak Varma and Deepak Varma (petitioner no.1). This certificate also bears the permanent address of parents. It is therefore submitted that there is voluminous evidence to show that the petitioner no.1 and Neelu Sharma had solemnized their marriage. All the other accused have aided and abetted him. It is therefore submitted that the petition is devoid of merits. The complainant must be given an opportunity to prove the charges during trial.

10. Learned counsel for petitioners, however, submitted that the documents which were relied upon by the respondent-complainant before this Court were not part of the complaint and no reliance can be placed on such documents.

11. Learned counsel for respondents relied on following decisions :

(a) Smt. Chand Dhawan Vs. Jawahar Lal and others (1992)2-SCR-837;

(b) Koppiseti Subbharao @ Subramaniam Vs. State of A.P. (2009)3-SCC-688.

12. I have perused the documents. The grievance of respondent no.2 is that during subsistence of her marriage with petitioner no.1 which was solemnized on 11th February 2005, the petitioner no.1 has

performed another marriage with Smt. Neelu Sharma. The contention of the petitioners, however, is that there is no evidence to support the said allegations. Merely on the basis of surmises and conjectures, the accused cannot be prosecuted for the said offences. The complaint indicates that the complainant was harassed by the accused. He had performed third marriage with Neelu Sharma. It is pertinent to note that pursuant to the directions of the Court the inquiry was conducted by parties u/s 202 of Cr.P.C and the said report was submitted to the Court. The report indicates that inquiry was conducted with respondent no.2 and petitioner no.1. The petitioner no.1 was in relationship with Neelu Sharma and out of the said wedlock daughter was born on 27th August 2010. The documents received from the Department of Registration of Birth/Death of Municipal Corporation of Greater Bombay shows that second child was born to Neelu Sharma on 19th September 2014 and name of petitioner no.1 is shown as father of the child, which indicates that the marriage was solemnized between petitioner no.1 and Smt. Neelu Sharma, and he is suppressing the details with regards to the place and registration of marriage. However, on perusal of the birth certificate produced by the complainant, it is apparent that residential address was shown as 249, D-45, Someshwar Society, Sector-2, Charkop, Kandivali, Mumbai. It is their permanent address. It is further stated that the petitioner no.1 had stated during the inquiry that Smt. Neelu Sharma is residing with Smt. Sangeeta Laxminarayan Varma at B-9, Poppy CHS, Ram Nagar, Borivali (West), Mumbai. In spite of summoning Smt. Neelu Sharma, her mother Geeta Sharma, sister Babli Sharma and brother Mukesh Sharma, they did not remain present before the inquiry officer. It was also mentioned that there is likelihood that other accused had

knowledge of the marriage between the petitioner no.1 and Neelu Sharma and therefore they are avoiding inquiry. It was further mentioned that the accused were aware about marriage between petitioner no.1 and Smt.Neelu Sharma and thereby performed the said marriage and cheated the complainant. However, there is no clear evidence against them. The report also refers to certificate with regards to disability of petitioner no.1. On the basis of said report the Trial Court had issued process. The statements of some of the accused were recorded. The petitioner no.5 has shown ignorance between the relationship of petitioner no.1 and Neelu Sharma. It appears from the documents that Neelu Sharma was residing with petitioner no.1 and her name was subsequently deleted from the ration card. The relationship reflected in the ration card indicate that Neelu is sister-in-law of petitioner no.5. The ration card also bears the names of one of the daughter of Neelu Sharma and petitioner no.1. From the record it is apparent that prima facie there is evidence to proceed against the petitioner no.1 and petitioner no.5. As far as petitioner nos.2 to 4 are concerned, there is nothing on record to show connivance except inference. The contention of the petitioner is that there is no proof of performance of marriage. However, there are several documents which indicates that the petitioner no.1 and Neelu Sharma have projected themselves as husband and wife and petitioner no.1 is also shown as father of two children born to them. The complainant must be given an opportunity to prove her case at trial and at this stage the entire proceedings cannot be quashed. Although petitioner no.5 during recording of her statement dated 11th December 2012 had stated that she is not aware of the relationship between petitioner no.1 and Smt.Neelu Sharma, the ration card which was issued in her name

and bearing names of Smt.Neelu Sharma and petitioner no.1 as well as their daughter speaks otherwise. At this stage, however, it is not possible to dismiss the complaint against petitioner no.1 and petitioner no.5 considering the nature of evidence relied upon by respondent no.2. However, in the absence of evidence against others, even prima facie, they cannot be subjected to ordeal of facing prosecution. Thus, the proceedings as against petitioner nos.2 to 4 are required to be quashed and set aside. The circumstances put forth by the complainant, prima facie, indicate that the petitioner no.1 and Neelu Sharma were living together as husband and wife. The complainant has relied upon certain circumstances including documents and in such eventuality she must be given an opportunity to prove the same during trial. The involvement of petitioner nos.1 and 5 is apparent, although there is nothing to proceed against other accused.

13. The decisions relied upon by both the sides relate to offences u/s 494 and 495 of IPC. It is the settled principle of law as to what is the requirement to constitute said offences. Most of the said decisions were delivered during the trial. In the present case, the process was issued against accused.

14. In the light of aforesaid observations, I pass following order :

ORDER

- (i) Criminal Writ Petition No.1850 of 2017 is partly allowed;
- (ii) The impugned proceedings arising out of CC No. 427/SW/2013 and impugned order dated 21st March 2017 passed by Additional Sessions Judge, at Dindoshi, in Criminal

Revision Application No.84 of 2015, are quashed and set aside as against petitioner nos.2 to 4;

(iii) The writ petition as against petitioner nos.1 and 5 stands dismissed.

(PRAKASH D. NAIK, J.)

MST