

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Reserved on : 06.09.2018

Pronounced on :11.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

CRL.OP.No.18688 of 2016

and

CRL.MP.No.8781 of 2016

1. Palanivel

2. Surya

3. Jayalakshmi

4. Ponboopathi

5. Poomathi

6. K.S.Rajendran

7. C.Dharmaraj

...Petitioners/Accused

versus

Savitha

...Respondent

Prayer: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure to call for the records in C.C.No.116 of 2016 pending on the file the Judicial Magistrate, Kangeyam and quash the same.

For Petitioners : Mr.M.R. Thangavel

For Respondent : Mr.N. Manokaran

सत्यमेव जयते ORDER

This petition has been filed by the accused Nos.1 to 7 to quash the proceedings against them in C.C.No.116 of 2010 on the file of the Judicial Magistrate, Kangeyam.

2. The respondent herein has filed a private complaint stating that the marriage between the first petitioner and herself was solemnised on 03.12.2008 and they were also blessed with a male child on 02.10.2010. She further stated that the first petitioner has filed a petition for divorce in HMOP.No.72 of 2010 on the file of the Sub-Judge, Dharapuram and the same was allowed on 18.11.2014. As against the said order, she filed an appeal in CMA.No.5 of 2015 on the file of the Additional

District Judge, Dharapuram and the said appeal was allowed on 27.01.2016. During pendency of the said appeal, the first petitioner has contracted second marriage with the second petitioner on 11.03.2015 in Bala Vinayagar Temple Varadhampalayam, Kangeyam Taluk, Tiruppur District. The other petitioners abetted the said second marriage and hence, the first petitioner is liable to be punished u/s.494 IPC and the petitioners 2 to 7 are liable to be punished u/s.494 r/w. 109 IPC.

3. Based on the aforesaid complaint, the learned Judicial Magistrate, Kangeyam, has taken the case on file in C.C.No.116 of 2016 and issued summons to the accused Nos.1 to 7. After receipt of summons, the accused Nos.1 to 7 have filed the present petition under Section 482 Cr.P.C., to quash the proceedings against them in the above C.C.

4. The learned counsel for the petitioners has submitted that the marriage between the first petitioner and the respondent herein was dissolved by the Sub-Court, Dharapuram in HMOP.No.72 of 2010 by the order dated 18.11.2014 and only thereafter, on 11.03.2015, the marriage between the petitioners 1 and 2 was solemnised and on that date, there was no marriage subsisting between the first petitioner and the respondent herein. He further submitted that as per Order 41 Rule 5 CPC, the appeal shall not operate as a stay unless a stay is granted by the appellate court, but in this case, the respondent has not obtained any stay before the appellate court and hence, there was no bar for contracting second marriage by the first petitioner. He further submitted that the respondent herein has taken summons to the first petitioner in the appeal only on 12.03.2015 whereas the marriage between the petitioners 1 and 2 was solemnised on 11.03.2015 itself and therefore, the petitioners cannot be prosecuted for the alleged offence under Sections 494 and 494 r/w.109 IPC.

5. In support of the aforesaid contentions, the learned counsel for the petitioners has relied upon the following decisions:-

1. Krishna Gopal Divedi Vs. Prabha Divedi (2002) 10 SCC 216
2. Anurag Mittal Vs. Shaily Mishra Mittal (Civ.A. 18312 of 2007 on the file of the Hon'ble Supreme Court Judgment dated 24.08.2018) reported in CDJ 2018 SC 872

6. Per contra, learned counsel for the respondent/complainant has submitted that as per Section 15 of the Hindu Marriages Act, 1955 in the case of dissolution of marriage, the second marriage shall be lawful only if it is held after expiry of appeal time or an appeal has been presented but has been dismissed. He further submitted that in this case,

appeal has been filed within the limitation and as such, the petitioners should have waited till the disposal of the said appeal, but during pendency of the appeal, the petitioners 1 and 2 got married and therefore the provisions of Sections 494 and 494 r/w.109 IPC will attract and hence he prayed to dismiss the petition. In support of the aforesaid contentions, he relied upon the decision in Jasbir Kaur Vs. Kuljit Singh (2008) 3 PLR 192.

7. It is an admitted fact that the marriage between the first petitioner and the respondent herein was solemnised on 03.12.2008 as per the Hindu Rites and Customs. It is also an admitted fact that the first petitioner herein has filed a petition in HMOP.No.72 of 2010 on the file of the Sub-Judge, Dharapuram, to dissolve the marriage which was solemnised between himself and the respondent herein. It is also an admitted fact that the learned Sub-Judge by the order dated 18.11.2014 has allowed the said HMOP and dissolved the said marriage.

8. It is seen from the typed set of papers filed by the petitioners herein that against the order passed in HMOP.No.72 of 2010, the respondent herein has filed an appeal in CMA.No.5 of 2015 on the file of the Additional District Judge, Dharapuram on 19.01.2015 itself. The endorsement made in the said appeal by the District Court, Tiruppur, would show that the appeal was filed in time. The learned District Judge, Tiruppur, after taking the appeal on file, has made over the said appeal to the Additional District Judge, Dharapuram, for disposal in accordance with law. The appeal was allowed by the Additional District Judge, Dharapuram, on 27.01.2016 and the order passed by the Sub-Judge, Dharapuram in HMOP.No.72 of 2010 dissolving the marriage was set aside. According to the petitioners, as against the order passed by the Additional District Judge, Dharapuram in CMA.No.5 of 2015, they have filed CMSA.No.20 of 2016 before this court and the same is still pending.

9. At this juncture, it would be relevant to refer to Section 15 of the Hindu Marriages Act, 1955, which reads thus:

"15. 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."

10. A plain reading of the aforesaid provision shows that it shall be lawful for either party to marry again after dissolution of a marriage only after expiry of the appeal time when no appeal has been presented; if any appeal has been presented only after dismissal of the said appeal. In this case, an appeal was filed in time. But without making any enquiry as to whether any appeal was filed against the order passed by the Sub-Judge, Dharapuram in HMOP.No.72 of 2010, the first petitioner got married the second petitioner on 11.03.2015. Therefore, it is clear that the first petitioner has violated the mandatory provision of Section 15 of the Hindu Marriages Act, 1955.

11. In Krishna Gopal Divedi Vs. Prabha Divedi, (supra), the husband secured a exparte decree divorcing his first wife on 16.07.1990 and married another lady on 25.05.1993. Thereafter, the first wife filed a petition to set aside the exparte decree and the same was allowed on 31.03.1994. Thereafter, the first wife filed a complaint against her husband on 28.03.1995 alleging that he has committed an offence under Section 494 IPC. To quash the said proceedings, the husband has filed a petition under Section 482 Cr.P.C., before the High Court. The said petition was dismissed. As against the same, he filed an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court taking into consideration of the fact that at the time of contracting second marriage by the husband, the marriage with the first wife was not in subsistence and hence, it held that the appellant/husband cannot be convicted for the offence under Section 494 IPC and accordingly, quashed the criminal proceedings. But in the present case, appeal was filed in time and only during pendency of the appeal the first petitioner contracted second marriage. Therefore, the aforesaid decision will not apply to the facts of this case.

12. In Anurag Mittal Vs. Shaily Mishra Mittal, (supra), the Hon'ble Supreme Court in paragraph No.18 has observed as follows:-

"18. Section 15 of the Act provides that it shall be lawful for either party to marry again after dissolution of a marriage if there is no right of appeal against the decree. A second marriage by either party shall be lawful only after dismissal of an appeal against the decree of divorce, if filed. If there is no right of appeal, the decree of divorce remains final and that either party to the marriage is free to marry again. In case an appeal is presented, any marriage before dismissal of the appeal shall not be lawful. The object of the provision is to provide protection to the person who has filed an appeal against the decree of

dissolution of marriage and to ensure that the said appeal is not frustrated. The purpose of Section 15 of the Act is to avert complications that would arise due to a second marriage during the pendency of the appeal, in case the decree of dissolution of marriage is reversed. The protection that is afforded by Section 15 is primarily to a person who is contesting the decree of divorce."

13. From the aforesaid decision, it is clear that as per Section 15 of the Hindu Marriages Act, the second marriage by either party shall be lawful only after dismissal of an appeal against the decree of divorce, if filed. The object of the provision is to provide protection to the person who has filed an appeal against the decree of dissolution of marriage and to ensure that the said appeal is not frustrated. It is also clear that the purpose of Section 15 of the said Act is to avert complications that would arise due to a second marriage during the pendency of the appeal, in case the decree of dissolution of marriage is reversed. Therefore, the aforesaid decision will not help the petitioners. On the contrary, it is supporting the case of the respondent.

14. In *Jasbir Kaur Vs. Kuljit Singh*, (supra), the Punjab-Haryana High Court in paragraph No.17 has observed as follows:

"17.Section 15 of the 1955 Act declares. According to Section 15 of the Act, a party to the dissolved marriage could marry again if period of filing an appeal has expired or the appeal has been dismissed. It necessarily implies that the decree holder has to make inquiries that no appeal has been filed within the period of limitation or that the appeal has been dismissed. Such a spouse cannot sit at home and wait the summons to come because service of summons may not necessarily be effected on the winning spouse within the period of limitation. "

From the aforesaid decision also, it is clear that as per Section 15 of the Hindu Marriages Act, a party to the dissolved marriage could marry again if the period of filing an appeal has expired or if any appeal has been filed and only after dismissal of the said appeal. It is also clear that the decree holder has to make enquiries that no appeal has been filed within a period of limitation or that the appeal has been dismissed and as such, the spouse cannot sit at home and wait that summons will come to him. Therefore, before contracting second marriage, the first petitioner herein should have made enquiries in the appellate court as to whether any appeal has been filed within a period of limitation. In this case, the first petitioner without

making any enquiry in the appellate court as to whether any appeal has been filed within the period of limitation, has married the second petitioner. Therefore, this court is of the view that a prima facie case is made out against the petitioners and hence the proceedings against them cannot be quashed.

15. In the result, this petition is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Judicial Magistrate,
Kangayam.

2. The Chief Judicial Magistrate,
Tiruppur District.

+1 cc to M/s.N.Manokaran, Advocate SR.No.3520

Order made in

CRL.OP.No.18688 of 2016

and

CRL.MP.No.8781 of 2016

RK(CO)

CSL/06.02.2019

सत्यमेव जयते

WEB COPY