

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.66 OF 2003**

The State of Maharashtra)....Appellant

V/s.

Satish V. Pabalkar)
Adult, Occupation Service)
Residing at 122, Wanawadi Gaon,)
Pune)Respondent

Ms Anamika Malhotra, APP for State
None for Respondent

**CORAM : K.R.SHRIRAM, J.
DATED : 16th OCTOBER 2020**

ORAL JUDGMENT :

1 This is an appeal impugning the judgment and order dated 4-9-2001 passed by the Additional Sessions Judge, Pune, setting aside the order of conviction passed by JMFC Kirkee, Pune, against respondent under Sections 494 (*Marrying again during lifetime of husband or wife*), 495 (*Same offence with concealment of former marriage from person with whom subsequent marriage is contracted*) and 496 (*Marriage ceremony fraudulently gone through without lawful marriage*) of Indian Penal Code. Originally, there were 4 accused. Accused no.1 was respondent herein, accused no.2 was the mother of accused no.1, accused no.3 was the sister of accused no.2 and accused no.4 was the colleague of accused no.1. Initially charge framed was for the offence punishable under Section 420 read with

Section 494 and 495 of IPC. Subsequently, fresh charge was framed by JMFC and it also included Sections 417, 419, 493, 495, 496 read with Sections 109, 114 and 34 of IPC. Trial Court acquitted accused nos.2, 3 and 4 and convicted accused no.1, who is respondent in the present appeal. Accused no.1 challenged the order of conviction and the Sessions Court by the impugned judgment and order allowed the appeal.

2 With the assistance of Learned APP Ms Malhotra, I have considered the records and proceedings and the impugned judgment.

3 Respondent who was accused no.1 had married original complainant Kumudini Gaikwad on 19-10-1995. On 20-10-1995, the said complainant alongwith accused no.1 went on a religious trip and returned by 4.00 p.m. same day. On 20-10-1995, in the evening Satyanarayan Puja was arranged in the house of accused no.1 where the relatives and friends of accused as well as complainant were present. After puja was over, a lady by name Priti Pabalkar came to the house of accused at about 8.00 p.m. and announced that she was already legally wedded wife of accused no.1 and that she had two children from the said marriage and she would also commit suicide by consuming poison. At that time complainant and her relatives came to know for the first time that accused no.1 was already married and accused nos.1, 2, 3 and 4 have suppressed that fact. On 22-10-1995, complainant lodged a complaint with the police. In the course of investigation of the said complaint, statement of Priti was also recorded on 27-10-1995 and Priti also lodged an FIR against accused nos.1 to 3 under Section 498A of IPC on 27-

10-1995. Some documents were seized by Investigating Officer from Priti and complainant also produced some documents before police. What happened to the complaint filed by Priti, nobody knows. While trial was in progress before JMFC, Priti has filed an affidavit stating that she was not married to accused no.1 and she was instigated by others to break the marriage of accused no.1 with complainant.

4 Trial Court came to conclusion that accused no.1 was married to Priti based on marriage certificate, which was produced before the Trial Court by prosecution. Priti, however, has not been examined and the warrants which were issued, could not be executed as she was not traced. Trial Court came to conclusion that non-examination of Priti, though would have been very material to the case, does not affect the case of prosecution. Without production of Priti, Trial Court came to a conclusion that accused no.1 was already married to Priti.

5 Sessions Court allowed the appeal on two main grounds: a) complainant would not come under the definition of aggrieved party mentioned under Section 198 of CrPC because performing second marriage itself is not legal and the second wife will not come under the meaning of wife; and b) prosecution has not proved beyond reasonable doubt that accused no.1 was already married to Priti.

6 As regards first ground is concerned, Sessions Court is not correct in as much as a complaint by second wife under Section 494 of IPC is maintainable. Essential ingredients for the offence under Section 494 is, (i)

accused must have contracted the first marriage; (ii) while the first marriage was subsisting accused has contracted second marriage; (iii) both the marriages must be valid in the sense necessary ceremonies governing the parties must have been performed. Appellate Court has not concluded that the second marriage of complainant has not been performed. Sections 494 and 495 of IPC does not state anywhere who can file the complaint. If, I accept the interpretation of the Sessions Court then, in a given situation first wife chooses not to file complaint that would mean that the offence is wiped out and monogamy sought to be achieved by means of Section 494, IPC, merely remains in statute book. Certainly, complainant should be an aggrieved person under Section 198 of CrPC, having regard to the scope, purpose, context and object of enacting Section 494, IPC and the prevailing practices sought to be curbed by Section 494, IPC. Moreover, Section 198(1)(c) of CrPC says that where the person aggrieved is a wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc. or with the leave of the Court, by any other person related to her by blood, marriage or adoption. In order to attract the provisions of Section 494 IPC both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties must have been duly performed. Though attempt was made before the Trial Court to prove that the second marriage was never performed, Trial Court did not accept the same and the Sessions Court has also not come to a conclusion that the second marriage did not take place. Therefore, in my

view, complainant could have maintained the complaint and would certainly be an aggrieved person under Section 198 of CrPC.

7 As regards Section 495, IPC is concerned, the concealment spoken of would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of former marriage, would also be entitled to lodge complaint for commission of offence punishable under Section 495, IPC. Section 495 begins with the words "whoever commits the offence defined in the last preceding Section.....". The reference to Section 494, IPC, in Section 495 makes it clear that Section 495, is extension of Section 494, and part and parcel of the same. Therefore, if the woman with whom the second marriage is performed by concealment of former marriage is entitled to file a complaint for commission of offence under Section 495, IPC, there is no reason why she is not be entitled to file complaint under Section 494, IPC.

8 I find support for this view in the judgment of the Apex Court in A. **Subhash Babu Vs. State of Andhra Pradesh & Anr.**¹ in which paragraphs 10 and 11 read as under:

"10. The contention that the respondent no. 2 is not an aggrieved person so far as commission of offences punishable under Sections 494 and 495 IPC is concerned, has no substance and cannot be accepted. Section 494 of IPC reads 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 punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

¹ AIR 2011 SC 3031

Whereas Section 495 of the IPC is as follows:-

"Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

As far as Section 494 IPC is concerned, the criminality attaches to the act of second marriage either by a husband or by a wife who has a living wife or husband, in a case in which second marriage is void by reason of its taking place during the life of such husband or wife. When a law, such as Section 11 of Hindu Marriage Act, 1955 declares that a second marriage by a husband, who has living wife, with another woman is void, for breach of Section 5 (i) of the said Act, it brings/attaches several legal disabilities to the woman with whom second marriage is performed. Say for example, she would not be entitled to claim maintenance from her husband even if she is inhumanly treated, subjected to mental and physical cruelty of variety of kinds etc. and is not able to maintain herself. Law of inheritance would prejudicially operate against her. She herself would suffer outrageous, wrong and absurd social stigma of being another woman in the life of the male who contracts second marriage with her. The members of the cruel society including her kith and kin like parents, brother, sister etc. would look down upon her and she would be left in lurch by one and all. When a Court of law declares second marriage to be void on a petition presented by husband who contracts the second marriage on the ground that he has a spouse living at the time of marriage, it only brings untold hardships and miseries in the life of the woman with whom second marriage is performed apart from shattering her ambition to live a comfortable life after marriage.

Having noticed the agony, trauma etc. which would be suffered by the woman with whom second marriage is performed, if the marriage is declared to be void, let us make an attempt to ascertain the purpose of enacting Section 494 IPC. This Section introduces monogamy which is essentially voluntary union of life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. Polygamy was practiced in many sections of Hindu society in ancient times. It is not a matter of long past that in India, hypergamy brought forth wholesale polygamy and along with it misery, plight and ignominy to woman having no parallel in the world. In post vedic India a King could take and generally used to have more than one wife. Section 4, of Hindu Marriage Act nullifies and supersedes such practice all over India among the Hindus. Section 494 is intended to achieve laudable object of monogamy. This object can be achieved only by expanding the meaning of the phrase "aggrieved person". For variety of reasons the first wife may not choose to file complaint against her husband e.g. when she is assured of re-union by her husband, when husband assures to snap the tie of second marriage etc. Non-filing of the complaint under Section 494 IPC by first wife does not mean that the offence is wiped out and monogamy sought to be achieved by means of Section 494 IPC merely remains in statute book. Having regard to the scope, purpose, context and object of enacting Section 494 IPC and also the prevailing practices in the so-

ciety sought to be curbed by Section 494 IPC, there is no manner of doubt that the complainant should be an aggrieved person. Section 198(1)(c) of the Criminal Procedure Code, amongst other things, provides that where the person aggrieved by an offence under Section 494 or Section 495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc. or with the leave of the Court, by any other person related to her by blood, marriage or adoption. In Gopal Lal Vs. State of Rajasthan (1979) 2 SCC 170 this Court has ruled that in order to attract the provisions of Section 494 IPC both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties must have been duly performed. Though Section 11 of the Hindu Marriage Act provides that any marriage solemnized, if it contravenes the conditions specified in Clause (i) of Section 5 of the said Act, shall be null and void, it also provides that such marriage may on a petition presented by either party thereto, be so declared. Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.

Even otherwise, as explained earlier, she suffers several legal wrongs and/or legal injuries when second marriage is treated as a nullity by the husband arbitrarily, without recourse to the Court or where declaration sought is granted by a competent Court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict right of filing complaint to the first wife and there is no reason to read the said Section in a restricted manner as is suggested by the learned Counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by wife living and not by the woman with whom subsequent marriage takes place during the life time of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the life of first wife.

A bare reading of the complaint together with statutory provisions makes it abundantly clear that the appellant having a wife living, married with the respondent no. 2 herein by concealing from her the fact of former marriage and therefore her complaint against the appellant

for commission of offence punishable under Section 494 and 495 IPC is, maintainable and cannot be quashed on this ground.

To hold that a woman with whom second marriage is performed is not entitled to maintain a complaint under Section 494 IPC though she suffers legal injuries would be height of perversity.

11. Section 495 IPC provides that if a person committing the offence defined in Section 494 IPC conceals from the person with whom subsequent marriage is contracted, the fact of the former marriage, the said person is liable to be punished as provided therein. The offence mentioned in Section 495 IPC is an aggravated form of bigamy provided in Section 494 IPC. The circumstance of aggravation is the concealment of the fact of the former marriage to the person with whom the second marriage is contracted. Since the offence under Section 495 IPC is in essence bigamy, it follows that all the elements necessary to constitute that offence must be present here also. A married man who by passing himself off as unmarried induces an innocent woman to become, as she thinks his wife, but in reality his mistress, commits one of the grossest forms of frauds known to law and therefore severe punishment is provided in Section 495 IPC. Section 495 begins with the words "whoever commits the offence defined in the last preceding Section....." The reference to Section 494 IPC in Section 495 IPC makes it clear that Section 495 IPC is extension of Section 494 IPC and part and parcel of it. The concealment spoken of in Section 495 IPC would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of former marriage, would also be entitled to lodge complaint for commission of offence punishable under Section 495 IPC. Where second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of Section 198 Cr. P.C. If the woman with whom the second marriage is performed by concealment of former marriage is entitled to file a complaint for commission of offence under Section 495 IPC, there is no reason why she would not be entitled to file complaint under Section 494 IPC more particularly when Section 495 IPC is extension and part and parcel of Section 494 IPC.

For all these reasons, it is held that the woman with whom second marriage is contracted by suppressing the fact of former marriage would be entitled to maintain complaint against her husband under Sections 494 and 495 IPC."

Therefore, on the issue of the locus of lodging complaint of complainant being questioned by the Sessions Court, I do not agree with the Sessions Court.

9 As regards second ground, which is very material to the matter at hand, the first ingredient required for offence under Section 494 itself has not been proved by prosecution, i.e., marriage of accused with Priti and I do not find fault with the conclusions of the Sessions Court. It was for prosecution to prove beyond reasonable doubt that accused no.1 must have contracted first marriage. Just because Priti went to the house of accused and stated she was the first legally wedded wife of accused no.1 and has two children from accused no.1 and later files affidavit before the Trial Court that she was not the wife of accused no.1, goes to the root of the matter. Simply producing marriage certificate, which is at Exhibit 97, would not itself be enough to prove that there is a marriage between Priti and accused no.1. This is because P.W.-7, who was a clerk in the office of sub-Registrar and through whom, the said marriage certificate was produced, has clearly stated that the bride and bride groom do not attend their office at the time of registration of marriage and he was unable to identify accused no.1. P.W.-7 also stated that he has no personal knowledge about the entry as recorded in 1988. Even priest Mr. Sunil Madhavrao Turki - P.W.-8, whose signature was found in Exhibit 97 has stated in his evidence that it may be that marriage of one Satish Pabhalkar and Ranjeeta might have been performed by him and by looking at Exhibit 97 stated that he has performed the said marriage but he was unable to even identify any of the accused who were present before the court. Therefore, even I am satisfied that the prosecution has failed to prove that accused no.1 was already married when

he married complainant and consequently prosecution proving concealment of first marriage of accused no.1 with complainant, does not arise.

10 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka*** ² in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

2. (2007) 4 SCC 415

11 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

12 Appeal dismissed.

(K.R.SHRIRAM J.)

Meera
M.
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