



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.O.P. (MD)Nos.3861 and 7081 of 2017

and

Crl.M.P. (MD)Nos.2832 and 4811 of 2017

Crl.O.P. (MD)No.3861 of 2017

1. M.A.K.Jahabar
2. Saleema ...Petitioners/Accused Nos.3 and 4

versus

S.K.Meera Banu ...Respondent/Complainant

Criminal Original Petition filed under Section 482 of Cr.P.C. seeking to call for the records in the case in C.C.No.11 of 2017 on the file of the learned Judicial Magistrate No.II, Nagercoil and to quash the same.

For Petitioners : Mr.K.N.Thambi
For Respondent : M/s.S.Krishnamoorthy

Crl.O.P. (MD)No.7081 of 2017

1. Azarudeen
2. Suber
3. Sowmiya ...Petitioners/Accused Nos.5 to 7

versus

S.K.Meera Banu ... Respondent/Complainant

Criminal Original Petition filed under Section 482 of Cr.P.C. seeking to call for the records in the case in C.C.No.11 of 2017 on the file of the learned Judicial Magistrate No.II, Nagercoil and to quash the same.

For Petitioners : Mr.K.N.Thambi
For Respondent : M/s.S.Krishnamoorthy

COMMON ORDER

The accused Nos.3 and 4 in C.C.No.11 of 2017 and the accused Nos.5 to 7 in C.C.No.11 of 2017 on the file of the Judicial Magistrate No.II, Nagercoil filed Crl.O.P.Nos.3861 and 7081 of 2017 respectively, to quash the complaint pending against them.



2. The complaint in C.C.No.11 of 2017 was filed by way of a private complaint by the respondent/defacto complainant as against these petitioners and two others, for the offence under Sections 494 read with 120B IPC.

3. The learned Judicial Magistrate No.II, Nagercoil, took cognizance on the complaint and issued summons to the petitioners. Aggrieved over the same, the above petitioners have filed the above Criminal Original Petition.

4. The case of the complainant is that the marriage between the complainant and the 5th accused took place in the Islamic form on 09.05.2012 and out of the wedlock, a child was born. After the marriage, the 5th accused went to abroad in search of job in June 2013 and returned in September 2013, with an intention to marry another woman, the 5th accused, with the help of other accused, created a document with the help of accused Nos.1 and 2, President and Secretary of the Jamath that the earlier marriage between this complainant and the 5th accused was divorced. After creating the said forged document, with the help of the other accused, the 5th accused married the 7th accused, one Sowmiya, in the presence of the accused, at Thangamaligai Marriage Hall on 10.05.2015. Though the accused Nos.5 and 6, the parents of the accused No.7, are aware of the fact that this 5th accused was married to the complainant, all the accused conspired together and arranged the marriage between 5th accused and 7th accused.

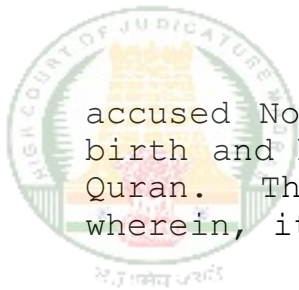
5. Heard Mr.K.N.Thambi, learned counsel for the petitioners in both the petitions and Mr.S.Krishnamurthy, learned counsel for the respondent/complainant.

6. The case of the complainant is that with an intention to marry another woman, the 5th accused along with other accused conspired together and created a fabricated document as if the marriage between the complainant and the 5th accused was dissolved and married the 7th accused, knowing well the marriage between this complainant and 5th accused is subsisting. The petitioners in Crl.O.P.No.3861 of 2017 are the father and mother of the accused No.5 and the petitioners in Crl.O.P.No.7081 of 2017 are the husband of the complainant, the father of the second wife and the alleged second wife of the accused No.5. The complaint was filed for the offence under Sections 494 read with 120B IPC.

7. Mr.K.N.Thambi, learned counsel for the petitioners submits that three ingredients are required to constitute an offence under Section 494 IPC, such as

- (i) a husband or wife living
- (ii) marries
- (iii) such marriage is void by reason of its taking place during the life of such husband and wife.

In this case, even assuming that the accused No.5 married the



accused No.7 as his second wife, the accused No.5 is a Muslim by birth and hence, he is entitled to have four wives at a time as per Quran. The learned counsel has also relied the extract of Quran, wherein, it is stated as follows:

"If you fear that you cannot deal fairly with orphan girls, you may marry women of your choice, two or three or four; but if you fear that you might not be able to treat them with equal fairness, then only one - or [from among] those whom you rightfully possess."

When it cannot be termed as a void marriage, it will not fall within the definition of Section 494 IPC and therefore, an offence cannot be made as against the petitioners. In support of his contention, the learned counsel for the petitioners has also relied upon the decision of the **Kerala High Court** reported in **1970 1 MLJ(Cri) 562 (Shahulameedu vs. Subaida Beevi)**, wherein, Mr.Justice V.R.Krishna Iyer held that Muslim Personal Law permits more than one wife. When the Muslim Personal Law permits more than one wife, the 5th accused is entitled to marry another woman and therefore, it cannot be a void marriage and it cannot fall within the ambit of Section 494 IPC. Even the complaint is accepted its entirety, the complaint did not make out an offence much less than the offence under Section 494 IPC. Therefore, the complaint is liable to be quashed.

8. Per contra, the learned counsel for the respondent/complainant submits that the provision of Section 494 IPC is applicable to the Muslim also and it cannot be quashed in *limini*, without allowing the complainant to adduce her evidence. The learned counsel for the respondent/complainant also submits that though the complaint was filed in the year 2017, it could not proceed further, in view of these petitions filed before this Court and moreover, the respondent/complainant and her child were deprived even without any maintenance. According to the learned counsel for the respondent, the respondent/complainant has also filed an application under the Domestic Violence Act, but, the petitioner/5th accused is evading the process of service of summons in the complaint instituted under the Domestic Violence Act and therefore, the petition filed under the Domestic Violence Act is also pending for several years.

9. This Court has paid its anxious consideration and also perused the available records.

10. This complaint is filed by the wife of the 5th accused as against the petitioners and two others for offence under Section 494 read with 120B IPC. The accused Nos.1 and 2 are the President and Secretary of Jamath and accused Nos.3 and 4 are the parents of the accused No.5 and accused No.7 is the second wife of the accused No.5 and accused No.6 is the father of the accused No.7.



11. For better appreciation, Section 494 is extracted hereunder:

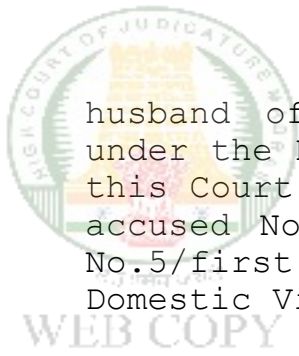
"494 - Marrying again during lifetime of husband or wife - Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

12. As pointed out by the learned counsel for the petitioners, marrying again during the life time of husband or wife is an offence, but, such marriage must be a void marriage, by reason of its taking place during the life time of first wife. As rightly pointed by the learned counsel for the petitioners, the Muslim Law permits more than one wife. The Quran extracted above also reiterated the same. The Muslim Personal Law (Shariat) Application Act 1937 refers to the application of personal law to Muslim. The Muslim Personal Law (Shariat) Application Act 1937 refers to the application of personal law to muslim as follows:

"2. Application of Personal law to Muslims - Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, Khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

13. Insofar as the Hindu Marriage Act is concerned, the Hindu Marriage Act prescribes that if a person marries another woman, it is void as per the Act. Similarly, the Christian Marriage Act declares that if any marriage was solemnized when either of spouse exists, that marriage is a void marriage. But, no such law is available insofar as Muslim Law is concerned. When Personal Law of Muslim permits for another marriage, it will not fall under the category of Section 494 IPC. So far as the Muslim is concerned, the Muslim Personal Law (Shariat) Application Act 1937 reads as, whether the parties are Muslims, the Muslim Personal Law shall apply.

14. It is brought to the knowledge of this Court that the first petitioner in Crl.O.P.No.7081 of 2017, the



husband of the complainant has evaded the proceedings initiated under the Domestic Violence Act for more than two years. Therefore, this Court is not inclined to entertain the petition insofar as the accused No.5 is concerned, in view of the conduct of the accused No.5/first petitioner in evading the proceedings initiated under the Domestic Violence Act for over a period of two years.

15. Insofar as the accused Nos.3 and 4/petitioners in Crl.O.P.(MD)No.3861 of 2017 and accused Nos.6 and 7/2nd and 3rd petitioners in Crl.O.P.(MD)No.7081 of 2017 are concerned, the criminal proceedings initiated against them in C.C.No.11 of 2017 on the file of the learned Judicial Magistrate No.II, Nagercoil are quashed. Accordingly, Crl.O.P.(MD)No.3861 of 2017 is allowed and Crl.O.P.(MD)No.7081 of 2017 is partly allowed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

To

The Judicial Magistrate No.II,
Nagercoil.

+2 CC to M/s.K.N.THAMBI, Advocate (SR-1831&1832[F] dated 13/01/2020)

Crl.O.P. (MD)Nos.3861 and 7081 of 2017
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AP(17/07/2020) 5P 4C