

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Before: Hon'ble Justice Sugato Majumdar

CRR 2709 of 2011

Jitendra Mohan Khan

Vs.

The State of West Bengal & Anr.

For the Petitioner : **Mr. Debabrata Acharyya,
Mr. Sital Samanta,
Mr. Debjani Saha.**

For the State : **Mr. Binoy Panda,
Mr. Pravas Bhattacharya,
Ms. Subham Bhakat.**

Hearing concluded on : **07.07.2022**

Judgment on : **14.07.2022**

Sugato Majumdar, J.:-

Instant application, filed under Section 401 of the Code of Criminal Procedure, 1973 is directed against the judgment and order dated 11/08/2011 passed by the Sessions Judge, Dakshin Dinajpur in Criminal Appeal No. 7 of 2011 confirming the judgment and order of conviction and sentence passed on 21/02/2011 by the Additional Chief Judicial Magistrate, Gangarampur in CR 160 of 2010.

Fact of the case in nutshell is that on the basis of written complaint made by the present Opposite Party No. 2 prosecution was launched against the present Petitioner and Parul Khan. After completion of the investigation charge sheet was filed. Charges were framed against the present Petitioner under

Section 498A and 494 of the Indian Penal Code to which they pleaded not guilty.

Defense of the present Petitioner is false implication. He stated in his examination under section 313 of the Code of Criminal Procedure 1973 that he did not marry the co-accused. Through cross examination defense also tried to establish that the present Petitioner had already been prosecuted for the same offence of bigamy and was acquitted.

The Trial Court held that the present Petitioner is guilty of the charges under Section 498A and 494 of the Indian Penal Code. The Trial Court acquitted the co-accused Parul Khan.

On appeal, the Sessions Judge upheld the judgment and order of sentence passed by the Additional Chief Judicial Magistrate, Buniyadpur in terms of the impugned judgment dated 11/08/2011.

Being aggrieved by the judgment of the appellate court, the instant Revision application is filed.

Mr. Acharyya, appearing for the Petitioner submitted that both the courts below committed grave error in deciding the issue of limitation involved in the case. Both the Courts below wrongly held that the offence under section 498A is a continuous one giving a go by to the express provisions of section 468 of the Code of Criminal Procedure, 1973. Mr. Acharyya further submitted that it is in the evidence of PW 1, namely, the de-facto complainant that earlier a criminal prosecution was initiated against the present Petitioner by the said PW 1 which was numbered as MC/222/1978 alleging the second marriage of the present Petitioner, where he was ultimately discharged. Therefore, according to him, the second prosecution is barred under section 300 of the Code. Both the Courts below committed grave error ignoring this aspect of the matter. Mr. Acharyya further submitted that in order to bring a case under

Section 494 of the Indian Penal Code there must be a valid marriage observing all the formalities required by law. Saptapadi or seven steps before the sacred fire is essential for a valid Hindu Marriage. Not a single piece of evidence is adduced in support of performance of such essential ceremonies. Conclusion arrived at by both the Courts below that the present Petitioner is guilty of bigamy is grave error in appreciation of evidence. He relied upon the ratio of ***Priya Bala Ghosh vs. Suresh Chandra Ghosh [1971 SCC (Cri.) 362]*** and ***Santi Deb Berma versus Kanchan Prava Devi [1992 SCC (Cri.) 65]***.

Mr. Binoy Panda, appearing for the state, candidly admitted that limitation prescribed under Section 468 of the Code of Criminal Procedure for offence under Section 498A of the Indian Penal Code is three years. He also admitted that there is no evidence to the extent that Saptapadi was observed by the present Petitioner in the alleged second marriage. However, according to him, there are enough evidence to suggest that there was the alleged second marriage between the present Petitioner and Parul Khan.

Written complaint in this case is not exhibited. However, it is in the record that prosecution was launched on the basis of a complaint case by the Opposite Party No. 2 on 08/08/2000. It is the evidence of P.W. 1, namely, O.P. No. 2 that she was married to the present Petitioner on 23rd Jaistha 1383 B.S. as per Hindu Rites and Customs. After 2 to 3 years of marriage her husband, namely, the present Petitioner began to torture her on the ground that she is unable to bear any child. It is also in her evidence that the Petitioner drove her out from the matrimonial home 7/8 years after the marriage. Because of his torture she voluntarily left her matrimonial home and began to reside in her paternal home 12 to 14 years prior to the date of the deposition.

Both the Courts below concurrently held that limitation prescribed by section 468 of the Code does not apply to this case as the offence under section 498A of the Indian Penal Code is a continuous one and that Court can condone

delay in the interest of justice the Appellate Court also upheld supported that finding. It is evident that both the Courts below failed to apply the correct principle of in deciding the issue of limitation.

P.W. 1 being de-facto complainant stated in her evidence that after she began to live in her parental home, she visited several times to her matrimonial home when she was ill treated. It is in her evidence that she had been living in her parental home for last 14 to 15 years from the date of deposition. The statement is rather vague for it fails to mention not only approximate date or period of time but also any length of time when such things occurred. There is nothing in evidence of P.W. 1 that she was recently or within a period of three years treated cruelly by the present Petitioner. Such vague statements cannot be neither be basis of conviction nor ought to lead to a conclusion that they are occurred a continuing offence. Both the Courts below failed to appreciate evidence in terms of true purport and meaning of section 498A of the Indian Penal Code.

The Petitioner was also convicted of offence under Section 494 of the Indian Penal Code on the charge of bigamy.

It is no longer *res integra* that one of the ingredients of Section 494 of the Indian Penal Code is that the second marriage must be a void one. In ***Priya Bala Ghosh Vs. Suresh Chandra Ghosh [(1971)1 SCC 864]*** referring to Section 17 of the Hindu Marriage Act, the Supreme Court of India observed that a marriage in order to be void as contemplated in Section 494 of the Indian Penal Code must be a valid one. It was observed that if the alleged second marriage is not a valid one according to law applicable to the parties, it will not be void by reason of its taking place during the life of the husband or the wife of the person marrying so as to attract Section 494 IPC. Again in order to hold that the second marriage has been solemnized so as to attract Section 17 of the Act, it is essential that the second marriage should have been

celebrated with proper ceremonies and in due form. It was further held that the prosecution has to prove that the alleged second marriage held been duly performed in accordance with the essential religious rites applicable to the form of the marriage gone through by the parties and that the said marriage must be a valid one according to law applicable to the parties.

P.W. 1 was not present when the alleged second marriage took place. P.W. 2 heard that the present Petitioner married again and his evidence in this regard is a hearsay one. P.W. 3 who was present in the alleged second marriage, stated that the present Petitioner married Parul Basak by exchange of *garland* and gift of *sindoor* to her. Except exchange of *garland* and *sindoor* nothing else took place there. P.W. 4 heard of the marriage and was not an eyewitness. No other evidence came forward to show that essential ceremonies including *homaor saptapadi* were performed. The statements of P.W. 3 clearly indicate that *saptapadi* (seven steps) of statutory rituals were performed both the Trial Court and the Appellate Court committed grave error not only in application of law but also in appreciation of evidence in convicting the accused under Section 494 of the Indian Penal Code.

Neither of the courts took into consideration the evidence of P.W. 1 and P.W.4 that the present Petitioner was earlier prosecuted under section 494 of the Indian Penal Code. P.W. 1 in her cross-examination candidly admitted that a complaint case was filed against the present petitioner on the charge of bigamy under Section 494 of the Indian Penal Code which was registered as Case No. 222 of 1978 before the Chief Judicial Magistrate, Balurghat. She further stated “said case was ultimately discharged.” It is in the evidence of P.W.4 that earlier prosecution was launched against the present Petitioner under section 498A of the Indian Penal Code in which he deposed as a witness and in that case the present Petitioner was discharged. Both the courts below

failed to take into consideration of these statements of the witnesses and provisions of section 300 of the Code of Criminal Procedure.

It is settled principle of law that in case of concurrent finds of both the courts below, High Court should be slow to interfere into unless there are very strong reasons to do so. In the case in hand both the Courts below committed serious errors in application of law as well as in appreciation of evidence causing miscarriage of justice. Therefore, this Court is constrained to interfere into the order of conviction passed by the Trial Court and upheld by the Appellate Court.

In nutshell, an instant revision application is allowed. The Judgment and Order of conviction and sentence passed on 21.02.2011 by the Additional Chief Judicial Magistrate, Gangarampur in CR 160 of 2010 is hereby set aside. The present Petitioner is set at liberty and is also released from the bail bond.

The instant criminal revision is accordingly disposed of.

The lower court record along with a copy of the judgment be sent the Trial Court.

(Sugato Majumdar, J.)