

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO.1590 OF 2015
SOW.ANUJA W/O. DATTATRAYA MANGNALE
VERSUS
DATTATRAYA S/O. RAMJI MANGNALE AND ANOTHER**

Mr. Anil M. Gaikwad, Advocate for the petitioner.

Mr. R.N.Chavan h/f. Mr. S.V. Kurundkar, Advocate for the respondents.

**WITH
CRIMINAL WRIT PETITION NO.1053 OF 2016
DATTATRAYA RAMJI MANGNALE
VERSUS
SOW. ANUJA W/O. DATTATRAYA MANGNALE**

Mr. R.N.Chavan h/f. Mr. S.V. Kurundkar, Advocate for the petitioner.

Mr. Anil M. Gaikwad, Advocate for the respondent.

**CORAM : ANIL L. PANSARE, J.
DATED : 28.07.2022**

PC :-

01. The facts that led to filing these two writ petitions under Article 227 of the Constitution of India are as under :-

02. The petitioner in Criminal Writ Petition No.1590 of 2015 is the first wife of respondent No.1. The allegations are, during subsistence of the first marriage, respondent No.1 has performed second marriage with respondent No.2. Respondent No.3 is mother of respondent No.2. Respondent

Nos. 4 to 27 are relatives of respondent No.2 as well as respondent No.1.

03. The petitioner has filed complaint against these respondents before the learned Judicial Magistrate, First Class, Loha being RCC No.2 of 2011 for the offences punishable under sections 494, 109, 34 of the Indian Penal Code. The allegations in brief were that respondent No.1 used to quarrel with the petitioner on petty grounds and the quarrel continued. The petitioner narrated the story to her parents. The parents and the petitioner then informed about the harassment at the hands of respondent No.1 to respondent Nos. 6, 13, 14, 16 and 26 with a hope that they will resolve the issue. However, these accused blamed the petitioner and said that she (the petitioner) is impotent. They abused her. All these accused thereafter harassed her mentally and physically and at times on phone. These accused asked the petitioner to leave the company of respondent No.1. These accused also instigated respondent No.1 to perform second marriage with the daughter of relatives of the accused persons. Respondent No.1 has thereafter removed the petitioner from his house and gave life threats to her. Accordingly, the petitioner lodged FIR against these respondents under section 498-A of the Indian Penal Code at Police Station, Wada, Dist. Nashik.

04. On 1st November, 2011, at about 10.00 a.m., respondent No.1 performed second marriage with respondent No.2. Similarly, respondent Nos. 3 to 27 led the company and taken active participation for solemnization of the second marriage, knowing fully well that respondent No.1 is married to the petitioner.

05. The learned Magistrate, after having gone through the complaint and having examined couple of witnesses, issued process under section 494 of the IPC against respondent Nos.1 and 2 and under section 109 of the IPC against respondent Nos. 3 to 27.

06. This order of issuance of process came to be challenged before the learned Sessions Court, Kandhar, Dist. Nanded, in Criminal Revision Application No.43 of 2012. The learned Sessions Judge maintained the order of issuance of process against respondent Nos.1 and 2. However, he has quashed the order against respondent Nos.3 to 27 on the ground that the evidence led by the petitioner and her cousin before the learned Magistrate only speaks of participation of respondent Nos.3 to 27 in solemnization of the

marriage of respondent No.1 with respondent No.2 The evidence does not disclose that the other respondents had knowledge of solemnization of the first marriage between respondent No.1 and the petitioner. In short, according to the learned Additional Sessions Judge, the evidence led for verification of complaint before the Magistrate did not disclose that there was a valid marriage performed between respondent No.1 and the petitioner and that the said marriage was within the knowledge of respondent Nos. 3 to 27.

07. Accordingly, the order of issuance of process has been set aside against respondent Nos.3 to 27.

08. The said order has been impugned in the present writ petition. Similarly, respondent No.1 has also assailed the order of the Additional Sessions Judge dated 11th May, 2015 maintaining the order of issuance of process against him.

09. I have considered the rival submissions. The learned Advocate for the petitioner would submit that the findings recorded by the learned

Additional Sessions Judge are contrary to the contents of the complaint before the Trial Court.

10. As against, the learned Advocate for the respondent would contend that mere participation of the respondents in a void marriage will not attract the provisions either under section 494 or section 109 of the IPC. In support, he has relied upon the judgment of the Single Judge at the Principal Seat in the case of Malan w/o. Rama and Ors. Vs. The State of Bombay and Anr., AIR 1960 BOMBAY 393. The facts before the Court were that accused No.1 therein had married one Krishnabai. The accused No.14 was the priest who officiated at the performance of the marriage. Other accused were also charged for the offence under section 494 read with section 114 of the IPC on the allegation that they had abetted accused No.1 in the commission of aforesaid offence under section 494 of the IPC. The learned Magistrate therein had convicted the accused persons. The learned Additional Sessions Judge upheld the finding of the Magistrate and the matter was accordingly carried before the Bombay High Court. The argument before the High Court was that the offence of abetment cannot be said to have been established against all or any of the accused. The High Court, therefore, examined the

ingredients of the offence of abetment. The accusation of the abetment was tested on the allegations levelled, that the accused persons were present at the time of solemnization of second marriage, that the accused persons had knowledge of the first marriage, that the accused persons threw holy rice on the couple during the performance of the marriage etc. In the light of the aforesaid allegations, the High Court observed in paragraph Nos.6 to 9 as under :-

“(6) The question for consideration is whether the aforesaid acts or any of them constituted an abetment of the offence of bigamy punishable under Section 494 I. P. C.

(7) [Section 107](#) defines abetment. It is well known that an act of abetment may take place in one of three ways: (1) Instigation, (2) Conspiracy, or (3) Intentional aid. Having regard to the charge in the present case, there is no doubt whatsoever that the prosecution did not allege that any of the aforesaid accused had instigated the commission of the offence of bigamy. This was conceded by the learned Government Pleader. The learned Government Pleader, however, urged that, on the facts aforesaid the prosecution had established that there was a conspiracy by all the aforesaid accused persons to commit the offence of bigamy. I do not think I can agree with this submission. In the first instance no conspiracy was alleged in the charge. The charge was that the aforesaid accused had abetted the void marriage, knowing it to be void, by celebrating the same. Therefore, the charge which the aforesaid accused person were called upon to meet was that they had taken part in the celebration of the marriage. There was no allegation whatsoever that, prior to the celebration of the marriage, these accused had entered into a conspiracy for the purpose of celebrating the marriage in question. From the judgments delivered by the learned trial Magistrate and the learned appellate Judge also, there is no doubt whatsoever that the charge which was pressed against the aforesaid accused was that they had participated in a void marriage. Moreover, the aforesaid facts, which I have mentioned and which have been found against the accused, do not leave any doubt that there was no conspiracy prior to the celebration of the marriage between the accused. Therefore, in my opinion, the charge which was levelled against the accused was not one that they had entered into a conspiracy for celebrating a void marriage. Under the circumstances, the principal question

which required to be decided in the present case is whether the facts brought home against the accused as aforesaid constitute an intentional aid within the meaning of Section 107 I. P. C.

(8) For the purpose of determining this question, in my opinion, it is better, first of all, to concentrate on the first three general facts found against all the accused persons. those general facts are that they knew that the accused No. 1 was celebrating a void marriage and was committing the offence of bigamy; that they remained present at the time of the celebration of that void marriage and, during the performance thereof, they threw holy rice on the couple. There is very good authority for the proposition that mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid. This proposition is not being disputed by the learned Government Pleader. In fact, this proposition was laid down by this Court as early as in *Empress v. Umi*, ILR 6 Bom 126. The learned Government Pleader, however contended that though this is so, there may be some cases in which persons may occupy a position of influence and rank so that their presence may mean encouragement to commit the crime and he contended that, when such is the case, persons holding the position of rank and influence should be regarded as abettors. For this purpose, the learned Government Pleader relied upon a passage from Messrs. Ratanlal and Dhirajlal's *Law of Crimes* 19th Edition, at page 230. The passage is as follows:

"Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and to be aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement....."

This passage is based upon the case in [Queen-Empress v. Lakshmi](#). Crim Rev. Appln. No. 51 of 1886: Rat Un Cri Cas 303. So far as this ruling is concerned, the aforesaid remarks are obiter. In this case, the learned Judges actually came to the conclusion that the woman who had been convicted of the offence of abetment did not hold a special position and her mere knowledge of what was done or was about to be done could not be held to be an abetment. Therefore, the observations which were made in this case do not give any help in deciding the present case. In my opinion even if one agrees with the submission of the learned Government Pleader that, under certain circumstance, where persons present hold position of influence or rank their presence should be construed as an encouragement of the criminal act, in the present case, it is impossible to hold that the aforesaid accused persons held such a position vis a vis accused No. 1 that their presence should be taken as having encouraged the accused No. 1 in committing the offence of bigamy. so far as some of the accused persons are concerned. the Learned Government Pleader had to concede that their acts do not come within the principle which is enunciated above. Accused No.5. is the brother of the bridegroom accused

No.6 to 8 are his bhaubands, and accused No.13 is the brother of the bride. It is conceded by the Learned Government Pleader that so far as these accused persons are concerned, they cannot be said to be occupying a position of rank or influence and their presence cannot be said to have encouraged accused No. 1 in the performance of the void marriage. The learned Government Pleader, however, contended that the acts of accused Nos. 1 to 4, 9, 11 and 12 stood on a different footing. The accused Nos. 2 and 3 are the parents of the bridegroom. and the accused No. 4 is his uncle. Accused No. 9 is the police patil of the village at which the marriage was celebrated and accused Nos.11 and 12 are the parents of the bride. It was contended that these persons occupied a position of ranks and influence and, therefore, their presence must be taken to have encouraged accused No.1 in the performance of the void marriage. This aspect of the case does not appear to have been discussed before any of the lower Courts, and none of the lower Courts has applied its mind on this subject. The matter is not one of presumption arising from certain relationship existing between the parties. In my opinion the matter is one which is one dependent upon the evidence in each case. The admitted fact is that these persons are related as aforesaid and that they remained present at the aforesaid void marriage. There is nothing else on the record of the case which would show that their presence amounted to encouragement and that if these persons had not remained present at the time of the marriage, the offence of bigamy probably would not have taken place and the accused No.1 would have acted in a manner different from what he did at the time of the performance of the aforesaid marriage. Sometimes elders do remain present even at marriages which they disapprove. They may do so out of sentiments or social considerations. Under the aforesaid circumstances, having regard to the fact that I am dealing with this matter in a revision application, and the fact that this aspect of the case has not been considered by the lower Courts. I am not prepared to hold that the aforesaid accused should be held to have encouraged the performance of the void marriage simply from the fact that they remained present at the marriage.

(9) The next point is whether the fact that the aforesaid accused person threw holy rice on the couple should be regarded as an act of abetment. The evidence discloses that this act of throwing rice was done by the aforesaid persons during the time when the 'antarpatri' was held and the 'managalastakes' were being recited. The question as to whether this act amounts to an abetment or not depends upon a consideration of Explanation 2 to Section 107 I. P. C. That Explanation says that whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and, thereby facilitates the commission thereof, is said to aid the doing of that act. Therefore, in order that the aforesaid act of throwing rice may be said to be an act of abetment, it is necessary to enquire whether the act of throwing rice as done in order to facilitate the commission of bigamy and, thereby bigamy was facilitated. It is not shown that this act is one of the necessary acts which has got to be performed

in the celebration of a marriage. It is true that the ceremony which was undertaken by accused No. 1 was a void ceremony and anything which was done on the aforesaid day did not amount to marriage in law. But in order that an offence under [Section 494](#) may be committed it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife. It is not shown to me that the throwing of rice on the couple was a necessary part of the ceremony in the performance of a valid marriage. It appears that this thing is ordinarily done by all the spectators who remain present at a marriage, and the act is more consistent with the presence of the aforesaid persons at the time of the celebration of the marriage rather than actual participation in the acts which ultimately lead to the formation of the marriage contract. In my opinion, the aforesaid act in itself does not lead to the necessary conclusion that the act was done to facilitate the performance of the marriage, much less could it be said that thereby the performance of the marriage was facilitated. Under the aforesaid circumstances. I have come to the conclusion that the acts which have been brought home against all the accused persons, except accused Nos. 3 and 9, whose further case will be considered hereafter, do not necessarily amount to an act of abetment. In my opinion, the acts which have been brought home against the aforesaid accused No. 2,4,5 to 8, and 11 to 13 are not acts of abetment within the meaning of Section 107 I. P. C., and therefore, these persons were wrongly convicted under Section 114 I. P. C.”

11. Thus, according to the learned Advocate for the respondent mere presence of accused persons in performance of void marriage will not attract the provisions under section 109 of the IPC. There is nothing on record to show that the respondent Nos. 3 to 27 had knowledge of first marriage or that they have instigated or encouraged performance of second marriage.

12. To my mind, the reliance placed on the judgment of the Bombay High Court by the learned Advocate for the respondent is misplaced. Firstly,

the finding rendered by the Bombay High Court at Principal Seat is after conclusion of full fledged trial. The accused therein were convicted. In that sense the entire evidence was available before the High Court to authoritatively comment upon the status of the attendees to the marriage. In the present case the order of issuance of process is under challenge. It is well settled that at the stage of issuance of process, the Magistrate has to consider the averments made in the complaint and the evidence led, if any.

13. If one goes through the averments made by the petitioner in her complaint filed under section 200 of the Code of Criminal Procedure, there are categorical allegations against the respondents. So far as respondent No.1-husband is concerned, there should not be any dispute that he is the root cause of this complaint. The role of other respondents is to be treated and analyzed on the basis of the history narrated in the complaint. One of the important aspects to understand as to whether the other respondents have encouraged and/or instigated performance of second marriage between respondent Nos.1 and 2 is the FIR lodged by the petitioner against respondent Nos.1, 6, 7, 13, 14, 15 and 26. The FIR was lodged under section 498-A of the IPC. The allegations against these respondents were that they have

harassed and abused the petitioner on the ground that she is impotent and that these respondents were encouraging respondent No.1 to get married to daughter of one of the relatives. The pleadings in the complaint would indicate that all the respondents are relatives of each other. The respondent No.2 is, thus, the daughter of the relative i.e. respondent No.3. Other being relatives of respondent No.3, so also of respondent No.1, there is every reason to believe that they all are aware of solemnization of first marriage of respondent No.1 with the petitioner. Rather there is categorical allegation in the complaint that respondent Nos.3 to 27, knowing fully well of the solemnization of marriage between respondent No.1 and the petitioner have led and actively participated in solemnization of the marriage of respondent No.1 with respondent No.2. Thus, the allegations in the light of the FIR against the respondents named above, would be sufficient to at-least issue process against the said respondents.

14. At this stage, the learned Advocate for the respondent would submit that other respondents except respondent Nos.1,2,3,6,7,14,15 and 26 cannot be blamed as the petitioner has not leveled specific allegations against these respondents.

15. Even, the said submission cannot be considered as valid ground for setting aside the order against them. Their role in solemnization of the marriage has not been detailed in the complaint. However, their role is to be examined in the light of the larger allegation made against them that all these respondents have led and actively participated in the solemnization of marriage between respondent Nos.1 and 2, knowing fully well of the subsistence of marriage between respondent No.1 and the petitioner.

16. The judgment, therefore, cited by the respondent will be of no help in as much as the position before the learned Magistrate in the form of complaint containing categorical allegation against the respondents is altogether different than what was available in the form of evidence before the High Court.

17. The learned Sessions Judge committed serious error in recording the finding that the complaint and the evidence does not disclose that respondent Nos.3 to 27 had knowledge of performance of valid marriage between respondent No.1 and the petitioner despite there being categorical

allegation in the complaint. The order, therefore, is contrary to the pleadings. It is a settled law that at the stage of issuance of process only averments made in the complaint are to be looked into. The respondents could appear before the Magistrate and put forth their case and if required may seek discharge.

18. In the result, Criminal Writ Petition No.1590 of 2015 is allowed. The order dated 11th May, 2015 in Criminal Revision application No.0800043 of 2012 is quashed and set aside. The order passed by the learned Magistrate is restored.

19. In view of the above, the Criminal Writ Petition No.1053 OF 2016 challenging issuance of process against respondent No.1, stands dismissed.

[ANIL L. PANSARE,J.]