



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

948 CRIMINAL WRIT PETITION NO. 128 OF 2024

NANDINI @ NANDA PRAVIN KHANDARE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for the Petitioner : Mr. Vanita Haribhau Sangole.
Jaitmal (Through Legal Aid).

APP for Respondent-State : Ms. V. S. Choudhari.

Advocate for Respondent : Party in person.

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CORAM : S. G. MEHARE, J.

DATE : 16.08.2024

PER COURT :-

1. Heard the respective learned counsels.
2. It is the matrimonial dispute. It has been alleged against the respondent that on 07.07.2019, he performed a marriage at village Viroli in Mahadev temple. One of the relatives of the petitioner/wife learnt about his marriage on 05.03.2020, and he told her that the marriage was performed by following the ceremonies as per the customs and rituals observed by their community. The person who witnessed his marriage was not examined before issuing process. However, the process was issued on the basis of the complaint and affidavit of the complainant with certain documents. Documents of the birth of

children were placed on record. It has been alleged that two children were born out of the relationship between the applicant and the so-called second wife, Ankita. The person who was the witness to the marriage is dead.

3. The learned Judicial Magistrate First Class considered the documents placed on record and the affidavit of the complainant and issued process under Section 494 read with 34 of the Cr.P.C. The petitioner had impugned the order issuing the process. The learned Sessions Judge, Ahmednagar, had allowed the revision and quashed and set aside the order of issuance of process. Against that order, the wife approached this Court.

4. The learned counsel for the petitioner submits that the opportunity was not granted to the applicant to produce the relevant documents. However, there was *prima facie* evidence to show that the petitioner had children from the second wife. The document was also placed on record to show that his so-called second wife is also his family member. However, the learned Sessions Court erred in holding that even if the documents of a hospital are believed, the inference can be drawn legally from that document that, at the most accused Nos.1 and 2, are the biological parents of that child. But, no

marriage was performed between them. Therefore, the hospital document cannot be considered, and *prima facie* sufficient material to issue a process against the opponent. The learned Sessions Court again erred in holding that the statement of the complainant was hearsay. The person who had witnessed the incident was not examined as a witness. The said person is dead. Hence, there is no propriety in remanding the matter to the learned Trial Court. She would further argue that the complainant has other documents to establish the second marriage during the subsistence of the first marriage. No fair opportunity was granted to the complainant by the Court to produce the evidence to *prima facie* establish that the respondent/husband has committed the offence under Section 494 of the IPC.

5. Learned counsel for the petitioner relying on the case of ***Ms. Malavika Rajkotia Vs. Giriraj Subramaniam of Delhi High Court, in Criminal M.C.1082 of 2019 and Criminal M.A. No.28506 of 2023, dated 03.01.2024***, submits that whether the marriage was properly conducted or not is a matter of evidence on merit. *Prima facie* material was available before the Court to take the cognizance and issue process. She read the pleadings in the complainant and submitted that the stage,

whether the marriage is performed as per Section 7 of the Hindu Marriage Act, is yet to come. Whether the marriage was legally valid or proper is a matter of evidence, and unless the opportunity was given to lead the evidence, the Court would not form an opinion that the marriage was not performed as per Section 7 of the Hindu Marriage Act. She prayed to remit the matter.

6. Per contra, the respondent/husband in person has a case that he was on his duties in a company in Pune on the alleged day of the incident. He was on duty for all day. He has produced the in and out duty punch card. He was there for all day. The person who informed the complainant is unknown to them. He kept silent for about 8 months, disclosing the marriage of the applicant. The family members have been unnecessarily harassed. Various attempts were made to fetch the applicant back, but she did not come. She was not willing to cohabit with him. He submits that he belongs to the Maratha community, where *Saptapadi* is the ceremony. Unless the 7th step is complete, the marriage cannot said valid under Section 7 of the Hindu Marriage Act. He also submits that the documents placed on record were not sufficient to take the cognizance and issue process. The allegations were vague. The

person who informed the complainant was not examined for the issuance of the process against them. The complainant filed the complaint on the basis information supplied by him. This material witness ought to have been examined before the issuance of process and learned Trial Court did not consider this material aspect. The Court cannot pass the order of assumptions and presumptions. There should be sufficient material to proceed against the accused. He supported the impugned order. He relied upon the case of ***Bhaurao Shankar Lokhande and another Vs. State of Maharashtra and another ; 1965 SCR (2) 837***. He also relied on the case of ***Smriti Singh Alias Mausami Singh and others Vs. State of U.P. and another; Application No.23148 of 2022, under Section 482, decided on 19.09.2023***. He submits that the complaint was absolutely false and without any evidence which may be sufficient to issue process against him.

7. The prime document placed on record by the complainant was the birth certificate of a child born to Ankita from the alleged wedlock. Unfortunately, the person who had witnessed the marriage was not examined before issuing the process. He was the prime witness. The pleadings in the complaint were on the basis of the information he had

supplied. The burden is on the complainant to *prima facie* establish that the accused has married for the second time. The second marriage must be *prima facie* proved to believe that the offence under Section 494 of the IPC has been committed. One of the conditions for establishing the crime is the solemnisation of marriage as per the custom prevailing in the community, caste or religion the parties are governed. The case of ***K. Neelaveni Vs. State ; 2010 11 SCC 607*** was referred to in the case relied upon by the complainant. In the said case, it has been observed that it has to be borne in mind that while considering the application for quashing of the charge sheet, the allegations made in the First Information Report and the materials collected during the course of the investigation are required to be considered. Truthfulness or otherwise of the allegation is not fit to be gone into at this stage as it is always a matter of trial. Essential ceremonies of the marriage were gone into or not is a matter of trial.

8. The facts of Bhaurao's case relied upon by the applicant were that he married complainant in 1962, and during the subsistence of marriage, he performed the marriage with another woman. The offence was tried, and the husband Bhaurao, was convicted. The sole question before the Hon'ble

Supreme Court was that was it necessary for the prosecution to establish that the alleged second marriage of the applicant No.1 with another woman had been duly performed in accordance with the religious rites applicable to the form of the marriage gone through. The Hon'ble Supreme Court, interpreting the term "solemnized", observed that it means in connection with the marriage 'to celebrate the marriage with proper ceremonies and with due form' according to the Shorter Oxford Dictionary. It has been further observed that it follows, therefore, that unless the marriage is celebrated or performed with proper ceremonies due form, it cannot be said to be 'solemnized'. It is, therefore, essential, for the purpose of Section 17 of the Hindu Marriage Act. That the marriage to which Section 494 applies on account of the provisions of the Act should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties may take to marry will not take them ceremonies with law and approved by any established customs.

9. The learned Counsel for the petitioner read the pleadings of the complainant, those were about the performance of marriage were that one of the relatives of the petitioner went

to Mahadev Temple at village Viroli for Darshan. Hence, he witnessed the illegal marriage. Admittedly, he was not a resident of the village Viroli. The complainant gave an oral explanation in the court that his daughter was married in that village. Hence, he went there. However, the learned counsel for the applicant did not perform his job correctly. So far as the ceremony of the marriage is concerned, it was pleaded that the marriage was performed on 07.07.2019 at 11.00 a.m. It was Sunday. They performed the marriage as per the Hindu rights and customs. All marriage ceremonies were performed.

10. Bare pleading that the ceremonies have been performed was also not the complete information about the customs prevailing in their caste. The type of ceremonies that were performed was not specifically pleaded. However, the parties are Hindus by religion governed under the Hindu Marriage Act. Saptapadi is one of the conditions for legal and valid marriage. However, that Rule is not strictly applicable to each one of the Hindus if they have their own customs and rituals. Therefore, there should have been specific pleadings about the custom prevailing in the caste. The ceremonies performed in the marriage were also missing. The foremost important thing is that the deceased Subhash Auti was the sole witness to the

incident is no more. He was the best witness to be examined before the Court before the order of issue process. The reasons best known to the complainant why she did not examine him.

11. Issuance of process is not a mere formality. The Court while exercising the power has to apply its mind, consider the material and form an opinion whether the complaint would be sustained in future. Though the evidence was there of having a child born out of the relationship between the husband and the so-called woman, that is not the proof to believe that the marriage ceremonies were performed and it was a bigamy. Considering the pleadings of the complainant, it seems that it was falling short of forming an opinion that *prima facie* evidence was available against the applicant/husband and his relatives to issue the process under Section 494, read with Section 34 of the IPC. Unfortunately, the sole eyewitness is no more. So, even if the opportunity is granted to the petitioner to lead the evidence, no purpose would be served. If she would produce new evidence that would be a omission and considered as a evidence produced after though.

12. The husband produced the document before the revisional Court stating that he was on duty on the alleged day

of the incident, though it was Sunday. He also produced the company's in-and-out punching card.

13. Reviewing the facts of the case in toto, the pleadings were insufficient to form an opinion that the respondent-husband has performed, the second marriage during the subsistence of the first marriage. There were no specific pleadings about the ceremonies those are performed in their community. General allegation of performing or celebrating the ceremonies would not help the complainant to establish the crime. In view thereof, the Court is of the view that the impugned order is free from infirmity and illegality and does not warrant interference.

14. Hence, the writ petition stands dismissed.

15. **The Secretary, High Court Legal Services, Sub-Committee, Aurangabad do pay the legal fees to advocate Ms. Vanita Sangole as per the schedule.**

(S. G. MEHARE, J.)

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