



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 1173 OF 2015

1] ANITA SUDAM AHIRE
2] SUDAM HAUSIRAM AHIRE ..APPLICANTS
VS.
THE STATE OF MAHARASHTRA AND ANR. ..RESPONDENTS

Adv. Sudip Mallick a/w Adv. Farzana Khan a/w Adv. Harshad
E. Palwe for the Applicants.

Mr. A.R. Patil, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : JANUARY 03, 2024

JUDGMENT:

1. By this application under Section 482 of the Code of Criminal Procedure (hereafter referred to as "Cr.P.C."), the challenge by the applicants is to the order dated 15/11/2007 and consequently for quashing the complaint instituted by respondent No.2 before the Court of Metropolitan Magistrate, 49th Court, Vikhroli, Mumbai.

2. The facts of the case, in brief, are as under:

(a) Applicant No.1 is the second wife of respondent No.3. Applicant No.2 is the father of applicant No.1. It is alleged that respondent No.3 (hereafter referred to as "husband")

married respondent No.2 (hereafter referred to as “first wife”) on 15/03/1990. Three daughters were born from the wedlock. The first wife was ill-treated by the husband and therefore, she left the matrimonial home at Nashik on 10/07/2005 whereafter she started residing in Mumbai along with her father. The first wife came to know that the husband had, during the subsistence of their marriage, solemnised second marriage sometime on 09/10/2005 with applicant No.1 (hereafter referred to as “second wife”). The complaint was, therefore, filed by the first wife before the trial Court in October 2007 on the accusation that the applicants and other accused have committed offence punishable under Section 494 read with Section 114 of the Indian Penal Code (hereafter referred as “IPC”). The complaint was duly verified on 23/10/2007 by the learned Magistrate.

(b) On perusal of the complaint and the statement of the complainant, the trial Court was of the opinion that *prima facie* a case is made out and hence issued process under Section 494 read with Section 109 of the IPC against the applicant and the co-accused.

3. I have heard the learned counsel for the applicants and learned APP for the prosecution. No one appeared for the contesting respondents though they are duly served.

4. Learned APP submitted that on the basis of the materials and having regard to the accusations in the complaint, the trial Court is justified in issuing the process against the applicants under Section 494 read with Section 109 of the IPC. It is submitted that applicant No.1 is the one who solemnised the second marriage and is therefore liable to be prosecuted for the offence punishable under Section 494 read with 109 of the IPC. It is submitted that the allegations set out in the complaint constitutes offence for which cognizance has been taken by the learned Magistrate. It is further submitted that on reading of the complaint as a whole and in the light of the statement on oath of the complainant, the ingredients of the alleged offence are disclosed.

5. I have carefully perused the complaint and also the verification statement of the complainant. Perusal of the complaint indicates that the husband solemnised the second marriage with applicant No.1 during the subsistence

of his first marriage with the complainant. It is alleged that the husband ill-treated the complainant and, therefore, she was forced to move out of the matrimonial home along with her children. It is alleged that when the complainant came to know that the husband had married applicant No.1, the complaint came to be filed.

6. The question is whether the allegations set out in the complaint constitute offence under Section 494 read with Section 109 of the IPC of which cognizance is taken by the learned Magistrate qua the applicants.

7. In answer to this question, it would be pertinent to refer to the relevant provision in Chapter 5 of the IPC dealing with 'abetment'. Section 107 of the IPC deals with 'Abetment of a thing', reading thus:

"A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the

doing of that thing.

Explanation 2.—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.”

8. Section 108 of the IPC deals with who is an ‘Abettor’,
reading thus :-

“A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.”

9. Section 109 prescribes the ‘punishment of abetment’
which reads thus :-

“Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.”

10. Section 494 of the IPC which is relevant in the context of the present case reads thus:

“494. Marrying again during life-time 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.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.”

11. Before I proceed further, it would be significant to refer to some decisions dealing with the offence of bigamy. The

Madurai Bench of the High Court of Madras in Saraswathi

Vs. Thirupathi and Anr.¹ dealt with Section 494 of the IPC. In paragraph No. 26 it is observed thus:

“26. A perusal of the said provision will make it clear that the said Section can be pressed into service against the First Respondent alone who contracted the second marriage during the subsistence of his marriage with the Appellant/Complainant. It is not the case of the Appellant/Complainant that the Second Respondent was having a husband and she married the First Respondent as her second husband during the subsistence of her marriage with her first husband, in which event alone she can be roped in as an Accused under Section 494, I.P.C. But, if it is established that she married the First Respondent with the knowledge that the First Respondent was already married and his first wife namely, the Appellant/Complainant was living and that their marriage was subsisting, she shall not be liable for the substantive offence punishable under Section 494, I.P.C., but shall be liable to be punished under Section 494, I.P.C. read with Section 109, I.P.C. for having abetted the commission of the said offence. Of course, as per Section 109, I.P.C. when no express provision is made in the Code for the punishment of abetment of a particular offence, if the act abetted is committed in consequence of the abetment, then such abettor shall be punishable with the punishment provided for the offence. Here is a case in which the marriage has taken place and hence, if the Second Respondent is proved to have got the knowledge of the first marriage of the First Respondent with the Appellant/Complainant, then she shall be liable to be punished with the punishment prescribed under Section 494, I.P.C. However, when a person is to be punished for abetment of an offence, separate charge stating that she is prosecuted for abetting such an offence and that the act abetted has been committed should have been framed. The charge against the Second Respondent ought to have been

¹ 2015 (1) MWN (Cr.) 110

framed as one for an offence punishable under Section 494. I.P.C. read with Section 109. I.P.C. The learned Trial Judge committed an error in not framing such a specific charge against the Second Respondent and convicting the Second Respondent under the substantive provision alone namely under Section 494, IPC Even for argument sake if it is assumed that the absence of framing of such a specific charge is only an irregularity not vitiating the proceedings, unless she is proved to have agreed for the marriage with the knowledge of the subsistence of the marriage between the Appellant/Complainant and the First Respondent, she cannot be convicted for the offence punishable under Section 494. I.P.C. read with Section 109, I.P.C. In this regard, there is absence of clear evidence, imputing direct knowledge to the Second Respondent regarding the subsistence of first marriage of the First Respondent with the Appellant/Complainant.”

12. The High Court of Karnataka in Smt. Revathi Vs. Smt. Netravathi² while construing Section 494 in paragraph No.8 has observed thus:

“8. A perusal of the above, indicates beyond doubt that a person who can be prosecuted under Section 494 of IPC is the erring husband or wife who marries again during the lifetime of his or her spouse and during the subsistence of the marriage. The petitioner herein who was arrayed as accused No.2 on the ground that she was the second wife of accused No.1 could certainly not be prosecuted for an offence under Section 494 of IPC. In that view of the matter, the criminal prosecution initiated against the petitioner / accused No.2 cannot be continued as that would result in an abuse of the process of law.”

It may be noticed that in Smt. Revathi (supra) the High Court of Karnataka was considering the prayer for quashing

² Criminal Petition No. 5678 of 2018

the complaint made by the second wife for the offence punishable under Section 494 of the IPC.

13. I may then refer to the decision of this Court in Sangita d/o. Natthulal Labhane Vs. Yashodhara w/o. Krishna Bhitre and Anr.³. This Court in paragraph No.8 observed thus:

“8. In so far as Section 494 of the Indian Penal Code is concerned, the learned counsel for respondent no.1/original complainant has fairly submitted that no case is made out against the present applicant. In my considered opinion, the concession has been correctly made inasmuch as under Section 494 of the Indian Penal Code it is either the husband or the wife who marries during the life time of husband or wife who can be punished. Under Section 494 of the Indian Penal Code the woman who marries a man whose wife is living cannot be prosecuted. Therefore, the order passed by the learned Magistrate issuing process against the applicant for the offence under Section 494 read with Section 34 of the Indian Penal Code and the order of the Revisional Court deserves to be quashed and set aside.”

14. In the decision rendered by Aurangabad Bench of this Court in Suresh s/o. Dodarao Kapse and others Vs. The State of Maharashtra and another.⁴, in paragraph No.10 the following observations are relevant:-

“10. With the assistance of the learned Counsel on both the sides I have gone through the complaint as well as the statement of the complainant on oath before the learned Magistrate. It is evident that the case prima facie can be said to have been made out

³ 2008 ALL MR (Cri) 2228

⁴ (1998) 3 Bom CR 488

for offence of bigamy or abatement thereof as against the accused Nos. 1 to 5, 10, 17, 18, 20 and 21. In case of other accused there is no evidence worth the name to show that they were directly or indirectly involved in the commission of the alleged offence. Mere allegations of their presence were not enough. Nor is there any positive indication in the complaint that any of them contributed in any form in performance of the second marriage of the applicants No. 1 and 2. It seems to me that in the circumstances the criminal prosecution against them was a mere farce and the order issuing process against them requires to be quashed.”

15. It may also be of significance to refer to the decision of the High Court of Jharkhand in Chundri Devi and Another Vs. State of Jharkhand and Another⁵ while dealing with the offence under Section 494 read with Section 109 of the IPC. The following observations are made in paragraph No. 47 reading thus:

“47. The essential ingredient to instigate the petitioner-Mohan Mahto to solemnize second marriage with petitioner-Deoki Devi on her part is wholly lacking in the records of the case. Thus, the finding of the learned trial court, upheld by the learned appellate court, holding that Deoki Devi knowingly married the accused Mohan Mahto who was already married, and consequent conviction of petitioner-Deoki Devi for abetment of offence under Section 494 committed by Mohan Mahto, is ex facie perverse, based on no evidence against Deoki Devi. Accordingly, the conviction and sentence of petitioner-Deoki Devi under section 494/109 IPC cannot be sustained in the eyes of law and calls for interference under revisional jurisdiction. Thus, the conviction of Deoki Devi under Section 494/109 IPC is

⁵ 2021 SCC OnLine Jhar 20

hereby set aside. However, the conviction of Mohan Mahto under Section 494 IPC does not call for any interference.”

16. Coming back to the facts of the present case, a careful perusal of the complaint and the statement on oath of the complainant would reveal that the accusations are only with regard to ill-treatment by the husband and the factum of the husband performing the second marriage with the applicant No.1 during the subsistence of the first marriage. The complaint is completely devoid of any material disclosing the ingredients of the offence of abetment against the applicants punishable under Section 109 of the IPC. The husband being the principal offender can be proceeded with under Section 494 of the IPC. So far as applicant No.1 is concerned, she being the second wife who married the husband during the subsistence of the first marriage is being proceeded with under Section 494 read with Section 109 of the IPC. However, there is absolutely no whisper in the complaint as to in what manner the applicants have aided or instigated the husband and thereby abetted him in the commission of the offence under Section 494 of the IPC. If the complaint is read as a whole,

the ingredients of the offence under Section 494 read with Section 109 of the IPC are not made out as against these applicants.

17. Let me look at the matter this way. The first marriage of the husband is subsisting. During the subsistence of the first marriage, the husband contracts a second marriage. A plain reading of Section 494 would give a cause to the wife from the first marriage to register an offence under Section 494 of the IPC against the husband. There is nothing on record to indicate that the second wife contracted the marriage with the husband being aware that the first marriage is subsisting. A penal statute must be strictly construed. The onus cannot be cast on the second wife to find out if the first marriage is subsisting. That is not the contemplation of Section 494 of the IPC.

18. The only assertion in the complaint is about the husband marrying the second wife during the subsistence of the first marriage. The mere assertion of performing a second marriage, is not, in my opinion, sufficient to proceed against the applicants without there being any allegation making out a case of abetment.

19. The Supreme Court in *Dhanalakshmi Vs. R. Prasanna Kumar and Others*.⁶ in paragraph No. 3 has explained the scope of this Court's powers under Section 482 of the Cr.P.C. Paragraph No.3 reads thus:

"3. Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide frivolous or vexatious, in that event there would be no justification for interference by the High Court."

20. In my opinion, there are no specific allegations in the complaint which disclose the ingredients of the offence of abetment punishable under Section 109 of IPC, the cognizance of which is taken by the learned Magistrate. In the absence of specific allegations against these applicants in the complaint constituting the offence punishable under

⁶ 1990 (Supp) Supreme Court Cases 686

Section 109 of the IPC, in my view, the applicants cannot be proceeded with only for the offence under Section 494 of the IPC.

21. The application, therefore, succeeds and is accordingly allowed in terms of prayer clause (a).

22. It is made clear that the complaint is quashed only so far as the applicants are concerned.

23. The application is disposed of in the above terms.

(M. S. KARNIK, J.)