IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

909 CRIMINAL APPLICATION NO. 4271 OF 2019

BEGUMBI W/O. SHAIKH AZIZ AND OTHERS
VERSUS
SHABANA BEGUM W/O. SHAIKH RAIS

WITH
CRIMINAL APPLICATION NO. 535 OF 2020

SHABANA W/O. SHAIKH RAEES AND OTHERS
VERSUS
SHABANA BEGUM W/O. SHAIKH RAIS

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Ms A. N. Ansari, Advocate for the Applicants
Mr. R. B. Sanap, Advocate for the Respondent sole

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CORAM : Y. G. KHOBRAGADE, J.

DATE : 25.02.2025

PER COURT :-

1. In both these Applications under Section 482 of the Code of Criminal Procedure, the Applicants have prayed to quash and set aside the order dated 28.11.2019 passed by the learned Additional Sessions Judge-6, Aurangabad, whereby it upheld the order of issuance of process passed by the learned J.M.F.C. Court No.4, Paithan, District Aurangabad on 19.09.2017 for the offence under Section 494 read with Section 109 of the Indian Penal Code.

2. In both these Applications, the Applicants are the original accused and the non-Applicant is the original complainant. For the sake of brevity, I would like to refer the parties to the present Applications in their original capacity.

3. The complainant has filed a criminal complaint bearing R.C.C.No.70 of 2013 alleging that, on 01.05.2008, her marriage solemnized with accused No.1 as per the Muslim customs and rites at Paithan, District Aurangabad. After marriage, she cohabited with accused No.1. Out of said matrimonial relations, she was blessed with a female child on 14.04.2009. However, subsequently, her husband accused No.1 subjected her to cruelty and domestic violence due to non fulfillment of demand of dowry. Further, the accused no. 1 removed all gold and silver ornaments from her person, and she was driven out of her matrimonial house after being beaten mercilessly. The complainant further alleged that, on 15.08.2011, she delivered a female child on second time at her parental house. Thereafter her father gave message to the accused persons about blessing of second time female child. Thereafter, on 21.08.2011, the accused Nos. 4 and 6 both visited to see the newborn female child. At that time, the father of the complainant inquired with accused No.1 as to when his daughter would be taken for cohabitation, but the

accused No.6 who is husband of sister-in-law of the Respondent quarreled with him and left her parental house. The complainant further alleged that during subsistence of her first marriage with the accused No.1, on 28.08.2011 her husband performed second marriage with accused No.2. The accused Nos. 3 to 11 helped and participated while solemnization of second marriage of accused No.1 with accused No.2. The accused Nos. 5, 10 and 11 also stood witness to the Nikahnama between the accused Nos. 1 and 2. It is further alleged that, she had initiated a proceeding under Section 498-A of the I.P.C. against the accused No.1 and during investigation of said crime, the Police recorded statements of witnesses and accused No.1. While recording the statement, the Accused no. 1 made a confessional statement that, he has solemnization of second marriage with accused No.2. After recording statement of verification of the complainant and after satisfying about allegedly committing the offence by the Accused persons, therefore, the learned J.M.F.C., passed an order on 19.09.2017 and issued process against the accused Nos. 1 to 11 for the offence under Sections 494 read with Section 109 of I.P.C.

4. Being aggrieved by said order, the accused/Applicant Nos. 1 to 11 instituted the Criminal Revision Application No.34 of 2018

u/s 397 of Cri. P. C., before the Sessions Court. On 28.11.2019, the learned Sessions Judge passed the impugned order and dismissed the Revision Application. Therefore, the Applicants/accused Nos. 3, 4, 6 to 9 have filed Criminal Application No.4271 of 2019 and accused Nos. 2, 10 and 11 have filed Criminal Application No.535 of 2020.

5. The learned counsel for the Applicants canvassed in vehemence that, the complainant has not made statement in the complaint that, all the accused Nos. 2 to 11 were having knowledge about subsistence of first marriage between her and accused No.1. It is also not made an averment that, the Accused 3 to 11 are participated while performing second marriage between accused Nos. 1 and 2 during subsistence of first marriage between her accused No.1.

6. It is further canvassed that, the accused No.1 is major married person and having right to take it's own individual decision in his life. The complainant has not brought any material on record to show that the accused 3 to 11 are abetted the accused No.1 and 2 for performing second marriage. Therefore, essential ingredients to constitute the offence under Section 494 read with Section 109 of I.P.C. are absent. Therefore, the learned Judicial Magistrate as well as

the learned Revisional Court could have refused to issue the process against the Accused. However, both the Courts below wrongly relied on statements of the complainant and issued process under Section 494 read with Section 109 of I.P.C. Therefore, prayed for quash and set aside the order dated 28.11.2019 passed by the learned Additional Sessions Judge-6, Aurangabad and thereby upheld the order of issuance of process passed by the learned J.M.F.C. on 19.09.2017.

7. Per contra, the learned counsel for the complainant canvassed that, the accused No.1 is the husband of the complainant. The accused No.2 is a second wife of accused No.1. The accused No.3 is the elder brother of accused No.1. The accused No.3 is the mother of Accused no. 1. The Accused nos. 4 is brother of Accused no. 1 and Accused no. 5 is a wife of Applicant No.4. Accused No.6 is husband of sister of accused no. 1. Accused No.7 is the sister-in-law of the complainant, accused No.8 is the husband of sister-in-law of the complainant, accused No.9 is the sister-in-law of the complainant, accused No.10 and 11 are parents of accused No.2. All the accused were having knowledge about subsistence of first matter of the accused with the complainant. But all the accused are participated while performing second marriage between the complainant and

accused No.1. So also, accused Nos. 5, 10 and 11 acted as a witness while performing second marriage of accused No.1 with the accused No.2 during subsistence of first marriage between accused No.1 and complainant. Therefore, question whether the accused Nos. 3 to 11 were present while solemnization of second marriage of the Accused no. 1 with 2 cannot be decided at this juncture without trial. Therefore, prayed for rejection of the application.

8. Having regard to the submissions canvassed on behalf of both side I have gone the record. On perusal of the complaint it shows that, the complainant specifically made averment that, on 01.05.2008 her marriage solemnized with accused No.1 and out of said matrimonial relations, she blessed with first female child on 14.04.2009. But thereafter accused No.1 raised cruelty against her for non fulfillment of demand of dowry and was beaten mercilessly and drove her out of matrimonial house on 01.05.2011. Thereafter she started residing at her parental house. On 15.08.2011, she has delivered second female child. Thereafter, the complainant's father passed the message to the accused and then on 21.08.2011, the accused Nos. 4 and 6 visited at her parental house to see the newborn child. After the complainant's inquired with accused Nos. 4 and 6

that, when they would take the complainant for cohabitation with accused No.1, but the accused Nos. 4 and 6 quarreled. The statement made in the complaint further shows that, on 28.08.2011, the complainant's husband accused No.1 performed second marriage with accused no.2 during subsistence of her marriage and accused Nos. 3 to 11 are actively participated while solemnization of second marriage ceremony though they were having knowledge about existence of first marriage of accused No.1 with her. The accused Nos. 5, 10 and 11 are acted as witnesses to the Nikahnama of second marriage between the accused No.1 and accused No.2.

9. It is also not case of the Accused that, the Accused no. 1 divorced the complainant at any time before or he obtained decree of divorce from the competent Court of law. Therefore, it prima facie appears about subsistence of marriage of the complainant with the Accused no. 1.

10. Needless to say that in the case of ***S. Nitheen and others Vs. State of Kerala and another, 2024(8) SCC 706***, the Hon'ble Supreme Court held that pre-charge evidence led in support of the complaint would reveal that the accused 3 and 4 were not even alleged to be present at the time of such marriage, therefore,

involvement of these accused persons of having a common intention to commit an offence under Section 494 of I.P.C. is not established by an iota of evidence. So also, there is no even a shred of allegation by the complainant that these accused persons acted as a witnesses to the second marriage having knowledge that the accused No.1 was already married with the complainant.

11. Section 204 of Cr.P.C. provides that if the Magistrate is of opinion that sufficient material is available on record to proceed against the accused persons for taking cognizance, in those circumstances, the Magistrate has to issue the process. In case-in-hand, it *prima-facie* appears that the complainant has made out substantial case for issuance of process.

12. On 19.09.2017, the learned J.M.F.C. Court No.4, Paithan, District Aurangabad, passed an order after holding inquiry under Section 202 of Cr.P.C. and issued process against the Applicants/accused persons for the offence under Section 494 read with Section 109 of I.P.C. On 28.11.2019, the learned Revisional Court passed the impugned order and upheld order dated 19.09.2017 passed by the learned J.M.F.C. Both the Court concurrently held that, material produced on record disclose that the complainant is legally

married to the accused no. 1 and during subsistence of their marriage, the accused no. 1 again performed second marriage with the Accused no. 2 with the aid of accused nos. 3 to 11.

13. On perusal of impugned Judgment and Order dated 28.11.2019 it shows that the learned Revisional Court considered Section 13 of the Mohammedan Law which restraint on polygamy by limiting the number of wives to four subject to the condition that all the wives be treated justly and equitably and it not religious practice or religious injunction directing Muslim for marrying more than one wife. A Second or subsequent marriage is permissible only with a view to care and compassionate treatment to a destitute female, orphan to make her life livable, if a Muslim man able to do justice not otherwise and the learned Revisional Court upheld order dated 19.09.2017 passed by the learned J.M.F.C., which does not appear perverse, illegal, bad in law and no substantial grounds are set out to interfere with the said findings. Therefore, both the Applications are dismissed.

[Y. G. KHOBRAGADE, J.]

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