
Before Ranjit Singh, J.

PADAM KUMAR,—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER,—*Respondents*

CRIMINAL MISC. NO. 54778/M OF 2004

5th February, 2007

Indian Penal Code, 1860—S.494—Exparte divorce decree passed in favour of petitioner—Petitioner contracting second marriage—Application filed after five years by respondent 2 for setting aside decree of divorce allowed—After about 10 years thereafter complaint under section 494 filed—Performance of second marriage of petitioner when there was no subsisting marriage between petitioner and respondent—Once marriage between petitioner and respondent stood validly dissolved allegation of bigamy cannot be urged—Petitioner not guilty of offence of adultery—Allowing proceedings to continue an abuse of process of Court—Petitions allowed, complaint and summoning order quashed.

Held, that second marriage was performed when there was an *ex parte* decree of divorce between petitioner Padam Kumar and respondent No. 2. Accordingly, the petitioners could not be guilty of offence of adultery. The complaint filed in this case, if allowed to continue, would only be exercise in futility. As observed by Hon'ble Supreme Court, criminal court cannot be allowed to waste time for such purpose where end result is almost foregone conclusion. Even otherwise, respondent No. 2 by her very conduct has allowed the thing to drift to such an extent that the parties not only have lived subsequent relationship of husband and wife for a number of years but by now have grown up children. Even the child out of the wedlock of petitioner Padam Kumar and respondent No. 2 has been married and have issues. At such a belated stage, the parties cannot be allowed to be saddled with such prosecution where offence would not be made out. Allowing these proceedings to continue would be nothing but an abuse of process of Court.

(Para 8)

A.P. Bhandari, Advocate, *for the petitioner.*

Yashwinder Singh, AAG, Haryana.

C.L. Verma, Advocate, *for respondent No. 2.*

JUDGMENT**RANJIT SINGH, J.**

(1) This order shall dispose of CRM Nos. 54778-M of 2004 and 65729-M of 2005.

(2) The facts have been taken from CRM No. 54778-M of 2004. Petitioner, Padam Kumar has filed CRM No. 54778-M of 2004. His wife Smt. Kamlesh Rani, daughter of Sham Lal Gupta alongwith her mother-in-law and brother-in-law have filed the second petition referred to above. Quashing of complaint dated 24th October, 2000 and summoning order dated 14th July, 2004 passed by JMJC, Ludhiana is sought in both the petitions. A complaint was filed by Smt. Anoop Mala complainant-respondent No. 2 Ex-wife of Padam Kumar, Petitioner, with the allegation that Padam Kumar has contracted second marriage with Kamlesh Rani and thus both are guilty of offence under Section 494 IPC. The admitted facts of this case are that petitioner, Padam Kumar married complainant-respondent No. 2, Smt. Anoop Mala on 29th October, 1981. A daughter and a son were born out of this wedlock on 15th September, 1982 and 6th November, 1983 respectively. Complaining that his wife had deserted him, the Petitioner, Padam Kumar filed an application under Section 9 of the Hindu Marriage Act for restitution of his conjugal rights in the year 1984. Complainant-respondent No. 2 Anoop Mala though served but did not appear and was proceeded *ex parte*. The decree of restitution of conjugal rights was thus passed on 13th June, 1984. Despite this decree in favour of Petitioner-Padam Kumar, respondent no. 2-wife did not join his company and the parties thereafter never cohabited. The Petitioner, Padam Kumar then filed a petition for dissolution of marriage under Section 13 of the Hindu Marriage Act on 15th June, 1985. Complainant-respondent no. 2-wife was served but again chose not to appear. She rather refused to accept summons. Smt. Anoop Mala was served at the same address as given by her in the complaint now filed under Section 494 IPC. In the divorce petition also, she was proceeded *ex parte*. Petitioner Padam Kumar, accordingly, was granted decree of divorce on 30th October, 1985. Thus, the marriage between Petitioner, Padam Kumar and Smt. Anoop Mala, respondent No. 2 stood dissolved with effect from 30th October, 1985. Thereafter, Petitioner, Padam Kumar contracted a second marriage with one Usha Rani on 9th August, 1986. Unfortunately the said lady died on 9th

August, 1987. Padam Kumar then married yet again with Smt. Kamlesh Rani, petitioner in one of the petitions, on 2nd September, 1987. Out of this wedlock, a son and two daughters are born. The daughter was born in the year 1989 followed by a son in the year 1991 and then second daughter in the year 1993. The elder daughter born out of the wedlock between Petitioner, Padam Kumar and respondent No. 2 was married by Padam Kumar and she is having two children of her own.

(3) After a considerable period on 15th June, 1990, respondent No. 2-wife moved an application for setting aside the decree of divorce granted in favour of Padam Kumar. This application was allowed on 5th August, 1993 and the *ex parte* decree granting divorce to Petitioner, Padam Kumar was set aside. It is therefore, in the year 2000, the respondent No. 2 filed a complaint under Section 494 IPC against Padam Kumar, his second wife and other petitioners as aforementioned. It is alleged by her that Padam Kumar, petitioner has contracted second marriage during the subsistence of his earlier marriage and as such guilty of offence u/s 494 IPC. It is on this complaint that the petitioners stand summoned,—*vide* order dated 14th July, 2004. Aggrieved against this action, these two petitions are filed pleading that the complaint and subsequent proceedings are an abuse of the process of Court specially when viewed in the background that there was no marriage subsisting when petitioners Padam Kumar and Kamlesh Rani got married.

(4) The counsel for the parties are heard.

(5) During the course of arguments, counsel for respondent No. 2 could not dispute the fact that the marriage between Petitioner, Padam Kumar and respondent No. 2 had been dissolved when the decree of divorce was passed and that marriage between Petitioner, Padam Kumar and Kamlesh Rani was performed during the period when there was no subsisting marriage between Petitioner, Padam Kumar and respondent No. 2. He however, by referring to Annexure R2/2, sought to contend that this case needed to be appreciated in the background, under which, Petitioner, Padam Kumar was able to achieve this purpose by managing an *ex parte* decree of divorce.

(6) What is required to be seen is whether having regard to the facts and the complaint as made, any offence u/s 494 IPC would be made out against the petitioners or not. It is also required to be appreciated that the divorce in this case was granted, even though,

ex parte on 15th June, 1985. The marriage between petitioner, Padam Kumar and Kamlesh Rani took place on 2nd September, 1987. Whatever may be the facts, on the date of this marriage, there was no subsisting marriage between Petitioner, Padam Kumar and respondent No. 2. Respondent No. 2 made first move for setting aside of the *ex parte* decree of divorce on 15th June, 1990 i.e. almost after five years of the grant of this divorce. Though, this *ex parte* decree was set aside in 1990, as noticed, yet respondent No. 2 did not make any effort to file any complaint in regard to second marriage against the petitioner or Kamlesh Rani till the year 2000 i.e. till 10 years after the date of her knowledge about the marriage. In between, Petitioner, Padam Kumar had arranged marriage of his daughter born out of the wedlock between him and respondent No. 2. Once the marriage between Padam Kumar and Anoop Mala stood validly dissolved, the allegation of bigamy against him and his second wife cannot be urged. In case **Krishna Gopal Divedi versus Prabha Divedi(1)**, it was held that no offence of bigamy would be made out where a person was remarried when there was no subsisting marriage between him and the complainant. The case of **Krishna Gopal Divedi** (*supra*) appears to be identical to the facts in the present case. In **Krishna Gopal Divedi's case** also, he had obtained an *ex parte* decree of divorce from his previous wife and had undergone a marriage with another lady thereafter. *Ex parte* decree of divorce, which had earlier been obtained by Krishna Gopal Divedi was set aside subsequently. A complaint was filed by the first wife against Krishna Gopal Divedi alleging that he was guilty of an offence under Section 494 IPC. Hon'ble Supreme Court held that Krishna Gopal Divedi cannot possibly be convicted under Section 494 IPC and, accordingly, allowed his appeal. The relevant observations of Hon'ble Supreme Court in this regard, are :—

“The first wife filed a complaint against the appellant on 28th March, 1995 alleging that the appellant has committed the offence under Section 494 of the IPC. On receiving the process issued by the Criminal Court the appellant moved the High Court of Allahabad for quashing the criminal proceedings. The main plank adopted by the appellant is that on the date when he conducted the second marriage the first marriage was not subsisting in view of the *ex parte* decree which continued in force on the said date.

(1) AIR 2002 S.C. 389

Learned counsel for the respondent (first wife) did not dispute the fact that she moved for setting aside the *ex parte* decree and succeeded in it when an order was passed on 31st March, 1994. As per that order the *ex parte* decree of divorce dated 6th July, 1990 was set aside if that be so, appellant cannot possibly be convicted for the offence under Section 494 of IPC on premise that he had undergone a ceremony of marriage with another lady on 25th May, 1993.

Learned counsel for the respondent contended that the appellant is guilty of adultery at least from the date 31st March, 1994. We are not considering that aspect since no complaint has been filed by the first wife against the appellant on that score.

As it is, we feel that the criminal proceeding now pending against the appellant for the offence under Section 494 of the IPC is only and exercise of futility. We do not want the criminal Court to waste its time for that purpose.”

(7) The perusal of the above law laid down by Hon'ble Supreme Court would clearly fit into the facts of the present case. It is clearly made out that second marriage was performed when there was an *ex parte* decree of divorce between Petitioner, Padam Kumar and respondent No. 2. Accordingly, the petitioners could not be guilty of offence of adultery. The complaint filed in this case, if allowed to continue, would only be exercised in futility. As observed by Hon'ble Supreme Court, criminal Court cannot be allowed to waste time for such purpose where end result is almost foregone conclusion. Even otherwise, respondent No. 2 by her very conduct has allowed the thing to drift to such an extent that the parties not only have lived subsequent relationship of husband and wife for a number of years but by now have grown up children. Even the child out of the wedlock of Petitioner, Padam Kumar and respondent No. 2 has been married and have issues. At such a belated stage, the parties cannot be allowed to be saddled with such prosecution where offence would not be made out. Allowing these proceedings to continue would be nothing but an abuse of process of Court. Both the petitions are allowed and the complaint and the order summoning the petitioners in the respective petitions are quashed relieving the respective petitioners of the consequences of the trial and proceedings.