

**AFR**

**Reserved**

**Case :- CRIMINAL REVISION No. - 623 of 2007**

**Revisionist :- Smt. Kiran Dhar**

**Opposite Party :- Alok Berman**

**Counsel for Revisionist :- Usman Siddiqui, Akhter Abbas, R.M. Sharma**

**Counsel for Opposite Party :- R.P. Misra, Rajeev Kr. Bajpai**

**Hon'ble Arvind Kumar Tripathi (II),J.**

1. Heard learned counsel for the revisionist and Shri R.P. Mishra, learned counsel for the opposite party.

2. Instant criminal revision has been filed by Smt. Kiran Dhar challenging the order dated 6.10.2007 passed by the Family Judge, Family Court, Lucknow by which application under Section 125 Cr.P.C. filed by Smt. Kiran Dhar was rejected.

3. A perusal of record reveals that an application under Section 125 Cr.P.C. was filed by Smt. Kiran Dhar before the court of Principal Judge, Family Court, Lucknow alleging that she is legally wedded wife of Alok Berman. Marriage was solemnized on 6.2.2005 as per Hindu customs and rituals. Shaptpadi was also performed. At the time of marriage many items, mentioned in paragraph 4 of the application under Section 125 Cr.P.C. was provided to the opposite party, and his family members, but they were greedy and were not happy with the dowry provided, so they started torturing her. To cut a long story short, the revisionist was sent back on 18.4.2005 to her parents house, and since then she is living in her father's house. By moving application under Section 125 Cr.P.C., she has claimed Rs.5000/- per month for maintenance from the date of filing of petition. Opposite party appeared and filed objections. The main defence was that at the time of marriage, the husband was having a living spouse i.e. his earlier wife, and thus his marriage with Smt. Kiran Dhar is *void ab*

*initio*, and due to this no order can be passed allowing the maintenance.

4. The Principal Judge, Family Court, after hearing the parties and going through the evidence on record, dismissed the application under Section 125 Cr.P.C., hence this criminal revision.

5. It was submitted by the learned counsel for the revisionist that, admittedly, the revisionist is legally wedded wife of Alok Berman. The revisionist was not aware of first marriage of Alok Berman by another woman and due to this her rights will not be affected by the fact of previous existing marriage prior to the marriage of Kiran Dhar and Alok Berman.

6. Learned counsel for the revisionist supported his arguments on the basis of case decided by the Apex Court in the cases of ***Ramesh Chandra Rampratap Ji Daga v. Rameshwari Ramesh Chadra Daga, 2005 (1) Supreme 155*** and ***Chanmuniya v. Virendra Kumar Singh Kushwaha and another, (2011) 2 SCC (Crl.) 666 = (2011) 1 SCC 141.***

7. Learned counsel for the opposite party argued that second marriage is *void ab initio* on the ground of subsistence of first marriage, then this wife is not entitled for maintenance as marriage is void. In support of his submission learned counsel for the opposite party has relief upon the decisions in the cases of ***Savitaben Somabhai Bhatiya v. State of Gujarat and others, (2005) 3 SCC 636; Khemchand Om Prakash Sharma v. State of Gujarat and another, (2000) 3 SCC 753; Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and another, (2013) 2 SCC 137; Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another, (1998) 1 SCC 530; Abbayolla M. Subba Reddy v. Padmamma, AIR 1999 Andhra Pradesh 19 (FB); and Naurang Singh Chuni Singh and Smt. Sapla Devi, AIR 1968***

**Allahabad 412 (V 55 C 104).**

8. After going through the submissions by the parties, the points, which are to be decided, are whether the revisionist being the wife of opposite party can be allowed any maintenance on the admitted position that first wife of opposite party is alive, and whether there has been any annulment of marriage by decree of divorce? Another question also arises that if the revisionist was not aware of first marriage of opposite party, then what will be the effect?

9. Before entering into the discussions and discussing law referred by the parties, it will be apt to reproduce Sections 5 and 11 of the Hindu Marriage Act, 1955: -

**5. Conditions for a Hindu marriage.-** A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: —

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party —

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of [twenty-one years] and the bride, the age of <sup>4</sup>[eighteen years] at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

**11. Void marriages.-** Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto <sup>1</sup>[against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

10. In the case of **Ramesh Chandra Rampratapji Daga v. Rameshwari Ramesh Chadra Daga** (supra) the Apex Court has

held as under: -

“It is well known and recognized legal position that customary Hindu Law like Mohamnendan Law permitted bigamous marriages which were prevalent in Hindu families and more so in royal Hindu families. It is only after the Hindu Law was codified by enactments including the present Act that bar against bigamous marriages was created by Section 5 (1) of the Act. Keeping into consideration the present state of the statutory Hindu Law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to spouse financially weak and economically dependant. It is with the purpose of not rendering a financially dependant spouse destitute that Section 25 enables the court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship. **(para 20)**

Section 25 is an enabling provision. It empowers the Court in a matrimonial case to consider facts and circumstances of the spouse applying and decide whether or not to grant permanent alimony or maintenance. **(para 21)**

The facts of the present case fully justify grant of maintenance both to the wife and the daughter. The evidence of the wife has been believed by the courts below and accordingly to us rightly so. From circumstances preceding and attending the marriage, it can safely be inferred that the present husband must have made reasonable enquiries about the previous marriage of the present wife. The wife's version is natural and inspires belief that the document of Chor Chhithi was shown and given to the husband. It is proved from the photocopy of the foil of Registration, placed on record. According to the wife, the husband did receive the document of Chor Chhithi but has not produced it before the Family Court. It is argued that it is open to the wife, if the document was registered, to get a copy from the Registration office. Even if that was possible, we find no ground to disbelieve her version that the fact of her previous marriage was not concealed from the present husband. The husband is an advocate. His falsehood went to the extent of denying his second marriage and calling his wife only to be a governess of his children from the first wife. He unsuccessfully denied even the parentage of daughter Puja, born through him. He failed to lead any evidence on the illegitimacy of the child. After the second marriage the parties lived as husband and wife and they had a considerably long married life of about nine years from 1981 to 1990. In such a situation, the Family Court and High Court were fully justified in holding that the wife deserves to be granted maintenance under Section 25 of the Act.” **(para 22)**

11. In the case of *Chanmuniya v. Virendra Kumar Singh Kushwaha and another* (supra) the Apex Court in view of divergence of judicial opinion on the interpretation of word 'wife' in Section 125 Cr.P.C., referred the matter to Larger Bench framing three questions; (1) Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the

presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125 Cr.P.C.?; (2) Whether strict proof of marriage is essential for a claim of maintenance under Section 125 Cr.P.C. having regard to the provisions of Domestic Violence Act, 2005?; and (3) Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisities of Section 7 (1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125 Cr.P.C.?

12. The decision is also of no help to the cause of the revisionist because in the above case, there is no finding to help the revisionist. The matter has been referred to the Larger Bench for determination, and until the decision of Larger Bench, the present decision shall prevail.

13. In the case of *Savitaben Somabhai Bhatiya v. State of Gujarat and others* (supra) the Apex Court has held as under: -

“There may be substance in the plea of learned counsel for the appellant that law operates harshly against the woman who unwittingly gets into relationship with a married man and Section 125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently there is no escape from the conclusion that the expression 'wife' as per Section 125 of the Code refers to only legally married wife. (para 8)

In Smt. Yamunabai's case (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code. (para 17)

It may be noted at this juncture that the legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'. (para 18)

14. In the case of *Khemchand Om Prakash Sharma v. State*

*of Gujarat and another* (supra) it has been held in para 2 that “The short question that arises for consideration in this appeal is whether the respondent Jasumatiben, who claimed maintenance, being the wife of the applicant, can be allowed any maintenance on the admitted position that the applicant's first wife is alive and there has been no annulment of marriage by a decree of divorce or otherwise. During the subsistence of the first marriage, any second marriage is null and void, and therefore, the courts below committed a mistake in granting maintenance in favour of Jasumatiben, who claimed maintenance as the second wife of the applicant. We, therefore, set aside the grant of maintenance in favour of Jasumatiben alone. Needless to mention the children, namely, Trupti and Vaishali continue to get maintenance, as directed.”

15. In the case of *Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and another* (supra) it has been held that held “marriage covered by Section 11 is void ipso jure, that is, void from the very inception. Such marriage has to be ignored as not existing in law at all. It was further held by this Court that a formal declaration of the nullity of such a marriage is not a mandatory requirement though such an option is available to either of the parties to a marriage.

16. In the case of *Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another* (supra) the Apex Court has held that expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife not covered by Section 11 of the Hindu Marriage Act.

17. In that case too, the point involved was as to whether a Hindu woman, who is married, after coming into force of the Hindu Marriage Act, 1955, to a Hindu male having a lawfully wedded wife, can maintain an application under Section 125 Cr.P.C. Bombay High Court heard the case, and decided against the wife. The appeal was

filed and that too was dismissed.

18. It has also been held in para 7 that “Lastly, it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent, who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.”

19. In the case of *Abbayolla M. Subba Reddy v. Padmamma* (supra) a Full Bench of Andhra Pradesh has held as under: -

A Hindu is under an obligation to maintain his wife, his minor sons, unmarried daughters and aged Parents. The obligation is personal. It arises from the very nature of the relationship and exists whether he possesses any property or not. The Maintenance Act gives statutory form to that obligation. The right of a Hindu wife for maintenance is an incident of the status of matrimony. Subsection (1) of Section 18 of the Act substantially reiterates that right and lays down the general rule that a Hindu wife whether married either before or after the commencement of the Act is entitled to be maintained by her husband during her life time. The rule laid down in this Section is subject to the exceptions stated in sub-section (3) which lays down that she cannot claim separate residence and maintenance if she is unchaste or ceases to be a Hindu by conversion to another religion. Under sub-section (2) of Section 18 wife is entitled to live separately from her husband without forfeiting her claim for maintenance, in the circumstances stated in clauses (a) to (g) mentioned in that subsection. Under clause (d), wife is entitled for separate residence without forfeiting her claim for maintenance if her husband has any other wife living. The claim for maintenance is maintainable under this Section irrespective of the fact that the marriage had taken place after or before the marriage of the applicant wife, provided the other wife is living. The ground laid down in this Section can, obviously exist only in case of any marriage solemnized before the Hindu Marriage Act came into operation. It is obviously for the reason that the Hindu Marriage Act, 1955 laid down monogamy as a rule of law and Hindu husband cannot marry another wife after the commencement of that Act. A bigamous marriage contracted after the coming into force of that Act, would be null and void and no question of having another wife can arise. Therefore, the word "Hindu wife" in Section 18 (1) connotes only a legally wedded wife of Hindu and such wife alone is entitled to claim maintenance from her husband under this Section. If her marriage is void ab initio, she is not entitled to claim maintenance under this Section. "Hindu wife" in this Section, we

reiterate, only means a wife whose marriage is valid under the provisions of the Hindu Marriage Act, 1955. The wife whose marriage has been solemnized, but is void on the ground that the first wife of the husband is living at the time of the marriage is not entitled to claim maintenance under this provision. **(para 15)**

The expression "any other wife" in Section 18 (2) (d) of the Act came up for consideration before Karnataka High Court in *Subbe Gowda v. Hanamma*, , and it is held by that Court that:

'The expression 'any other wife' in Section 18 (2) (d) means, any other legally wedded wife. Therefore, even if the husband is living with another woman treating her as his wife, it cannot be said that he has any other wife living within the meaning of Section 18 (2) (d)."

While the personal law governing the parties prohibits bigamous marriage, on a parity of reasoning, it can also be stated that the expression 'Hindu wife' in Section 18 means only a legally wedded wife and not a wife whose marriage is void under the provisions of the Hindu Marriage Act. The second marriage/bigamous marriage being void cannot create a legal statute of "husband" and "wife" between the parties. That marriage is void ab initio and the woman cannot get the status of a wife nor the male gets the status of husband to her. Therefore, she cannot get a right to claim maintenance under Section 18 of the Act. **(para 16)**

20. A Division Bench of this Court in the case of *Naurang Singh Chuni Singh and Smt. Sapla Devi* (supra) has also held that marriage of hindu husband solemnised with second wife during continuance of his marriage with his former wife is void on account of Sections 5 (1) and 11 of the Hindu Marriage Act, and second wife is not entitled to claim maintenance from her husband.

21. In the instant case, it was submitted by the learned counsel for the revisionist that wife was not aware of her husband's first marriage, so she cannot be penalized for concealing of fact by the husband.

22. This question was answered in the case of *Savitaben Somabhai Bhatiya v. State of Gujarat and others* (supra), and the Apex Court has held that plea of the wife that she was not informed about the earlier marriage of her husband when she married him, is of no avail. The principle of estoppel cannot be pressed into service to defeat the provisions of Section 125 of the Code of Criminal Procedure.

23. From the above, it is clear that a woman, who had married without knowing about the previous marriage of the husband does not acquire legal status of wife, and is not entitled to claim maintenance.

24. In the instant case, from the evidence it has to be seen that as to whether the alleged annulment of marriage between Alok Berman and his previous wife was valid or not, and on the basis of evidence, can annulment by parties outside the court can be treated as not valid?

25. The provisions of divorce has been mentioned in Section 13 of Hindu Marriage Act, 1955, which reads as follows: -

**“13. Divorce.-** (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party —

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(a) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation .— In this clause, —

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable

form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

[Explanation. — In this sub-section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

[(1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of <sup>7</sup>[one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of <sup>7</sup>[one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation. —This clause applies whether the marriage was solemnised before or after the commencement of the Marriage

**13 - A. Alternate relief in divorce proceedings.** — [13A. Alternate relief in divorce proceedings. —In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.]

**13 - B. Divorce by mutual consent.** — [13B. Divorce by mutual consent. — (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]”

26. Section 13 of Hindu Marriage Act clearly requires a petition either by the husband or the wife for dissolving the marriage by decree or divorce on the ground mentioned in Section 13 of Hindu Marriage Act. No other form of divorce has been recognized by Hindu Marriage Act. Annexure 5 is an agreement between Alok Berman and his earlier wife – Smt. Rani in which parties had signed a divorced deed in which they have stated that they are dissolving the marriage by this deed on the conditions mentioned in the deed. Condition no.6 is also very relevant in which she has stated that if either of the parties filed a divorce case in the Court, then another party will give consent to the divorce without making any objection.

27. It is not on record as to whether any suit for divorce was filed by Smt. Rani or not. In absence of any document and decree of divorce by the court, it can safely be presumed that no such application was moved by either of parties before the competent court

for dissolution of marriage. In view of this, the only evidence of divorce is the document Annexure 5. This document has not seen the light of day during any divorce proceeding. Hindu Marriage Act does not recognize any divorce of such type. It has also not been averred and proved that there was such custom in the society of parties to recognize such type of divorce.

28. In the absence of any custom and in absence of any decree for divorce, it cannot be said that marriage between Alok Berman and Smt. Rani was dissolved, which goes to show that Alok Berman was still legally married husband of Smt. Rani, who was, admittedly, alive at the time of marriage of Smt. Kiran Dhar with Alok Berman, and the marriage between them was not annulled as per law.

29. In view of Sections 5 (1) and 11 of Hindu Marriage Act and also in view of decision of Apex Court in ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another*** (supra) the marriage between Smt. Kiran Dhar and Alok Berman is *void ab initio*, and she is not entitled to maintenance.

30. It is also clear from the decision of ***Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another*** (supra) that even if the second wife (Smt. Kiran Dhar) was not aware of first marriage of her husband with another woman, she is not entitled to any maintenance.

31. In view of the above discussions, this criminal revision is liable to fail, and is hereby dismissed.

**Order Date :- 14.5.2014**  
Anupam

**(Justice Arvind Kumar Tripathi – II)**