THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.09.2014

C O R A M

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

Criminal Appeal(MD) No.4 of 2004

Saraswathi ... Appellant

Vs.

1.Thirupathi
2.Dhanalakshmi ... Respondents

Appeal filed under Section 378 Cr.P.C., against the order dated 14.06.2004 made in C.A.No.48 of 2002 on the file of the III Additional District and Sessions Court, Madurai reversing the order dated 04.04.2002 made in C.C.No.1123 of 1997 on the file of the Judicial Magistrate No.2, Madurai.

For Appellant : Mr.K.Prabhu

For 1st Respondent : Mr.R.Sundar

For 2nd Respondent : Mr.R.Sivalingam
(Legal Aid Counsel)

JUDGMENT

The appellant was the complainant before the trial Court namely, the Court of Judicial Magistrate No.II, Madurai and Calender Case No.1123 of 1997 came to be instituted on a complaint preferred by the appellant/complainant herein alleging that the respondents herein committed an offence punishable under Section 494 of the Indian Penal Code. The trial ended in conviction of both the respondents herein who figured as accused Nos.1 and 2 for the offence of bigamy punishable under Section 494 IPC and both of them were sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.100/- with a direction to undergo rigorous imprisonment for one week in case of default in payment of fine. On an appeal preferred before the Sessions Court in C.A.No.48 of 2002, the learned Appellate Judge (III Additional District and Sessions Judge) Madurai set aside the conviction and acquitted the respondents herein holding that the appellant herein had not proved that the respondents had committed the offence punishable under Section 494 IPC.

2.As against the judgment of the lower appellate Court reversing judgment of conviction passed by the trial Court and acquitting the respondents herein, the appellant herein (complainant) has preferred the present Criminal Appeal under Section 378 (4) of the Code of Criminal Procedure, 1973 along with a petition under Section 378(5) of Cr.P.C seeking special leave to prefer such an appeal. The said petition filed under Section 378 (5) Cr.P.C, which was numbered as Crl.O.P.(MD)No.205 of 2004, stands allowed and the numbering of the appeal even before the grant of special leave stands ratified by the order granting special leave under Section 378(5) of the Criminal Procedure Code.

3.The case of the appellant/complainant is that she is the legally wedded wife of the first respondent-Thirupathi (A-1) and that the first respondent, during the subsistence of his marriage with the appellant/complainant, married the second respondent-Dhanalakhsmi on 18.06.1997 and thereby committed an offence punishable under Section 494 IPC. The further case of the appellant/complainant is that

the second respondent-Dhanalakshmi (A2) did marry the first respondent knowing fully well that the first respondent was already married and the appellant herein/complainant was his legally wedded wife and that the marriage between the appellant/complainant and the first respondent was subsisting at the time of her marriage with the first respondent and that thereby she also had committed the offence punishable under Section 494 IPC.

4. The respondents, who appeared on summons before the trial Court, denied having committed any offence, pursuant to which a charge was framed against the respondents 1 and 2 herein for an offence punishable under Section 494 IPC. After having a charge read over and explained, they denied having committed the offence and they wanted the case to be tried. Accordingly, a trial was conducted in which including the appellant herein/complainant three witnesses were examined as P.Ws.1 to 3 and one document was marked as Ex.P.1 in order to prove the charge framed against the respondents herein. On the side of the respondents herein, who faced the trial as accused persons, no witness was examined and no document was

marked.

5. After affording them an opportunity under Section 313(1)(b) of the Code of Criminal Procedure, to explain the incriminating materials found in the evidence adduced on the side of the appellant herein/complainant, arguments were heard by the trial Court. Keeping in mind the points canvassed in the arguments advanced on both sides, the learned trial Judge considered the evidence and after such consideration, pronounced a judgment, holding the respondents herein accused Nos. 1 and 2 guilty of the offence punishable under Section 494 IPC with which they stood charged and convicted them for the said offences. After giving an opportunity under Section 248(2) Cr.P.C to make their representation regarding the punishment to be imposed, the learned trial Judge imposed a punishment on each one of the respondents herein to undergo rigorous imprisonment for three years and to pay a fine of Rs.100/- with a further direction that in default of payment of fine, he/she should undergo rigorous imprisonment for one week as a default sentence. The finding of the trial Court is based on the oral testimonies of P.Ws.1 to 3 and the documentary evidence, namely Ex.P.1.

6. The finding of the trial Court holding the respondents herein/accused 1 and 2 guilty of the offence punishable under Section 494 IPC was found fault with by the lower appellate Judge, on the sole ground that there was no direct evidence as to the marriage between the first respondent and the second respondent, which is said to be bigamous. The learned lower appellate Judge also disbelieved the oral testimony of P.W.2, who was examined as the sole eye witness to have seen the marriage performed at the entrance of Samayapuram Mariyamman Temple. The learned lower appellate Judge also expressed the view that Ex.P.1 produced on the side of the appellant herein/complainant was not enough to prove the factum of marriage between the first respondent and the second respondent to support the conviction of the respondents herein for the offence punishable under Section 494 IPC.

7. The said judgment of the lower appellate Court in Criminal Appeal No.48 of 2002 reversing the judgment of conviction passed by the trial Court is challenged in the present appeal preferred under Section 378 (4) of Cr.P.C on various grounds set out in the appeal petition.

8.The points that arise for consideration in this appeal are as follows:-

(i)Whether the lower appellate Court committed an error in holding that the first respondent was not guilty of the offence punishable under Section 494 IPC and consequently acquitted him after setting aside his conviction for the said offence made by the trial Judge?

(ii)Whether the lower appellate Court committed an error in holding that the second respondent was not guilty of the offence punishable under Section 494 IPC and consequently acquitted her after setting aside her conviction for the said offence made by the trial Judge?

9.The arguments advanced by Mr.K.Prabhu, learned counsel for the appellant/complainant, by Mr.R.Sundar, learned counsel for the first respondent/first accused and by Mr.R.Sivalingam, learned counsel (legal aid counsel) for the second respondent/second accused are heard. The judgments of the Courts below and the materials available on record summoned from the Courts below for reference in this appeal are also perused and taken into consideration.

10.The respondents 1 and 2 herein were prosecuted for having committed an alleged offence punishable under Section 494 IPC in the Court of Judicial Magistrate No.II, Madurai in Calender Case No.1123 of 1997, a case was instituted on complaint. The offence under Section 494 IPC is a non-cognizable offence and hence, the case came to be instituted on complaint. The trial resulted in conviction of both the accused (respondents herein). But on appeal to the appellate Court, the judgment of the trial court was reversed, the conviction of the respondents was set aside and they were acquitted. As against the reversing judgment, the present appeal has been filed.

11.As against any order of acquittal passed in a case instituted on complaint, an appeal shall lie to the High Court with the special leave of the High Court under Section 378 (4) of Cr.P.C. Of course, sub-Section (4) of Section 378 Cr.P.C does not say whether such order of acquittal should be one passed by the Court of original jurisdiction or by an appellate Court which is subordinate to the High Court. However, the very arrangement of sub-sections of Section 378 of Cr.P.C will make it clear that the appeal contemplated under sub-

section (4) of Section 378 of Cr.P.C is not confined to the order of acquittal passed by the trial Court, but it shall include the order of acquittal passed by the appellate Court also, provided the appellate Court is a Criminal Court other than the High Court. The said indication is found in sub-clause (b) of sub-section (1) and sub-Clause (b) of sub Section (2) of Section 378 of Cr.P.C. Where an order of acquittal is passed by the Magistrate in respect of a cognizable and non-bailable offence, then such order becomes appealable to the Court of Session and the District Magistrate may direct the Public Prosecutor to present the appeal in the Sessions Court. Such an order, which is appealable to the Sessions Court and any order of acquittal passed by the Court of Session in exercise of its power of revision alone are exempted from the category of orders appealable to the High Court under sub-Section (1) or (2) or (4) of Section 378 of Cr.P.C.

12. The order of acquittal in this case which is challenged in the appeal is one passed by the Court of Session in its appellate jurisdiction. The sub clause (b) of sub-Sections (1) and (2) make it clear that an appeal against original order of acquittal or an appellate

order of an acquittal passed by any Court other than the High Court shall lie to the High Court. The exemption provided therein is the cases in which the appeal could have been filed before the Sessions Judge under sub clause (a) of sub-sections (1) and (2) of Section 378 of Cr.P.C and the order of acquittal passed in a revision by the Court of Session.

13.For the sake of convenience, Section 378 of Cr.P.C is reproduced hereunder:-

> *"378.Appeal in case of acquittal:-(1) Save as otherwise provided in sub section (2) and subject to the provisions of sub-sections (3)and (5),-*
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> *(a)the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*
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> ***(b)the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in***

revision]

(2)If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government,may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a)to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b)to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision].

(3)[No appeal to the High Court] under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4)If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal,

the complainant may present such an appeal to the High Court.

(5)No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6)If in any case, the application under sub-section (4) for the grant of special leave, to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)".

14.Here is a case in which the order of acquittal impugned in this appeal was passed by the learned Sessions Judge in an appeal. Hence, it is an appellate order of acquittal which is made appealable to the High Court under Section 378 of Cr.P.C. The case having been instituted on complaint, attracts sub-section (4) and the only condition for entertaining the appeal is that a special leave should be granted on an application filed within the time stipulated in sub-section (5). It is not in dispute that such an application was filed within the time

stipulated in sub-section (5) and the appeal has also been preferred within such time, even though the appeal could have been preferred within 30 days from the date of grant of special leave to appeal. Hence, there cannot be any controversy over the maintainability of the appeal. In fact, the learned counsel appearing for the respondents 1 and 2 did not put forth any argument that the appeal is not maintainable. Hence, the question of maintainability need not hold up further discussion of the case.

15.It is an admitted fact that and it has also been proved beyond reasonable doubt that the first respondent is the husband of the appellant/complaint and their marriage took place on 18.06.1972 in accordance with the provisions of the Hindu Marriage Act, 1955 as applicable to Tamil Nadu. P.W.1 has given a categorical statement in her chief examination that her marriage with the first respondent was solemnised at Ramalinga Sowdambigai Sannathi within Panjavarnaswamy Temple, Uraiyoor, Trichy and that due to the cohabitation they were gifted with three daughters by names, Akilandeeswari, Priya and Prema and a son by name, Shanmugam.

These facts spoken to by P.W.1 in her evidence was not challenged by the respondents/accused in their cross examination. It has also been stated in clear terms by P.W.1 that the marriage was not dissolved as on the date of alleged occurrence and also as on the date of her examination before the trial Court.

16.When the incriminating parts of the evidence adduced on the side of the complainant were culled out and formulated as a questionnaire under Section 313(1)(b) of Cr.P.C, the respondents did not deny the same and on the other hand they simply stated that they were not guilty of the offence. Their attention was concentrated only in refuting the evidence adduced regarding the bigamous marriage between the first respondent and the second respondent alleged to have taken place on 18.06.1997. Therefore, the fact that the marriage between the appellant herein/complainant and the first respondent/first accused was subsisting as on the date of the alleged occurrence, namely on 18.06.1997, stands proved beyond reasonable doubt.

17.Then the next question that arises for consideration is whether the marriage alleged to have been performed on 18.06.1997 stands proved by the appellant/complainant. In this regard, though P.W.1's evidence is not a direct evidence regarding the factum of marriage, she has given a clear and cogent evidence to the effect that she was informed of the marriage of her husband namely, the first respondent with the second respondent and that the said marriage came to be registered on the very same day in the Office of the Registrar situated near the Court in Trichy. Besides such an oral testimony, she has produced a certified copy of the document registered in the office of the District Registrar, Trichy as Document No.878/97. The same has been marked as Ex.P.1. The said copy is a certified xerox copy of the document and hence, it contains the signatures of the first respondent as well as the second respondent. It is pertinent to note that the same is not a marriage certificate evidencing the registration of marriage under any of the laws relating to the registration of the marriage. It was a document registered under the provisions of the Registration Act, 1908. It was titled and styled as an agreement of a domestic relationship to live together

(வாழ்க்கை உடன்படிக்கை பத்திரம்). The execution of the said document and registration of the said document have not been denied or disputed, on the other hand stand admitted by the respondents/accused persons. It contains a recital that they got married to each other on the date of the document itself in Samayapuram Mariyamman Temple. The registration of the said document has been spoken to by P.W.3 Srinivasan, a record clerk of the Distinct Registrar's Office, Trichy.

18.Apart from the production and proof of the above said document as an evidence to prove the case of the appellant/complainant herein regarding the performance of the alleged marriage between the respondents herein on 18.06.1997 at Samayapuram Mariyamman Temple, one Sivaji was examined as a witness to the said marriage. He deposed as P.W.2. According to his version, on 18.06.1997, he along with one Ravikumar, had gone to Samayapuram Mariamman Temple near Trichy to offer worship to the deity therein and at that point of time, at about 7.00 to 7.30 a.m, he saw the respondents with garlands at the entrance of the temple. He has further stated that he also saw the first respondent tying a Thali to

the second respondent and the respondents exchanging garlands. It is his further statement that he questioned the respondents herein, reminding them that the first respondent had already married Saraswathi, the appellant herein and asked them why they were performing his second marriage and that the first respondent replied that P.W.2 should leave the place, as the same was none of his business. It is also his clear evidence that he and Ravikumar met the appellant herein in a day or two thereafter and informed her of what they had seen at Samayapuram Mariyamman Temple and that pursuant to the same, a panchayat was convened, five days after they furnished information to the appellant/complainant and that in the panchayat, the first respondent agreed to leave the second respondent and live with the appellant/complainant herein, but later on went back from his commitment made before the panchayatars. It is his further evidence that when the appellant/complainant approached the police, they asked her to approach the Court.

19.P.W.2, during cross examination, has asserted that he was an eye witness to the marriage of the first respondent with the

second respondent and he actually saw the first respondent tying a Thali around the neck of the second respondent at the entrance of the above said temple. It is also his evidence during the cross examination that there were about 15 to 20 persons, who attended the marriage, but he did not inform those persons that the first respondent was already married and that however, he asked the first respondent as to how he could venture to marry the second respondent when his first wife Saraswathi was alive, for which the first respondent replied that his second marriage with the second respondent was performed with the consent of his first wife. These details were elicited by the counsel for the respondents in the cross examination. His evidence was sought to be projected as evidence of interested witness by simply alleging a motive against P.W.2. The learned trial Judge rightly held that his evidence cannot be rejected as the testimony of interested witness.

20.However, the learned lower appellate Judge, on an erroneous appreciation of evidence, rendered a finding that the testimony of P.W.2 could not be relied on as he happened to be a chance witness and another person by name Ravikumar, who had

allegedly gone with P.W.2 to Samayapuram Mariyamman Temple at the time of alleged occurrence, was not examined. The learned lower appellate Judge seems to have forgotten the principle that the accused cannot dictate terms to the complainant as to how and by what evidence, her case shall be proved and that the non examination of any person *per se* could not be viewed as a flaw in the prosecution case. The learned lower appellate Judge has also forgotten the process of elimination discording the evidences which are unreliable and relying on the evidence after discording the unreliable evidence and in such process even if the evidence of single witness is trustworthy, there shall be no impropriety in basing a conviction on the testimony of such single witness. The only criterion to be taken into account is whether the evidence of such witness shall instil the confidence of the Court. In this case, it cannot be said that the only admissible piece of evidence is the oral testimony of P.W.2. His testimony stands corroborated by the testimonies of P.Ws.1 and 3 and also by the recital found in the admitted document marked as Ex.P.1. The cumulative effect of these pieces of evidence will undoubtedly lead to a conclusion that the first respondent herein married the second

respondent on 18.06.1997 at Samayapuram Mariamman Temple and that the performance of the said marriage stands proved. The learned lower appellate Judge seems to have forgotten yet another factor that it is not necessary that the charges are to be proved only by direct eye witnesses. Circumstantial evidence can also be relied on to arrive at a conclusion that the charge against the accused stands proved. In fact, the circumstances are more reliable than the oral testimonies of the witnesses, because witnesses may lie or may faulter due to slip of tongue or loss of memeory, whereas the circumstances are not susceptible to such defeats. In this case, the subsistence of the marriage of the first respondent with the appellant/complainant has been admitted besides having been proved by the appellant/complainant. The second marriage of the first respondent with the second respondent on 18.06.1997 at the entrance of Samayapuram Mariyamman Temple stands proved by the oral testimonies of P.Ws.1 and 2 and also by the recital found in Ex.P.1-registered document. The learned lower appellate Judge refused to accept Ex.P.1, as a piece of evidence in proof of the case of the appellant/complainant regarding the second marriage of the first

respondent with the second respondent, solely on the ground that Ex.P.1 is not a marriage certificate evidencing the registration of the marriage. But the learned lower appellate Judge failed to note that such document contains an admission that the first respondent married the second respondent in the morning hours on the date of the document itself at Samayapuram Mariyamman Temple. Such an admission which is found in a written and registered document has been overlooked by the learned lower appellate Judge. The admissions are best pieces of evidence even though they may not be conclusive proof of the fact admitted therein. Here is a case in which there is the oral testimony of an eye witness (PW2) regarding the performance of the second marriage of the first respondent with the second respondent, which stands corroborated by the evidence of P.W.1 and also by the admission found in Ex.P.1. If the cumulative effect of the testimonies of P.Ws.1 and 2 and Ex.P.1 are taken into consideration, there is no possibility of arriving at any other conclusion than the one that the performance of the marriage between the first respondent and the second respondent on 18.06.1997 stands proved beyond reasonable doubt.

21.In the foregoing discussions we have seen that the appellant's case that the first respondent contracted the second marriage with the second respondent during the life time of his legally wedded wife, namely the appellant herein and during the subsistence of his marriage with the appellant herein. Hence, his marriage with the second respondent apart from being invalid on the above said ground will amount to an offence punishable under Section 494 IPC, according to the appellant. However, the learned counsel for the first respondent relied on the judgments of the Hon'ble Supreme Court (i) in **Priya Bala Ghosh Vs.Suresh Chandra Ghosh** reported in **AIR 1971 SC 1153** and in **Santi Deb Berma Vs. Kanchan Prava Devi** reported in **AIR 1991 SC 816** and contended that observance of necessary formalities of the customary marriage under the Hindu Marriage Act, 1955 have not been proved and that therefore, the conviction of the respondents recorded by the trial Court was not sustainable. Of course, in those cases, it has been stated that unless the necessary formalities for a customary of Hindu marriage are followed in respect of the second marriage, conviction for bigamy under Section 494 IPC shall not be proper, as the second marriage

itself would have been void for non observance of the formalities. Those two judgments were pronounced in respect of persons governed by the Hindu Succession Act, 1956 in States, where there is no amendment as found in Section 7-A of the Hindu Marriage Act applicable in Tamil Nadu and Puducherry. So far as the Tamil Nadu is concerned, Section 7 stands amended by Section 7-A which reads as follows:-

> *"7-A.Special provision regarding suyamariythai and seerthiruththa marriages – (1) This section shall apply to any marriage between any two Hindus, whether called suyamariyathai marriage or seerthiruththa marriage or by any other name, solemnised in the presence of relatives, friends or other persons-*
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> *(a)by each party to the marriage declaring in any language understood by the parties that each takes the other to be his wife, or as the case may be, her husband; or*
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> *(b)by each party to the marriage garlanding the other or putting a ring upon any finger of the other; or*
>
> *(c)by the tying of the thali.*
>
> *(2)(a)Notwithstanding anything contained in*

section 7, but subject to the other provisions of this Act, all marriages to which this section applies solemnised after the commencement of the Hindu Marriage (Madras Amendment) Act, 1967 shall be good and valid in law.

(b)Notwithstanding anything contained in section 7 or in any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage (Madras Amendment) Act, 1967, or in any other law in force immediately before such commencement or in any judgment, decree or order of any Court, but subject to sub-section (3), all marriages to which this section applies solemnised at any time before such commencement shall be deemed to have been with effect on and from the date of the solemnization of each such marriage, respectively, good and valid in law.

*(3)Nothing contained in this section shall be deemed to_*

(a)render valid any marriage referred to in clause (b) of sub-section (2), if before the commencement of the Hindu Marriage (Madras Amendment) Act, 1967-

(i)such marriage has been dissolved under any custom or law; or

(ii)the woman who was a party to such marriage has, whether during or after the life of the other party

thereto, lawfully married another; or

(b)render in valid a marriage between any two Hindus solemnised at any time before such commencement, if such marriage was valid at that time; or

(c)render valid a marriage between any two Hindus solemnised at any time before such commencement, if such marriage was invalid at that time on any ground other than that it was not solemnised in accordance with the customary rites and ceremonies of either party thereto:

Provided that nothing contained in this sub-section shall render any person liable to any punishment whatsoever by reason of anything done or omitted to be done by him before such commencement.

(4)Any child of the parties to a marriage referred to in clause (b) of sub-section (2) born of such marriage shall be deemed to be their legitimate child:

Provided that in a case falling under sub-clause(i) or sub-clause(ii) of clause (a) of sub-section (3), such child was begotten before the date of the dissolution of the marriage or, as the case may be, before the date of the second of the marriages referred to in the said sub-clause (ii)".

22.A reading of the said Section will make it clear that for the validity of a marriage between two Hindus, no specific form is necessary. Either by acknowledging in the language known to each parties that each of them takes the other as husband or wife, as the case may be, in the presence of elders and relatives or friends or other persons, or by symbolic representation of such declaration by exchanging rings, exchanging garlands or tying thali will be sufficient observance of the formality to make a Hindu Marriage among the two Hindus in Tamil Nadu to be valid. The very fact that the section employees the conjunction 'or' and not 'and' while describing formalities to be observed is very significant. It is brought to the notice of the Court by the Bar that at the time of drafting of the Bill, the conjunction 'and' was used and when it was placed before the reformer in Dravidar Movement namely, E.Vera.Ramasamy Periyar, for his opinion, he alone suggested the correction of the conjunction 'and' into 'or' to make it clear that the symbolic representation **'in any one of the forms'** shall be sufficient. The section also provides for validation of marriages performed prior to the introduction of Section 7-A of the Hindu Marriage Act, 1955 and several such marriages were

saved from being held void for non observance of any of the customary rituals provided the conditions found in Section 7-A were present. After the amendment in Tamil Nadu, for convicting a person professing Hindu religion for bigamy, it shall be enough to show that he underwent a form of marriage which complies with the above condition namely, acknowledgment by words or symbolic representation of acknowledgement by exchanging garlands or exchanging of rings or tying of thali provided the marriage is with a woman professing Hindu religion. What the appellant/complainant has to prove is that but for the subsistence of the first marriage, the second marriage would have been valid.

23. Suppose the marriage is between the accused, a Hindu and another person professing Christianity, it shall not be enough to prove that he tied thali or they exchanged garlands or exchanged rings or made declarations as provided in Section 7-A of the Hindu Succession Act, 1955, because marriage between two persons when at least one of them is a Christian shall have to be solemnised either in accordance with Christian Marriage Act or under the Special

Marriage Act. In such cases, even if the marriage is solemnised observing all the customary rites of Hindu marriage, the marriage shall not be valid. Fortunately, that is not the case on hand. Admittedly, the first respondent and the second respondent are Hindus and they are proved to have undergone a marriage ceremony which conforms to the requirements of Section 7-A of the Hindu Marriage Act, 1955 applicable in Tamil Nadu. Therefore, the said defence sought to be made on behalf of the respondents is bound to be rejected as untenable.

24.Learned counsel for the first respondent, drawing the attention of the Court to the judgment of a Division Bench of this Court in **B.Jagadeesh Chandra Bose and another Vs. Superintendent of Police, Kanyakumari District and others** reported in **(2009) 2 MLJ (Crl) 607** argued that the registration of a marriage agreement shall not be equated with a marriage certificate issued on the basis of registration of marriage. The said contention is not relevant in this case, because the document which has been produced in this case (Ex.P1) is not projected as a marriage

certificate. It is true that Ex.P1 is styled as an agreement for having a domestic relationship. But the same has been used for proving an admission made therein that the respondents underwent a form of marriage in the morning on the date on which the said agreement came to be executed and registered. Such an admission was sought to be proved in establishing the case of the appellant/complainant herein that the first respondent married the second respondent on 18.06.1997 at Samayapuram Mariyamman Temple.

25.Section 494 IPC reads as follows:

> *"494.Marrying again during lifetime 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 lace, 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".

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 IPC. 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 IPC, but shall be liable to be punished under Section 494 IPC read with Section 109 IPC for having abetted the commission of the said offence. Of course, as per Section 109 IPC 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 IPC. 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 framed as one for an offence punishable under Section 494 IPC read with Section 109 IPC. 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 IPC read with Section 109 IPC. 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.

27.P.W.1, in her evidence in chief examination, has not asserted that the second respondent did have the knowledge of the subsistence of the marriage between the appellant/complainant and the first respondent. On the other hand, she has simply stated that one Banumathi, younger sister of the first respondent and one Subbu @ Subbulakshmi, the elder sister of the second respondent had attested Ex.P.1 document and that both of them knew the subsistence

of marriage between the appellant/complainant and the first respondent. However, learned counsel for the appellant drew the attention of the Court to the other part of her evidence wherein she has stated that the second respondent resided in the street next to the street in which P.W.1 was living in Trichy and that hence, she knew the marriage of the first respondent with the appellant/complainant. A person living in the next street in a town cannot be said to have direct knowledge regarding the marital status of a person living in the other street. P.W.1 does not directly state anything about the knowledge of the second respondent. There is also nothing in Ex.P.1 to show that the second respondent did have the knowledge of the marriage between the appellant/complainant and the first respondent. The stray sentence found in the testimony of P.W.1 that the second respondent also knew the marriage between the appellant/complainant and the first respondent, shall not be enough to hold that the second respondent married the first respondent with the knowledge that the first respondent had already married the appellant/complainant. Convicting the second respondent with such evidence alone, that too when specific charge has not been framed against the second

respondent imputing knowledge to her, shall not be in the interest of justice. Hence, this Court comes to the conclusion that there is no defect or error in the judgment of the learned lower appellate Judge setting aside the conviction of the second respondent and acquitting her of the offence punishable under Section 494 IPC for which she was prosecuted. However, the judgment of the lower appellate Court setting aside the conviction of the first respondent for the said offence (offence under Section 494 IPC) is no doubt defective and erroneous and the same is liable to be set aside restoring the judgment of the trial Court convicting him for the offence punishable under Section 494 IPC.

28. Regarding the sentence, the submissions made on both sides are also taken into consideration. The maximum punishment prescribed under the said penal provision, namely 494 IPC is imprisonment of either description for 7 years and also fine. The trial Judge seems to have imposed a sentence of rigorous imprisonment for three years and a fine of Rs.100/- with a default sentence of rigorous imprisonment for one week. So far as the fine amount is concerned,

the trial Court seems to have shown leniency. Substantive sentence awarded by the trial Court, as contended by the learned counsel for the first respondent, is some what harsh and the same needs reduction. This Court is of the view that reducing the substantive sentence to two years rigorous imprisonment and increasing fine to Rs.1000/- from Rs.100/- with a default sentence of one month simple imprisonment shall meet the ends of justice.

29.In the result, the appeal is allowed in part. The judgment of the lower Appellate Court reversing the conviction of the second respondent and acquitting her shall stand confirmed. The judgment of the lower appellate Court reversing the conviction of the first respondent and acquitting him is set aside and the conviction of the first respondent for the offence under Section 494 IPC by the trial Court shall stand confirmed with a modified punishment, imposing rigorous imprisonment of two years and a fine of Rs.1000/- with a default sentence of simple imprisonment for one month. The excess fine amount shall be collected from the first respondent and the first respondent shall surrender before the trial Court within two weeks,

whereupon he shall be committed to jail for undergoing the unexpired portion of the sentence. The trial Magistrate shall issue necessary warrant. The imprisonment, if any, already undergone shall be set off under Section 248 Cr.P.C. The second respondent shall stand acquitted of the offence with which she stood charged. The fine amount, if any, paid by her shall be refunded. As it is reported that the second respondent is on bail, the bail bond shall stand cancelled.

24.09.2014

Index : yes/no
Internet: yes/no
sms

To

1.The III Additional District and Sessions Court,
Madurai.

2.The Judicial Magistrate No.2
Madurai

P.R.SHIVAKUMAR,J.

sms

Criminal Appeal(MD) No.4 of 2004

24.09.2014